

The Impact of President Trump's EO's on DEI: Essential Strategies for Employers

By Monica H. Khetarpal & Michael D. Thomas

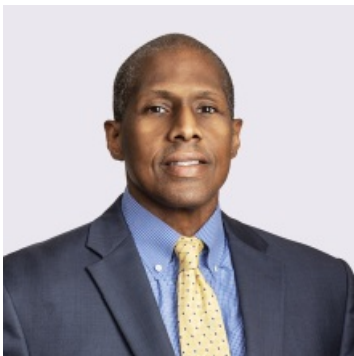
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Transcript

INTRO

In light of President Trump's recent Executive Orders, Diversity, Equity, and Inclusion (DEI) programs and policies are facing unprecedented scrutiny. As private sector employers are encouraged to eliminate long standing programs, it's more crucial than ever for businesses to consider their decisions thoughtfully.

On this episode of We get work[®], we delve into the Administration's focus on targeting organizations that violate existing anti-discrimination laws in their employment practices. We explore what withdrawing from "illegal" DEI initiatives could mean for businesses and how employers can fulfill their obligations to ensure psychological safety and wellness for all employees.

Our hosts today are Monica Khetarpal, co-leader of the Education & Collegiate Sports Group, and Michael Thomas, co-leader of the Corporate Diversity Counseling Group, and principals, respectively, in Jackson Lewis's Chicago and Orange County offices.

Monica and Michael, the question on everyone's mind today is: How can employers ensure fairness without violating existing anti-discrimination laws, and how does that impact my business?

CONTENT

Monica H. Khetarpal

Principal, Chicago

My name is Monica Khetarpal. I am a partner in Jackson Lewis' Chicago office. I'm here with my partner, Michael Thomas. Michael, do you want to introduce yourself?

Michael D. Thomas

Principal, Orange County

Hello, and always a pleasure to work with Monica. My name is Michael Thomas. I am a partner in Jackson Lewis' Irvine-Orange County office.

Khetarpal

We are here today to talk about a topic that's on a lot of people's minds: the recent executive orders and other enforcement activity that the Trump administration pushed out in the first few days after the inauguration. So, I will kick it off to Michael to do a little brief summary about exactly what we're talking about today.

Thomas

Thank you, Monica. So, both Monica and I are leaders of our firm's Corporate Diversity Counseling Practice Group. This is something that's very top-of-mind for us and for our clients. President Trump signed executive orders that not only rescinded DEI policies in the federal government but also encouraged the private sector to end what the orders call illegal DEI discrimination and preferences.

DEI initiatives, just to be clear, were under attack prior to the executive orders. So, what the executive orders have really done is really increase scrutiny at a very rapid pace that's seemingly changing almost daily. Despite this unprecedented scrutiny, DEI practices that are consistent with nondiscrimination laws are not only permitted, but they're actually critical to providing equal employment opportunities for all employees that are mandated by law.

Jackson Lewis, and you'll hear from Monica and me at different times, are doing podcasts and webinars on this topic. So, we'll get more guidance out in the near future.

Khetarpal

Yeah, and a lot of that guidance, including the webinars that Jackson Lewis has already put out in articles and other podcasts, focuses a lot on the legal application of those executive orders. But today, we want to take a different approach. We want to talk about the practical side of the impact of the executive orders on employers mostly and what exactly you need to do now, what you need to know now. And to the extent you've been doing DEI for a long time in your organization, what do you need to do to change it, if anything? What's going on at this moment that matters to you? What are your takeaways? Michael is going to talk a little bit about specifically what the executive orders say and don't say.

Thomas

Thanks, Monica. One of the most important things to remember before I launch into the executive orders' language is that the executive orders do not really change existing law regarding discrimination, contracting, employment or otherwise. But again, they really increase that level of scrutiny and investigation that you're likely going to see. So, really, the executive orders are directions for federal administrative agencies on how they should be interpreting the law and how they should be enforcing the law from that interpretation.

Let's first talk about Ending Illegal Discrimination and Restoring Merit-based Opportunity. Let's talk about that executive order. It largely applies to federal contractors or recipients of federal funding. This executive order directs agencies that enforce existing anti-discrimination laws to terminate what the order calls 'illegal DEI and DEIA policies.'

So, this executive order revokes Executive Order 11246, which many of you are probably familiar with, which applies to federal contractors and subcontractors. The executive order eliminates federal contractors' obligation to create what we have called an affirmative action plan. Even before the executive order, you were not permitted to make decisions based on protected categories. The executive order also directs the OFCCP to stop promoting diversity, encouraging balancing based on protected categories.

The executive order instead requires contractors to certify, which becomes important, that it does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws. Now, it sounds simple to certify that you don't have a DEI initiative that violates the law. But that contract term means, and depending on who's looking at that contract term and who's looking at your DEI initiative, if that DEI initiative actually does violate the law, and you have certified that it does not violate the law, you could get some kind of adverse verdict. You actually could be found liable under the False Claims Reporting Act, which creates significant exposure for employers and potentially individuals. It doesn't actually come out or stand out clearly within the executive order. But it is one of the consequences of having to certify that you do not have a DEI program that violates the law.

The executive order also touches upon the private sector. The Trump administration likely does not have the authority to mandate that private businesses abandon DEI policies. But what the order does is use language to really threaten potential legal action against private sector companies and really force them in many ways to either address or abandon their DEI initiatives.

So, the following one we're about to go through applies to both federal contractors and the private sector. The order instructs federal agencies to identify up to nine potential civil compliance investigations of publicly traded corporations, large nonprofit 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. As well as litigation that would be potentially appropriate for federal lawsuits, intervention or statements of interest.

Now, again, that's an executive order incentivizing federal agencies to identify these groups of employers. Those agencies are further directed to identify key sectors of concern and the most egregious and discriminatory DEI practitioners within each agency's jurisdiction. Then, develop a plan of specific steps or measures to deter DEI programs or principles. Within the private sector, the executive order can't mandate this, but it really does encourage potential litigation to be brought to get employers to adjust, change or even abandon their DEI practices.

Monica, I know there are a lot of these executive orders. What else is out there?

Khetarpal

There are. Well, the administration has been busy. There are actually a number [of executive orders] that came out.

We're going to talk about two in particular now that came out at the same time as the executive order that Michael just talked about. One is the Defending Women from Gender Ideology, Extremism, and Restoring Biological Truth to the Federal Government. That executive order states that it's now the policy of the United States that there are only two sexes. So, federal agencies can't use, apply, allow for or really deal with anything other than male and female. Those are now immutable terms.

This rescinds the EEOC's 2024 guidance on harassment in the workplace. That guidance defined sex-based harassment to specifically include harassment based on sexual orientation and gender identity. So, it's quite a shift. This applies to the federal government, not the private sector. Just like Michael said, all executive orders don't change the law, really. In this case, there are times when there's a conflict between state laws that specifically identify gender identity and sexual orientation as protected categories or that allow for, for example, the choice of intimate spaces like bathrooms or locker rooms. When there's a conflict in that law, you really need to dig deeper to see which one applies to each individual circumstance.

There's also the Ending Radical and Wasteful Government DEI programs and Preferencing Executive Order. This also mostly applies to the federal government. It directs all government agencies to terminate all what it calls 'illegal DEI programs.' You might say, well, aren't they already illegal? It's really about how the administration interprets the law and applies it to different DEI programs to determine what it calls 'illegal or unlawful DEI programs.' This executive order asks agencies to provide OBM, the Office of Budget Management, with a list of DEI positions and federal funding for DEI, including if they are starting to use code words to try to avoid scrutiny. Some institutions, agencies and employers are trying to change the words and nomenclature used in order to avoid being picked up for additional scrutiny.

There are various notices and memos from the administration to agencies that have come out recently. To put DEI personnel on paid leave, to cease all programming, to provide an email address for employees to report attempts to try to obscure that connection between DEI and the work being done. Even before these executive orders were entered, there was pushback to DEI. A lot of companies have started examining what they've done on that front. A lot of companies, especially after George Floyd's murder, took an aggressive stance on DEI, and now they're sort of reevaluating things in light of the environment.

You might see a lot of news that says that companies have actually retreated or, on the one hand, from DEI maybe entirely or really doubled down on it.

Our advice is really not to believe everything you read in the news, which is good

life advice, frankly, right, Michael? You have to really dig down into what it really means. Companies are doing a variety of things. It's not just one or the other. They double down or stay the course because they don't want to make waves with certain constituencies, their clients, their customers, or they're going to back off because they're getting pressure from the opposite side. So, what are they doing? They're looking to see, OK, what is their risk profile? What level of risk are they comfortable with, given their individual positions? Then they're trying different things to manage that risk and to bring it in line with their risk profile.

Some of the things they're trying are targeted communications, both internal and external, to publicize the company's position---either doubling down or retreating. And socializing those changes that they're going to make to their DEI programs so that they don't come as a surprise to any of their stakeholders. They are also identifying the riskiest areas within their programming. So, they might have multiple layers, levels and different programs related to DEI. Which ones do they think are most problematic or most risky? They are taking a hard look at those and maybe making some changes. Some of those may include things like mentoring programs or even employee resource groups.

They're also deciding whether and how to make those changes. Maybe that means they're making slight changes or larger changes. Or maybe they're pivoting from an emphasis on diversity to more of an emphasis on inclusion, which Michael and I hold close to our hearts. We love the inclusion piece of all of this. They're also trying some nomenclature changes. So, instead of a chief diversity, equity and inclusion officer, they might try an equal employment opportunity officer. Maybe they're eliminating the DEI office but moving those functions to within human resources so that they're not completely eliminated. There's no no-risk way to address these issues. The executive orders make clear that just by changing the name of things, they are going to call out that type of coded change. So, you really want to be careful not to be too cute about what you're doing to try to avoid being in the crosshairs. Michael?

Thomas

I agree wholeheartedly, Monica. You have to be mindful of what doubling down and possibly withdrawing from DEI initiatives really means. It's different than what you hear on the news. Often, doubling down means that a company, as Monica mentioned, has reviewed their policies and practices related to DEI and EEO. What does that really mean? They've looked at all their DEI communications internally and externally. When I say externally, that becomes incredibly important. So, they review the website. How are you describing your DEI initiatives? How are you describing your employee resource groups? How are you describing your initiatives in your 10-K statements, ESG statements, sustainability reports, proxy statements and all these documents that are actually publicly facing? Because important, you could have a DEI strategy that is completely legally compliant, but the way you actually describe it on your website, you might describe it in a way that suggests it's not legally compliant. One of these groups for individuals or a federal agency might grab that language and then you get a letter or a lawsuit. So, a lot of these companies are reviewing everything, internal and external communications, and engaging stakeholders.

Then, sometimes, if they see that there's nothing wrong with what they're doing or it's at least aligned with their risk profile, they might make a statement that says that they're renewing their commitments. That's important because, in part, it shows that you're legally compliant with EEO obligations, and then making that statement can put you out there as an employer of choice for a lot of that diverse talent that might want to work with you. But at the same time, talking about risk tolerance can also potentially make you a target. So, you want to make sure that whatever communications you do engage in that's public, it's at least aligned with your risk strategy or your risk tolerance.

The flip side of that is also true. Often, after this review has been done, companies say you know what, maybe we have gone a little bit too far, and I want to adjust the language a little bit. Or maybe the language we think is legally compliant, but it's not consistent with our values, so they make some changes, but they don't effectively communicate those changes to their internal and external stakeholders. So, when they make those changes, it gets perceived as them withdrawing from DEI. The reality is that they're not really withdrawing from DEI. They just realize that if they are committed to DEI, they have to actually be a little more focused on DEI compliance with EEO obligations. Their changes actually show their commitment, but they haven't effectively communicated that. One of the things, and we'll talk about it a little bit, is that your communication strategy has become really important.

But Monica, so what do we ultimately recommend that clients think about and do along with some of the things you've already said?

Khetarpal

These are really practical take-homes and things you can do right now. The first is to know thyself. The way you're going to take stock is to first start by asking all shareholders what they feel your organization should be doing with respect to DEI. No one person should make a decision on what to do going forward. You really need buy-in.

So, that may mean your CEO, your C-suite or your board. You might want to find a way to take the temperature of your customers or clients and your employee base. You want to take everybody's temperature and then decide what is your risk tolerance. Where do you want to be? Because again, there's no no-risk situation. Those who are pulling back from DEI are getting some heat, and those who are pushing forward are also getting heat.

So, after you decide where you want to be, you want to audit. Take stock of your policies and your procedures, whether they're written or also in the implementation. You want to look at your training in all sorts of areas, wherever DEI may reside. You want to match up to your risk tolerance and make the changes accordingly. You want to make sure that you're really focusing in the end on making sure that everybody has an equal opportunity for success. So, we're pivoting towards fairness. We're breaking down barriers and making sure everybody has a fair chance at your organization. That should be one of your guiding lights.

You want to make sure that you make that commitment to fairness and work backward to reimagine what your DEI program is going to look like now based on your risk tolerance and what you've done in the past and make sure that you're really focusing on fairness. So, that might mean that you're retreating a little bit from DEI or that you're pushing your commitment. You may need to make some adjustments one way or another to be legally compliant. But you want to do this in a very measured way. Then you want to make sure that, like Michael said, a lot of this comes back to communication. Communication is so important, and how and whether you communicate it internally or externally may make a big difference as to whether the changes you're making now are impactful.

Thomas

That stakeholder engagement that you mentioned, Monica, is incredibly important. One of the things to think about is that there is going to be a blowback in one form or another, whether it is internal employees complaining or some external organization sending you a letter of some sort. So, you want to feel confident, or at least as confident as you possibly can, about where you stand within your risk assessment.

Some ways to minimize your risk are--- one, when you're describing your DEI initiative, avoid using different forms of shorthand and instead use language that's within the EEO. So, your Equal Employment Opportunity Language. That can be things like you might right now have language that says we're increasing representation. You could tweak or adjust that language instead by using the term removing barriers. Removing barrier language actually comes from the EEO. Again, you want to review how you're communicating and what you're communicating to make sure it's consistent with, as Monica pointed out, your risk tolerance.

The one thing that I'll add really briefly, and then Monica will come back to you to talk a bit more about communications, is you want to make sure that you're focusing on psychological safety and wellness for all of your employees. One of the concerns that does come up is there's an argument that the EOs, so the executive orders, and even some of the attacks on DEI have really been targeted towards the African American, Hispanic, immigrant and LGBTQ+ communities. Some of those attacks or some of the language within the EOs and in some of these letters seem to be targeting individuals' identities. This means how they're showing up to the workplace feels less psychologically safe, less well in terms of wellness, and even you can have a sense of your own physical safety being threatened. As an employer, you have an obligation to provide a work environment that feels safe for all of your employees. So, what this really calls for is that leaders have to recognize how different groups experience safety and wellness in the workplace and that it actually really differs. And to understand those differences and create a wellness environment where all employees can equally thrive. So, back to you, Monica.

Khertarpal

Yeah, Michael, that is just so important. A little preview: Michael and I are going to do another podcast specifically on inclusion and the fact that it's not really

under attack. It's a great way to maybe achieve some of your goals.

Going back to the communication strategy, this is another thing that Jackson Lewis has been doing in conjunction with our clients on a DEI strategy. Because the two go hand in hand.

You really want to have a strategy in place now. Everybody can anticipate that there may be some upheaval, some scrutiny. Some are more at risk, and some are less at risk. But everybody should anticipate that there could come a time when you need to make a statement about DEI policies. So, develop that communication strategy now, not when you're in a crisis mode. So, think about when you would make a statement and how quickly you want to come out with it if something happens. Who is going to make the statement? Who's going to do the first draft? Who's going to have final decision-making power? Because what you don't want is a power struggle at a moment of crisis. And when and how it's going to be disseminated. Think about external communications and internal communications. I can't stress enough to be very careful about privilege issues. So, consider doing drafts and build this out now because the timing of what you put out will be very critical.

Communications work best to control reputation when it's done quickly before media and social media spin it. But that takes advanced preparation, especially to develop those systems so that you are protecting privilege as you're getting your drafts out, et cetera.

So, all of those things are our take-home advice on how to deal with the changes that have come so far through these executive orders and anything else that may be coming down the pike. Again, executive orders don't change existing laws regarding discrimination in contracting, employment, or otherwise, but they do signal increased investigation and enforcement activities that we're going to see. So, we want to focus on anything that involves discriminatory preferences, and it's really important that employers take stock of where they are and where they want to be on these issues.

Michael, any parting words?

Thomas

My last comment would be to also be mindful of DEI privileged communications back and forth. We've had some matters where litigations come up and email communications about their DEI initiatives discuss things like, well, now that our DEI is illegal, and that sentence is discoverable. So, be mindful of those types of communications as well. So, anyway, back to you, Monica.

Khetarpal

Thank you everyone for listening. Stay tuned for more from Jackson Lewis on all of these issues. We're keeping close track of developments. They're coming out rapidly and we're pushing out information and analysis in a timely way for all of you to help navigate everything that's coming down.

OUTRO

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