



# Sorting Through the Fallout: Exploring Employer Obligations to Employees in Light of Federal and State Bans on DEI Initiatives

CARA LEAHY WHITE

# What is DEI and What's Going On?

- ▶ Diversity, equity, and inclusion policies are generally designed to ensure that members of all races, genders, religions, socioeconomic classes, and sexualities are treated equally. Some DEI policies include elevating members of certain underrepresented classes to put them on equal footing with other historically privileged classes.



# History of DEI 1860-1999

- ▶ One of the earliest DEI implementations was the preferential hiring of veterans and widows of veterans after the US Civil War.
- ▶ In 1936, FDR enacted the Randolph Sheppard Act, which mandated that the federal government give preference to products made by the blind.
- ▶ Affirmative Action was first mentioned in the 1935 Wagner Act, but can be traced back as early as Reconstruction.
- ▶ Throughout the latter half of the 1900's, the zeitgeist moved from just non-discrimination practices to practices that promoted diversity, equity, and inclusion as a motive for preferring historically underrepresented groups.



# Integration was DEI.





# History of DEI: 1990-2010

- ▶ In 1990, President George W. Bush signed the Americans with Disabilities Act.
- ▶ In 1998, President Clinton signed the Veterans Employment Opportunities Act and issued an Executive Order creating a task force to encourage the promotion of individuals with disabilities.
- ▶ In 2000, President Clinton issued Executive Orders directing executive departments and agencies to implement programs for the recruitment and career development of Hispanic employees and individuals with disabilities.
- ▶ In 2009, President Obama strengthened the Veterans Employment Act through an Executive Order, directing the federal government to give preference to veterans in hiring decisions.



# History of DEI: 2020-2022

- ▶ While DEI is NOT a new concept by any means – you are already familiar with anti-discrimination practices in your workplaces – they became more prominent in 2020.
- ▶ COVID-19 and the resulting shut down coupled with nationwide protests stimulated public interest in disability aid, reparations, healthcare for all, mutual aid, and debt forgiveness – all ideas that led to DEI policies being enacted in workplaces and social circles.
- ▶ As people returned to work, public interest waned, but policies stayed largely intact.



# History of DEI: 2023-2025

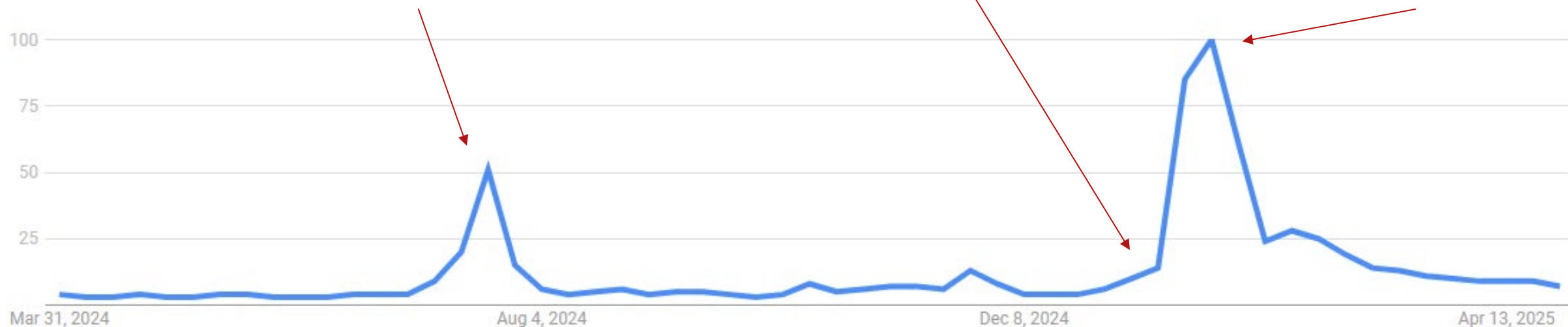
- ▶ In 2023, the SCOTUS rejected Affirmative Action.
- ▶ Focus by some shifted to combating “DEI.”
- ▶ In January 2025, President Donald Trump, by Executive Order, ordered all Federal governmental DEI programs shut down.

# Recent Public Interest in Anti-DEI Policies

Failed Assassination Attempt of President Donald Trump while a Woman led Secret Service

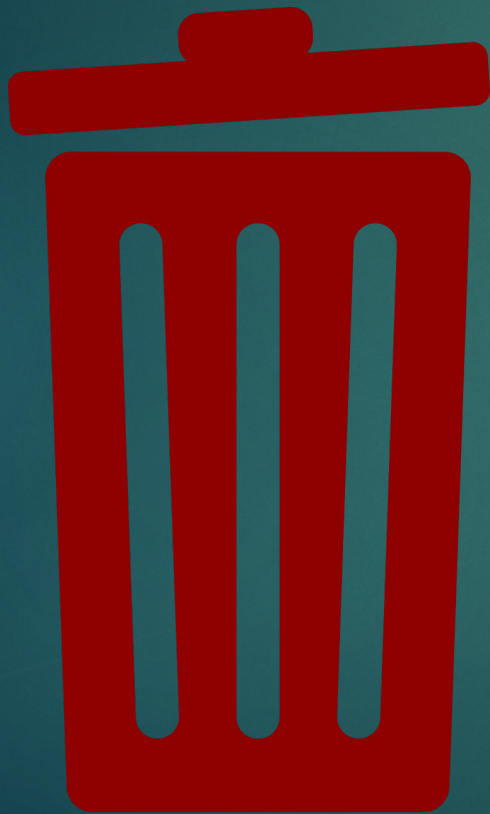
Airplane Crash with Female Pilot

Anti-DEI Executive Orders Enacted





# EO 14151, “Ending Radical and Wasteful Government DEI Programs and Preferences”



- ▶ Eliminated DEI programs at the federal level.
- ▶ Preliminary injunction granted, but then stayed pending appeal. Currently partially active.
- ▶ Goes hand in hand with Executive Order 14173

# EO 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”

- ▶ Revokes an Equal Employment Opportunity executive order signed in 1965.
- ▶ Requires federal grant recipients and contractors to certify that they do not operate DEI programs that violate anti-discrimination laws.
- ▶ Requires each executive agency to identify up to nine corporations or nonprofit entities or associations to target with civil investigations to deter DEI programs.



# EO 14168, “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”

- ▶ Rescinds guidance that recognized Gender Identity as a protected category under Title VII of the Civil Rights Act of 1964.
- ▶ Defines "sex" as an individual's immutable biological classification as either male or female, determined at conception.
- ▶ Conflicts with *Bostock v. Clayton County*.





# Who is suing?

- ▶ Women in trades groups, disabled veterans groups, counties who run senior volunteer programs, states who are concerned about education funding, LGBTQ groups, Latino Arts groups, education associations, students who had their books restricted.
- ▶ The lawsuits are varied, but generally focus on: spending clauses, separation of powers, the First Amendment rights to speech, gathering, and association.
- ▶ What does this mean for you? Stay tuned. There are 13 pending lawsuits fighting these orders, and they are in various stages of stay, appeal, or injunction. It is difficult to predict what will happen to them.





# State of Texas: GA-55

*Governor Greg Abbott*

January 31, 2025

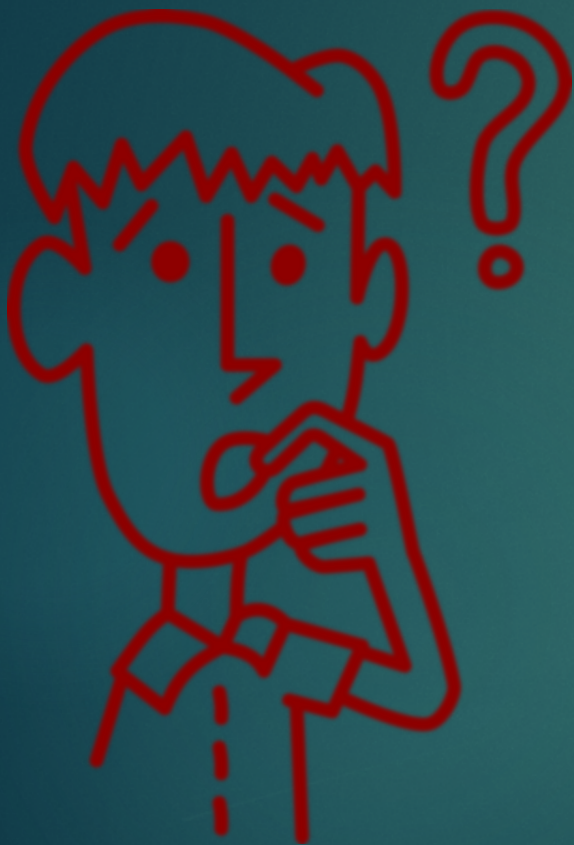
*Executive Order GA-55*

Page 2

NOW, THEREFORE, I, GREG ABBOTT, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and Statutes of the State of Texas, do hereby direct all state agencies to comply with the color-blind guarantee of both the state and federal Constitutions, including by ensuring that all agency rules, policies, employment practices, communications, curricula, use of state funds, awarding of government benefits, and all other official actions treat people equally, regardless of race.

- ▶ As a result, state agencies can no longer have DEI policies that treat people differently based on race. The GA does not address sex or other protected classes and is textually limited to **state agencies, not cities.**

# Then why are we talking about this?



- ▶ The reference to the Executive Order in pending litigation against Coppell ISD, **an independent school district**, shows that the Attorney General is eager to apply the EO to non-state agencies, even though the EO explicitly only applies to state agencies.
- ▶ Municipalities should be prepared to see laws in the future that attempt to enforce anti-DEI policies at the local level.



Texas Senate Bill 689: Relating to employment practices regarding diversity and prohibiting the implementation of diversity, equity, and inclusion initiatives by certain governmental entities.

- ▶ Texas Senate Bill 689 has cleared the Senate but is still waiting on approval from the House.
- ▶ A governmental entity shall ensure that each unit of the entity does not, except as required by federal law:
  - (1) compel, require, induce, or solicit any person to provide a diversity, equity, and inclusion statement or give preferential consideration to any person based on the provision of a diversity, equity, and inclusion statement;
  - (2) establish or maintain a diversity, equity, and inclusion office; or
  - (3) hire or assign an employee of the entity or contract with a third party to perform the duties of a diversity, equity, and inclusion office.



# Possible Implications for Municipalities

- ▶ Changes in eligibility for grants
- ▶ Rework employee resource groups
- ▶ Rework training programs





# Changes in eligibility for grants

- ▶ State and federal agencies, in order to ensure that they themselves are complying with GA-55, may scrutinize grant recipients more closely to ensure that they don't cause the State agency to fall out of compliance.
- ▶ They may even require you to ensure that contractors paid with the grant money do not have DEI programs.
- ▶ Read contracts carefully, because the acceptance of such contracts or grants legally binds the municipality to adhere to those terms.



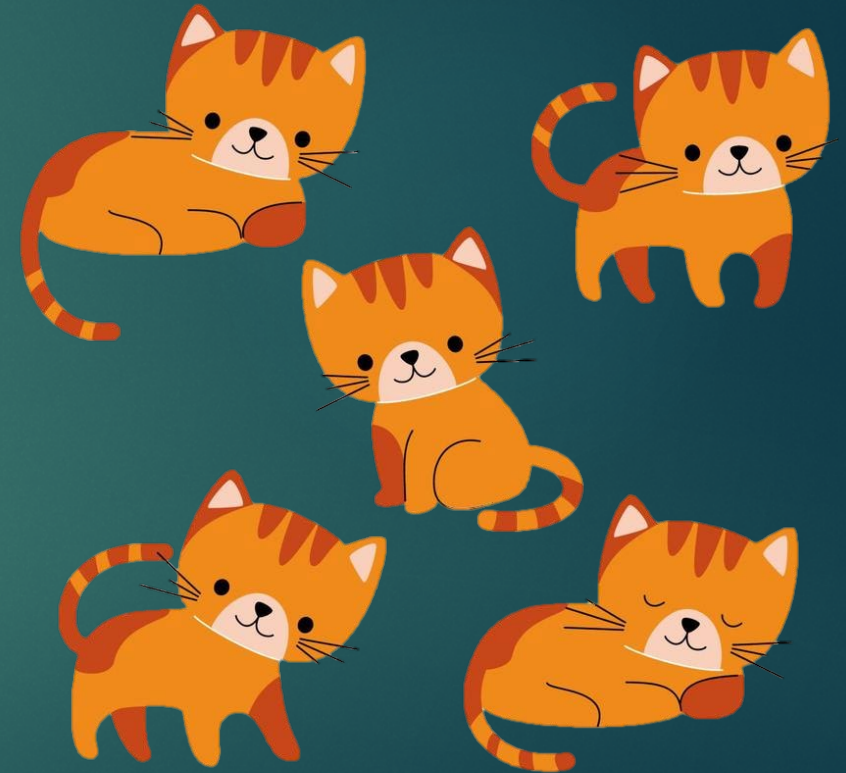
# Employee Resource Groups

- ▶ These are your “Working Moms”, “Black Engineers,” and OUTLaw groups.
- ▶ If you currently have a group that is focused on promoting a historically underrepresented group based on a protected class, you should proceed with caution.
- ▶ These groups may exist– but they need to allow anyone to join. This isn’t new, but you should expect additional scrutiny as a result of the executive orders.
- ▶ Limiting membership in workplace groups, such as employee resource groups (ERG) or other employee affinity groups, to certain protected groups, is prohibited.



# Employee Resource Groups

- Do not allow anyone to be excluded because of a protected characteristic
- Yellow cat gets to attend the orange cat function despite not being orange
- Orange cat foundation needs to include yellow cat on the email chain
- Be prepared – this will not be popular
- This does not give yellow cat free rein to do whatever he wants, but he must be treated like everyone else.





# WHAT TO DO IF YOU EXPERIENCE DISCRIMINATION RELATED TO DEI AT WORK



Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on protected characteristics such as race and sex. Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, no matter which employees are harmed. Title VII's protections apply equally to all racial, ethnic, and national origin groups, as well as both sexes.

**Before you can sue in federal court, you first must file a charge of discrimination with the EEOC.** The U.S. Equal Employment Opportunity Commission (EEOC) investigates charges of discrimination and can file a lawsuit under Title VII against businesses and other private sector employers. The Department of Justice can file a lawsuit under Title VII against state and local government employers based on an EEOC charge, following an EEOC investigation.

## What can DEI-related discrimination look like?

Diversity, Equity, and Inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

### Disparate Treatment

DEI-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including:

- Hiring
- Exclusion from training
- Firing
- Exclusion from mentoring or sponsorship programs
- Promotion
- Exclusion from fellowships
- Demotion
- Selection for interviews (including placement on candidate slates)
- Compensation
- Fringe benefits

### Harassment

Title VII prohibits workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics. Harassment is illegal when it results in an adverse change to a term, condition, or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive. Depending on the facts, DEI training may give rise to a colorable hostile work environment claim.

### Who can be affected by DEI-related discrimination?

Title VII protects employees, potential and actual applicants, interns, and training program participants.

### What should I do if I encounter discrimination related to DEI at work?

If you suspect you have experienced DEI-related discrimination, contact the EEOC promptly because there are strict time limits for filing a charge. The EEOC office nearest to you can be reached by phone at 1-800-669-4000 or by ASL videophone at 1-844-234-5122.

### Limiting, Segregating, and Classifying

Title VII also prohibits employers from limiting, segregating, or classifying employees based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities. Prohibited conduct may include:

- Limiting membership in workplace groups, such as Employee Resource Groups (ERG) or other employee affinity groups, to certain protected groups
- Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources

### Retaliation

Title VII prohibits retaliation by an employer because an individual has engaged in protected activity under the statute, such as objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge. Reasonable 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.



[www.EEOC.gov](http://www.EEOC.gov)



Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee’s race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise “balancing” a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

## DISPARATE TREATMENT

Dei-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including:

Hiring	Firing
Promotion	Demotion
Compensation	Fringe Benefits
Exclusion from Training	Exclusion from mentoring or sponsorship programs
Exclusion from Fellowships	Selection for interviews (including placement on candidate slates)

# Reworking of Staff Training

- ▶ The EEOC has issued guidance that:
  - ▶ Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources is prohibited.
  - ▶ Depending on the facts, DEI training may give rise to a colorable hostile work environment claim:
    - ▶ If the employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics during or as a result of the training and,
    - ▶ If the training results in an adverse change to a term, condition or privilege of employment, or in an action so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive.



# What to do with that guidance

- ▶ Eliminate references **to inherent bias or collective guilt.**

# Next Steps For Municipalities

- ▶ Internal and Public Relations
- ▶ Policy Review and Revision
- ▶ Hiring and Promotion
- ▶ Monitoring and Compliance



# Internal and Public Relations

- ▶ Be careful to keep your staff informed about what policies are changing and why.
- ▶ Be prepared to explain the changes to the public.
- ▶ Be prepared for frustration from your staff and the public.
- ▶ It is likely that your staff may feel unsupported or less valued if you publicly step away from diversity initiatives.
- ▶ An example from the corporate world: after Target announced it was rolling back its DEI policies in January, the analytics site Placer.ai reports the store's foot traffic decreased 9% in February 2025 compared to last year.



# Policy Review and Revision

- ▶ Most of your training programs are likely compliant with the law, but you may need to change some wording and training modules.
- ▶ Ensure that training modules and materials focus on preventing discrimination, promoting respectful workplaces, and ensuring content is accurate and balanced.



# Hiring and Promotion



- ▶ Review practices for compliance with Title VII and the Equal Protection clause.
- ▶ Ensure selection criteria are job-related and consistently applied – not based on “wanting some more boys in the office” or “adding some diversity in the room.”
- ▶ Document merit-based hiring decisions. Take care to document why you selected one applicant over another, especially if they are similarly situated.
- ▶ Ensure promotion criteria are objective, job-related, and consistently applied; document merit-based promotion decisions; analyze for potential disparate impact.



# Hiring and Promotion, cont.

- ▶ Write everything down.
- ▶ Document everything with your non-discriminatory reasoning.
- ▶ Do not base your decisions on anything having to do with race, color, religion, sex, national origin, disability, age, or genetic information.



# Monitoring and Compliance

- ▶ Take steps to evaluate all current programs and policies
- ▶ Ensure that all employees know what is expected of them
- ▶ Take time to do audits of current trainings, ERGs, fellowships, grants, awards, etc.
- ▶ Do bi-annual audits at a minimum to ensure you are in compliance
- ▶ Document everything!



# Texas Commission on Human Rights Act (TCHRA)

- ▶ Sec. 21.051. DISCRIMINATION BY EMPLOYER. An employer commits an unlawful employment practice if because of **race, color, disability, religion, sex, national origin, or age, the employer:**
  - ▶ (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or
  - ▶ (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.



# Title VII

- ▶ It shall be an unlawful employment practice for an employer
- ▶ (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's **race, color, religion, sex, or national origin**; or
- ▶ (2) to limit, segregate, or classify its employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual's **race, color, religion, sex, or national origin**.



# LGBTQ Employees

- ▶ As far as the law is concerned, it is **still** unlawful to discriminate against someone based on their sex.
- ▶ Is the discrimination against a transgender person based on the provoker being unhappy or angry with how someone is presenting their sex? That the person looks too much like the sex other than what they were assigned at birth? Sex is a protected class.
- ▶ *Bostock* still stands. If someone is being discriminated against in your workplace based on their sexuality, that is still workplace bullying. It may not rise to the standard of a hostile environment, but is the bullying impacting the ability of that employee to succeed at their job?
- ▶ **You still have tools to protect your employees!**



# Everything is still in flux

*Per a court order, HHS is required to restore this website as of 11:59 PM, February 14, 2025. Any information on this page promoting gender ideology is extremely inaccurate, and disconnected from the immutable biological reality that there are two sexes, male and female. The Trump Administration rejects gender ideology and condemns the harms it causes to children, by promoting their chemical and surgical mutilation, and to women, by depriving them of their dignity, safety, well-being, and opportunities. This page does not reflect biological reality and therefore the Administration and this Department rejects it.*



# Keeping track of the litigation

- ▶ Rely on publicly available tracking of legal challenges
- ▶ Ask your legal counsel to keep you informed.

<a href="#">Nat'l Association of Diversity Officers in Higher Ed. v. Trump</a> (D. Md.)  Case No. 1:25-cv-00333-ABA  (Fourth Circuit <a href="#">Case No. 25-1189</a> )	<a href="#">Complaint</a>	2025-02-03	<p><b>Overview:</b> Several organizations, including the National Association of Diversity Officers in Higher Education, sued President Donald Trump alleging his Executive Orders 14151 and 14173 ("EOs") that target diversity, equity, and inclusion ("DEI") programs violate their constitutional rights, including the right to free speech. The organizations are asking the judge to declare both EOs unconstitutional and unlawful, and to stop enforcement of the EOs immediately and at least for the duration of the lawsuit. The judge has partially granted the organization's request by stopping enforcement of the EOs while the lawsuit is pending. The Trump administration has appealed the judge's decision to a higher court.</p> <p><b>Case Summary:</b> On Jan. 20, 2025, the Trump administration issued an <a href="#">executive order</a> to "[defend] women from gender ideology extremism and [restore] biological truth to the federal government." That same day, the President issued an <a href="#">executive order</a> directing the OMB Director, assisted by the Attorney General and OPM, to terminate DEI programs, offices and positions, and "equity-related" grants and contracts. On Jan. 21, the administration issued a <a href="#">third executive order</a> revoking an Equal Employment Opportunity executive order in place since 1965; requiring federal grant recipients and contractors to certify that they do not operate DEI programs that violate anti-discrimination laws; and requiring each executive agency to identify up to nine corporations or nonprofit entities or associations to target with civil investigations to deter DEI programs.</p> <p>Plaintiffs argue the first order is an unconstitutional violation of the Spending Clause and the 5th Amendment's due process guarantee for vagueness. They argue the second order unconstitutionally violates 5th Amendment due process for vagueness; the 1st Amendment's free speech clause; and the separation of powers. They seek declaratory judgments that both orders are unlawful and unconstitutional, and preliminary and permanent injunctions against both.</p> <p><b>Update 1:</b> On Feb. 13, Plaintiffs <a href="#">moved</a> for a TRO and preliminary injunction against enforcement of the Executive Orders.</p> <p><b>Update 2:</b> On Feb. 18, Defendants <a href="#">filed</a> a response against Plaintiffs' motion for a TRO and preliminary injunction, arguing, inter alia, that two of four Plaintiffs lack standing and that Plaintiffs' claims fail on merits. On Feb. 19, Plaintiffs <a href="#">filed</a> a supplemental brief in support for a TRO and preliminary injunction.</p> <p><b>Update 3:</b> On Feb. 21, Judge Adam B. Abelson issued a <a href="#">memorandum opinion</a> and <a href="#">granted</a> the preliminary injunction in large part, enjoining implementation of the Termination Provision of Executive Order 14151 and of the Certification and Enforcement Threat Provisions of Executive Order 14173. The court stated that "Plaintiffs' irreparable harms include widespread chilling of unquestionably protected speech." The court also denied the preliminary injunction in part, allowing the Attorney General to prepare the report pursuant to Executive Order 14173 and to engage in an investigation.</p> <p><b>Update 4:</b> On Feb. 24, the Defendant submitted a <a href="#">notice</a> of appeal to the Fourth Circuit.</p> <p><b>Update 5:</b> On Mar. 3, Judge Abelson denied the Defendants' motion to stay the injunction pending an appeal.</p> <p><b>Update 6:</b> On Mar. 10, Judge Abelson granted Plaintiff's motion to clarify the scope of the injunction, such that it applies not only to "persons in active concert or participation with defendants," but to all federal executive branch agencies.</p> <p><b>Update 7:</b> On Mar. 14, the Fourth Circuit <a href="#">granted</a> the government's petition for a stay of the preliminary injunction pending appeal.</p> <p><b>Update 8:</b> On Mar. 21, Plaintiffs <a href="#">filed</a> a motion to vacate the preliminary injunction granted by Judge Abelson on Feb. 21 in light of the Fourth Circuit's grant of stay of the preliminary injunction pending appeal. Plaintiffs seek to vacate so that they can instead seek additional relief that takes into account new factual developments and also save judicial resources.</p> <p><b>Update 9:</b> On Apr. 1, Defendants <a href="#">filed a motion</a> opposing Plaintiffs' motion to vacate the preliminary injunction, asserting that the district court lacks the jurisdiction to do so after a notice of appeal has been filed.</p> <p><b>Update 10:</b> On Apr. 2, Plaintiffs <a href="#">filed a reply</a> in further support of their motion to vacate the preliminary injunction order and requested the Court grant this motion as soon as possible.</p>	2025-04-02
--	---------------------------	------------	---	------------





It is **not** illegal to have a diverse workplace.

It **is** illegal to promote or demote someone based on a protected class.



# Questions?

