

PRESIDENT TRUMP'S EXECUTIVE ORDER ON "ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT-BASED OPPORTUNITY" – OVERVIEW, OPEN ISSUES, AND IMPLICATIONS FOR HIGHER EDUCATION

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OVERVIEW AND INTRODUCTION

On January 21, 2025, President Donald Trump signed an Executive Order (EO) titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity", EO 14173.¹ EO 14173 explicitly and implicitly has ramifications for institutions of higher education. The EO also leaves plenty of room for interpretation, in ways both favorable and unfavorable to colleges and universities. This reference guide will provide an overview/reminder of the impact of EOs generally, evaluate key provisions of this particular EO, detail open issues and ambiguities, and provide initial guidance on short-term and long-term strategy for responding to this EO. We will start with a "cheat sheet" of the key action items, identify open issues, and then dive into more detail analyzing the EO.

Finally, keep in mind that legal action challenging EO 14173 is likely, so the landscape is likely to change. Saul Ewing's Higher Education Group will keep you apprised of these changes, and we are always available to discuss.

CHEAT SHEET: FIVE IMMEDIATE STEPS AND CONSIDERATIONS

1. Examine and catalogue whether, and in what capacities, your institution may serve as a federal contractor.
2. To the extent you have been following the affirmative action scheme of EO No. 11246 – in place since 1965 – you can continue to do so until April 21, 2025. Put that date in your calendar.
3. Examine, catalogue, and assess by risk any "DEI" programs and programs that may be interpreted as "promoting" DEI.
4. Consider providing your community with FAQs reiterating, among other things, the points explicitly made in Section 7 of EO 14173; namely, that the EO is not meant to interfere with First Amendment protected speech, and that persons teaching at a federally funded institution of higher education may still teach about the practices that this EO intends to eradicate (i.e., DEI initiatives).
5. Assume that some agency may be asking for all documentation in this space from your institution someday, and maybe someday soon. So, consider conducting these examinations and assessments through (or by) counsel, in anticipation of possible litigation/legal action, and as work product and/or attorney-client privileged material.

1. www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/

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OPEN ISSUES – PAUSE, REFLECT, ASSESS

1. **Global Observation:** There is no doubt that “DEI” is a charged phrase for this Administration. It is fair to assume that those who drafted EO 14173 intended that phrase to be interpreted as broadly as possible. The actual drafting of the EO, however, leaves plenty of room for interpretation. *Most notably: there is no standard definition of “DEI” that controls and carries throughout the EO.* Additionally, the EO does not provide any clarity as to how its policies will be enforced. The EO requires the Attorney General and Department of Education to issue guidance for compliance in the coming months.
2. **The Immediate Actions Are for Federal Agencies – Not You:** While EO 14173 certainly empowers federal agencies to enforce its language with private entities, including institutions of higher education, the immediate action is directed to those agencies. In other words, while speed is key in evaluating your institutional response to this EO, you need not change or eliminate anything today. We would caution against knee-jerk reactions or wholesale, disruptive changes.
3. **Consider Caveated Language in EO 14173:** The second paragraph of the EO, in Section 1, favorably cites the Civil Rights Act of 1964, and then complains of DEI and DEIA “preferences”, including those at institutions, that **can** violate the civil rights laws of this Nation. The third and fourth paragraphs of Section 1 talk about **illegal** DEI and DEIA policies, intentionally modifying the phrase “DEI and DEIA policies” with the term “illegal”. And the final paragraph of Section 1 states that the “purpose of this order” is to end “**illegal** preferences and discrimination.” So:
 - a. Given this prefatory language, does the EO acknowledge, explicitly or implicitly, that some DEI and DEIA policies could be “legal”, and not “dangerous, demeaning, or immoral”?
 - b. As the focus is on DEI and DEIA “preferences” that “can” violate the civil-rights laws, and specifically the Civil Rights Act of 1964, is this an acknowledgment that not all such programs or preferences “do” or “must” violate that Act? And can an institution rationally argue that it has evaluated its programs in light of this EO, wanting to adhere to the EO, and has concluded that the programs that might constitute “DEI” are actually consistent with the Civil Rights Act of 1964, so it will decline to make any changes?
 - c. Similarly, Section 2 of the EO states that all executive departments and agencies are ordered to terminate “**discriminatory and illegal**” preferences, policies, etc., and that agencies should combat “**illegal** private-sector DEI preferences, mandates, policies, programs, and activities.”
 - d. And Section 3(b)(iii) of the EO dictates that the employment, procurement, and contracting practices of federal contractors and subcontractors “shall not consider race, color, sex, sexual preference, religion, or national origin **in ways that violate the Nation’s civil rights laws.**” That qualifying phrase seems important, and, depending on how your particular federal appellate court has decided certain issues, might lead to different outcomes.
 - e. Section 3(b)(iv)(B) similarly requires that going forward, each federal agency include in “every contract or grant award” 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.**”
 - i. There is a fair amount to unpack here.
 1. What is a program “promoting” DEI? How broadly should that be interpreted?
 2. What if the legitimate view of your institution is that, in your particular jurisdiction, these programs do not violate applicable Federal anti-discrimination laws? Can you therefore sign this certification? Do you need to caveat your certification?
 3. Note that the focus is solely on federal law, not state laws or requirements.

EXECUTIVE ORDER PRIMER



STEPPING BACK – REMIND ME: WHAT IS AN EXECUTIVE ORDER?

Executive orders are official documents executed by the President of the United States. Each order is signed by the President and published in the Federal Register.

Executive orders are used to direct and manage the Executive Branch of the Federal Government, which includes federal offices, departments, and agencies (i.e., Department of Education, Department of Energy, Centers for Disease Control and Prevention, etc.). For example, an executive order can establish a national holiday or outline a major federal policy or program. It can instruct a federal office or agency to do something, or demand a report on a certain issue.

The President is authorized to issue executive orders pursuant to his or her presidential powers under the Constitution and/or congressional statute (where applicable). However, despite the commanding title, executive orders are not laws. Congress can neither approve nor overturn a specific executive order, though it can pass legislation that authorizes a certain type of order.

Executive orders are better described as presidential directives that have the force of law. They are a way for the President to exercise their authority while avoiding the delay and complications of going through Congress for formal approval. The legal effects of an executive order are therefore similar to those of a regulation issued by a federal agency. Neither is a law, but they are typically treated as such.

Finally, executive orders target the Executive Branch, and the Executive Branch alone. That means state-specific agencies and private sector companies are not directly subject to the restrictions or requirements imposed by executive orders. That being said, they may be indirectly impacted by executive orders if they work with or receive money from the federal government.

CHALLENGES TO AND REVOCATION OF EXECUTIVE ORDERS – GENERAL PROCESS

Executive orders are rarely challenged in court via private civil suits. This is because such suits are only permitted where the order at issue is authorized by congressional statute, and even then, the statute must indicate Congress's intent for the order to be enforceable in court.

A sitting President can revoke his or her own executive orders, as well as prior orders. In fact, it is common practice for a sitting President to cancel executive orders of his or her predecessors. The President can do so by issuing a new executive order that explicitly revokes the prior order(s).

PRIOR EXECUTIVE ORDERS THAT WERE REVOKED ON JANUARY 21, 2025

EO 14173 explicitly revokes multiple prior orders, including one presidential memorandum.

These now-revoked orders include the following:

Executive Order Number/Title	Date	Description
<u>EO No. 11246:</u> <i>Equal Employment Opportunity</i>	September 24, 1965	Prohibited discrimination by federal contractors and subcontractors on the bases of race, color, religion, sex, and national origin and required them to take affirmative action to prevent such discrimination.
<u>EO No. 12898:</u> <i>Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations</i>	February 11, 1994	Directed federal agencies to promote environmental justice by identifying and addressing the disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations; and established an Interagency Working Group on Environmental Justice.
<u>EO No. 13583:</u> <i>Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce</i>	August 18, 2011	Directed executive departments and agencies to develop and implement a more comprehensive, integrated, and strategic focus on diversity and inclusion as a key component of their human resources strategies, to promote the federal workplace as a model of equal opportunity, diversity, and inclusion.
<u>EO No. 13672:</u> <i>Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity</i>	July 21, 2014	Added sexual orientation and gender identity to the prohibited bases of discrimination in EO No. 11246.
<u>Presidential Memorandum:</u> <i>Promoting Diversity and Inclusion in the National Security Workforce</i>	October 5, 2016	Provided guidance to the national security workforce to strengthen the talent and diversity of their respective organizations.

HOW THIS EXECUTIVE ORDER IMPACTS YOUR INSTITUTION OF HIGHER EDUCATION AS A(N) ...

“FEDERAL CONTRACTOR”

While higher education institutions are not always federal contractors, and not in all capacities, they certainly can be. This often comes up when the institution:

- Receives federal funding for research projects or specific educational programs (e.g., National Institutes of Health grants, Department of Defense funded research, research for the National Science Foundation or Department of Energy, etc.);
- Engages in service contracts with federal agencies, such as offering consulting, technical assistance, or training services to federal entities; and
- Serves as a subcontractor to a primary federal contract.

From the federal contractor lens, institutions of higher education should have two primary takeaways from the EO. First, as any other federal contractor, you have until April 21, 2025, to eliminate the use of “affirmative action” policies that have been not only allowed, but mandated, since the Johnson Administration.

Second, and perhaps of more concern, federal agencies have been directed to embed in every contract:

- A term requiring every federal contractor 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
- A term requiring every federal contractor to certify that it does not “operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

EO 14173, Section 3(b)(iv)(A)–(B). 31 U.S.C. § 3729(b)(4), to be clear, is the False Claims Act (FCA). So, as drafted, this EO is threatening that in the future, every college or university that contracts with the federal government may face civil penalties and potential treble damages if it does not meet what this particular Administration sees as “compliance with Federal anti-discrimination laws”; which, in turn, would seem to include confirming that you have no “program promoting DEI that violates any applicable Federal anti-discrimination laws” (all a bit circular, and with seemingly legitimate room for interpretation). Institutions will have to carefully assess what level of certainty they can and must have to make this certification in a way that mitigates FCA risk, and, ultimately, whether the promise of federal work is worth that risk.

“GRANT RECIPIENT”

The same provisions just discussed for federal contractors also apply to any “grant awardee” of the federal government, and federal agencies are being instructed to build these same requirements and certifications into grant awards. The same analysis applies.

ENTITY THAT ADMITS STUDENTS

EO 14173, at Section 5, confirms that any institution of higher education that receives federal grants or participates in Title IV financial aid programs must adhere to *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). That is not a new development. What is new is the dictate that, by May 21, 2025, the Attorney General and the Secretary of Education “shall” jointly issue guidance regarding the “measures and practices required to comply” with the *SFFA* decision.

ENTITY THAT VALUES FREE SPEECH AND ACADEMIC FREEDOM

According to Section 7(b) of the EO, it “does not prevent ... institutions of higher education from engaging in First Amendment–protected speech.” This is curiously worded in a couple of ways. First, is the intent really limited to the *institution’s* “First Amendment” rights, or the people of and at that institution who actually speak? Second, the precise language of this Section discusses “Federally–funded State and local educational agencies or institutions of higher education ...” Is this section intended to only apply to public institutions, to which the First Amendment applies? Is the suggestion that it is acceptable for this EO to quell non–First Amendment–protected speech at private institutions?

As for academic freedom, Section 7(c) of the EO states as follows: “[t]his order does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.” Note that this section only seems to protect such faculty speech when it is part of a “larger course of academic instruction,” not if it is being done in an advocacy, op–ed, or protest role.

INSTITUTION WITH AN ENDOWMENT OF OVER \$1 BILLION

The EO instructs that by May 21, 2025, the head of every federal agency (including the Department of Education), working with the Attorney General, should come up with a plan that identifies the “most egregious and discriminatory DEI practitioners in each sector of concern” and up to nine (9) potential civil compliance investigations of ... “institutions of higher education with endowments over 1 billion dollars.” EO 14173, Section 4. Presumably those institutions with an endowment of over 1 billion dollars know who you are, but the intent of this Section of the EO is clear – the Administration is seeking high–profile targets of which it can make an example.

HOW THIS EXECUTIVE ORDER INTERACTS WITH STATE (OR LOCAL) LAW

To go back to an earlier discussion about what an executive order is, and is not – an executive order is not a law. Accordingly, already–voiced “Supremacy Clause” arguments that federal law takes precedence over contrary state law really do not work.

Taking that argument out of play, the unsatisfying answer to this issue is: it depends. Keep in mind that EO 14173, at the most basic level, is telling federal agencies what they can and cannot do. On its face, the EO has no impact on state agencies or legislatures, nor how you do business with your state or municipal government. One can say with a high degree of confidence, though, that certain states are sure to adopt or parrot the EO language in the near future.

So, if faced with a seeming conflict between EO 14173 and the law of your state, ask a few questions:

- Is there an actual conflict?
- Why am I asking this question? Is our institution seeking to do business with the state or local municipality? If so, look to your state and local law, not the EO. Is our institution seeking to do business with a federal agency? Then, yes, the EO becomes important.
- Does my state law mandate that our institution have the very type of DEI program or initiative that the EO forbids? If so, and your institution wants to continue serving as a federal contractor, you will need to have some hard discussions and think about creative ways to thread the needle.

HOW THIS EXECUTIVE ORDER INTERACTS WITH OTHER EXECUTIVE ORDERS AND AGENCY ACTION SINCE JANUARY 20, 2025

“Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”, Executive Order 14168, January 20, 2025

In EO 14168 (Section 2), President Trump declares that “[i]t is the policy of the United States to recognize two sexes, male and female.” Consistent with this “policy” (which is the policy of this Administration, not the United States), EO 14168 goes on to criticize and demand the eradication of a number of things, all of which may fall within a college or university’s “DEI” policies or be adjacent to same:

- Bathroom or shower designations based on gender identity.
- The entire concept of gender identity.
- The entire concept of gender ideology.
- Any official document seeking to know someone’s “gender” as opposed to “sex.”
- The expansion of *Bostock v. Clayton County* (2020) to Title IX.
- Any use of federal funding to promote “gender ideology.”
- A host of previously issued guidance documents that touch on:
 - Transgender equality
 - Supporting LGBTQI+ students
 - Title IX and Sexual Orientation

“Ending Radical and Wasteful Government DEI Programs and Preferencing”, Executive Order 14151, January 20, 2025

This Executive Order rescinded President Biden’s Executive Order 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.” Pursuant to that Executive Order, all agencies, including the Department of Education, created “Equity Action Plans” (EAP). The Department of Education’s 2023 EAP, among other things, committed to increased funding for minority-serving colleges, and the use of non-race-based metrics to expand access to college for students from underrepresented backgrounds. Moreover, that EAP drove partnerships between institutions of higher education and their particular state.

That EAP has been withdrawn, raising a number of questions: 1) what happens to current programs that were based on that EAP? 2) what about commitments made to/in conjunction with a state agency under that EAP? Can they still be carried out, or do we have a state/EO 14151 conflict, now?

In the avoidance of doubt, the Department of Education’s website now lists all of the actions it has taken to eliminate DEI consistent with this Executive Order

www.ed.gov/about/news/press-release/us-department-of-education-takes-action-eliminate-dei

Specifically, and to quote ED verbatim from that noted website, actions the Department has taken already include:

- Dissolution of the Department’s Diversity & Inclusion Council, effective immediately; Background: The Diversity & Inclusion Council was established following Executive Order 13583 under then-President Obama. President Trump has rescinded the Executive Orders that guide the Council and issued a new Executive Order, “Ending Radical and Wasteful Government DEI Programs and Preferencing,” that terminates groups like the Diversity & Inclusion Council. DEI documents issued and related actions taken by the Council have been withdrawn.
- Dissolution of the Employee Engagement Diversity Equity Inclusion Accessibility Council (EEDIAC) within the Office for Civil Rights (OCR), effective immediately and pursuant to President Trump’s Executive Order “Ending Radical and Wasteful Government DEI Programs and Preferencing”;
- Cancellation of ongoing DEI training and service contracts totaling more than \$2.6 million;

- Withdrawal of the Department's EAP;
- Placement of career Department staff tasked with implementing the previous administration's DEI initiatives on paid administrative leave; and
- Identification for removal of more than 200 web pages from the Department's website that housed DEI resources and encouraged schools and institutions of higher education to promote or endorse harmful ideological programs.

"Pursuant to OPM guidance, the Department will continue its comprehensive review of all agency programs and services to identify additional initiatives and working groups that may be advancing a divisive DEI agenda, including programs using coded or imprecise language to disguise their activity. Careful review of all public sites and media channels for DEI language and resources will also continue."

And Heads Up: Just Changing Nomenclature May Not Work: On January 21, 2025, Charles Ezell, the Acting Director for the U.S. Office of Personnel Management, sent a memo to the heads and acting heads of departments and agencies setting forth "initial guidance regarding DEIA executive orders." In that memo, departments and agencies were directed to notify employees that the government is "aware of efforts by some in government to disguise these programs by using coded or imprecise language. If you are aware of a change in contract description or personnel position description since November 5, 2024 to obscure the connection between the contract and DEIA or similar ideologies, please report all facts and circumstances to DEIAtruth@opm.gov within 10 days."

The notification went on to say that there "will be no adverse consequences for timely reporting this information. However, failure to report this information within 10 days may result in adverse consequences."

Ezell's Memo is a shot across the bow, and a warning that simply changing the title of a DEI policy to, for instance, a "Workforce Improvement" policy or "Integrative Workforce Solutions" policy, would not appear to otherwise avoid consequences of the order. However, the Memo should not be construed to actually bar workforce improvement policies or integrative workforce solutions that promote healthy environments for all to excel and thrive, whether in the office or the classroom.

PRACTICAL TAKEAWAYS

Whether you do some, none, or all of the following is an institutional and risk tolerance decision. But if you want to expedite compliance with the apparent meaning of the EO, any of the following are worth considering:

- Auditing and cataloguing "DEI" or "DEI-supportive" programs. To do this in a meaningful way, consider color coding or otherwise categorizing the programs. Think about involving counsel and/or having the process directed by counsel, all in anticipation of possible litigation/legal action. As just one hypothetical "ranking" system:



- **DEFINITELY CONTRARY TO THE EO, UNDER ANY INTERPRETATION.**
- **PROBABLY CONTRARY TO THE EO, UNDER MOST INTERPRETATIONS.**
- **MIGHT BE CONTRARY TO THE EO, NOT INSTITUTION-CRITICAL.**
- **MIGHT BE CONTRARY TO THE EO, BUT INSTITUTION-CRITICAL.**
- **DO NOT THINK IT IS CONTRARY TO THE EO.**

- Ending any requirements for diversity statements as part of hiring, promotion, and tenure decisions (statements identifying an institution as an equal employment opportunity employer remain lawful);

PRACTICAL TAKEAWAYS (CONTINUED)

- Publicly committing/recommitting to make hiring and admissions decisions based solely on merit and without consideration of race, ethnicity, religion, gender, or other historically protected classes;
- Publicly demonstrating/affirming your compliance with the Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*;
- Revising need-based tuition assistance programs to focus solely on socioeconomic diversity, without any consideration of race, gender, or other historically protected classes;
- Adopting a policy of institutional neutrality barring administrators from making official statements on political issues or controversies off campus;
- Reviewing all programs and trainings to ensure they do not promote or require the teaching of concepts prohibited under the order, such as ideas related to inherent racial guilt, sexism, or other ideologies seen as divisive;
- Until there is firm guidance on what DEI programs violate the Executive Order (and, for that matter, exactly how this Administration defines "DEI"), temporarily discontinuing DEI policies and programs until they can be reviewed and their legality is confirmed;
- Scrubbing DEI initiatives or programs from all websites affiliated with the institution;
- Reviewing any potential conflicts between federal requirements and existing state laws where the institution is located; and
- Having legal experts monitor and regularly consult with officials at the institution to ensure updated policies and procedures that comply with federal law.

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