

# CLIENT ALERT: Employers Should Prepare for Increased Scrutiny Against Private Sector DEI Programs

The Trump Administration and Republican Attorneys General have signaled that private sector employers could expect to be targets of enforcement measures seeking to eliminate diversity, equity, inclusion, and accessibility (“DEI” or “DEIA”) initiatives in employment. On January 21, 2025, President Trump issued Executive Order 14173, titled “**Ending Illegal Discrimination and Restoring Merit-Based Opportunity**,” and proclaimed that the federal government, major corporations, institutions of higher education, and other prominent entities have been employing “dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called” DEI or DEIA.

Following the Executive Order, Attorney General Pam Bondi issued an internal memorandum within the Department of Justice (“DOJ”) titled “**Ending Illegal DEI and DEIA Discrimination and Preferences**” (the “Memo”). The Memo and Executive Order, neither of which alter existing Federal anti-discrimination law, but which clearly express the current Administration’s policy views, proclaim that policies relating to DEI and DEIA can “violate the text and spirit of our longstanding Federal civil-rights laws” and “undermine our national unity.” The Memo directs the DOJ’s Civil Rights Division to “investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.” By March 1, 2025, the Civil Rights Division and Office of Legal Policy are expected to submit a report to AG Bondi identifying “the most egregious and discriminatory DEI and DEIA practitioners” and outlining plans and other strategies to “end illegal DEI and DEIA discrimination and preferences,” such as proposing *criminal* and civil compliance investigations into certain entities with DEI programs, and participating in litigation consistent with the Administration’s objective to “end illegal discrimination and preferences.”

States’ Attorneys General are responding to the Administration’s actions in manners consistent with the partisan split concerning DEI-related issues. For example, Texas Attorney General Ken Paxton, joined by Attorneys General from 10 other states, **sent letters to six major financial institutions** to threaten action against them based on their DEI and environmental commitments. Similarly, 19 Attorneys General **sent a letter to Costco Wholesale Corporation** demanding that they abandon their DEI policies they assert violate federal law. On February 13, 2025, 16 Democrat Attorneys General, led by Massachusetts Attorney General Andrea Joy Campbell, responded in kind, **issuing guidance** asserting that DEIA initiatives are consistent with federal and state law. According to the Democrat Attorneys General, the federal government cannot prohibit companies’ efforts to seek and support diverse, equitable, inclusive, and accessible workplaces in the private sector. The guidance argues that President Trump’s Executive Order “conflates valid and legal programs and practices supporting diversity, equity, inclusion, and accessibility with unlawful preferences in hiring and promotion.”

While the Administration has issued no detailed guidance on DEI practices it views as “unlawful,” the federal government’s recent pronouncements offer some insight that may help employers determine what DEI initiatives may be considered problematic by this Administration. For example, the AG’s Memo states that it intends to eliminate policies that exclude or divide individuals based on race or sex, but does not prohibit educational, cultural, or historical observances that celebrate diversity, recognize historical contributions, and promote awareness, citing Black History Month and International Holocaust Remembrance Day as examples. In addition, Charles Ezell, the Acting Director of the U.S. Office of Personnel Management, the federal government’s human resources agency, **issued a memorandum** regarding the federal government’s initiatives in which he stated that although Employee Resource Groups (“ERGs”) “that promote unlawful DEIA initiatives” should be prohibited, agencies can continue to allow employees to host affinity group lunches, engage in mentorship programs, and otherwise gather for social and cultural events, as long as attendance at such events is not restricted by any protected characteristics and attendees are not segregated by

protected characteristics. Director Ezell did not state that ERGs are categorically prohibited but opined that if agencies permit ERGs or other affinity group events, these groups and events cannot be permitted only for certain races, sex, or religions, but not others.

Employers should review their employment and operational policies and programs that could be viewed as promoting DEI in anticipation of the federal government's and certain state governments' indications that they could take action against such policies. Policies impacting key employment decisions such as hiring, promotion, and compensation should be analyzed with particular care along with any operational programs that could be seen as promoting DEI initiatives that are targeted by these pronouncements. With the DOJ and certain states prepared to target employers with DEI policies, and the Equal Employment Opportunity Commission's Acting Chair naming "**rooting out unlawful DEI-motivated race and sex discrimination**" as an enforcement priority, employers will be tasked with ensuring compliance with these new changes.

MBJ will be working with employers to assess their obligations with respect to DEI policies and practices, and other policies addressing hiring, promotion, compensation, training, and inclusivity. MBJ will continue to monitor new developments that will impact employers as they become available.

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