

February 7, 2025

# Federal Agencies Begin to Implement and Expand on DEI Executive Orders

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## DOJ and OPM Memos Raise Risk of Criminal Investigations of Private Sector DEI Practices, and Signal Aggressive Evaluation of HR Practices Such as Diverse Slate Hiring and Affinity Groups

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### SUMMARY

On February 5, 2025, the U.S. Department of Justice (“DOJ”) and U.S. Office of Personnel Management (“OPM”) issued internal memoranda that begin to implement President Trump’s January 2025 Executive Orders related to diversity, equity, inclusion, and accessibility (“DEI” or “DEIA”) programs, which we previously discussed [here](#). Among other things, the memoranda direct government agencies to (i) plan for potential criminal investigations of DEI practices at large companies, non-profits, professional associations, and universities; (ii) end diverse slate hiring practices (*i.e.*, where a diverse slate of job candidates must be interviewed before a hiring decision is made); and (iii) limit employee resource groups, or affinity groups, such that they cannot promote unlawful DEIA initiatives or advance recruitment, hiring, preferential benefits (including, but not limited to, training or other career development opportunities), or employee retention agendas based on protected characteristics. Although the memoranda relate primarily to the federal workforce, they provide insight into the administration’s views and enforcement priorities, and are likely to fuel private civil litigation.

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### DEPARTMENT OF JUSTICE MEMORANDA

Hours after her Senate confirmation on February 5, 2025, U.S. Attorney General Pam Bondi issued two memoranda to DOJ employees that provide additional detail on the DOJ’s enforcement priorities with respect to DEI initiatives. The first [memorandum](#), titled *Ending Illegal DEI and DEIA Discrimination Preferences* (the “DOJ Preferences Memo”), describes how the DOJ will “investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector

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and in educational institutions that receive federal funds.” The second [memorandum](#), titled *Eliminating Internal Discriminatory Practices* (the “DOJ Practices Memo”), describes steps the DOJ will take “to eliminate programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race and sex.”

### A. The DOJ Preferences Memo

The DOJ Preferences Memo provides that, by March 1, 2025, the DOJ will create an internal report that will address many of the items the DOJ was instructed to report on in President Trump’s January 21, 2025 Executive Order 14173 (“Ending Illegal Discrimination and Restoring Merit-Based Opportunity”). Specifically, the report will address:

- “Key sectors of concern within the [DOJ’s] jurisdiction”;
- “The most egregious and discriminatory DEI and DEIA practitioners in each sector of concern”;
- “A plan including specific steps or measures to deter the use of DEI and DEIA programs or principles that constitute illegal discrimination or preferences, including proposals for criminal investigations and for up to nine potential civil compliance investigations of” publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, state and local bar and medical associations, and institutions of higher education with endowments over one billion dollars;
- “Additional potential litigation activities (including interventions in pending cases, statement of interest submissions, and amicus brief submissions), regulatory actions, and sub-regulatory guidance”; and
- “Other strategies to end illegal DEI and DEIA discrimination and preferences and to comply with all federal civil-rights laws.”

Much of the guidance above hews closely to Executive Order 14173, but also includes a directive to identify potential **criminal** investigations related to the DEI practices at large companies, non-profit entities, professional associations, and universities. Any such criminal investigations would represent a novel use of the Criminal section of the DOJ Civil Rights Division.

The DOJ Preferences Memo also states that the DOJ “will work with the Department of Education to issue directions, and the Civil Rights Division will pursue actions, regarding the measures and practices required to comply with *Students for Fair Admissions*,” which is the 2023 Supreme Court decision striking down race-based affirmative action programs in university admissions.

### B. The DOJ Practices Memo

The DOJ Practices Memo directs all DOJ “components” to “thoroughly evaluate consent decrees, settlement agreements, litigation positions (including those set forth in amicus briefs), grants or similar funding mechanisms, procurements, internal policies and guidance, and contracting arrangements” to identify “race- or sex-based preferences, diversity hiring targets, or preferential treatment based on DEI-or DEIA-related criteria.” Thereafter, “[a]ll [DOJ] materials that encouraged or permitted race- or sex-based preferences as a method of compliance with federal civil rights laws [will be] rescinded and will be replaced

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with new guidance affirming that equal treatment under the law means avoiding identity-based considerations in employment, procurement, contracting, or other Department decisions.”

Additionally, the DOJ is directed to “narrow the use of ‘disparate impact’ theories that effectively require use of race- or sex-based preferences.” Disparate impact is a theory of discrimination which considers whether facially neutral policies and procedures have an outsized statistical impact on one group of employees relative to another, regardless of any intention to discriminate. As part of the “updated guidance” on disparate impact, the DOJ will “emphasize that statistical disparities alone do not automatically constitute unlawful discrimination,” which is a directive that reflects current law, but will almost certainly be implemented in a way that will make it more difficult for disparate impact plaintiffs to state a claim.

The DOJ Practices Memo also requires the DOJ to create an internal report by March 15, 2025 that will confirm the agency’s compliance with President Trump’s January 20, 2025 Executive Order 14151 (“Ending Radical and Wasteful Government DEI Programs and Preferencing”), including by:

- “Confirming the termination, to the maximum extent allowed by law, of all DEI, DEIA, and ‘environmental justice’ programs, offices, and positions . . . ; all ‘equity action plans’, ‘equity’ actions, initiatives, or programs; all ‘equity-related’ grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, suppliers, vendors, or grantees”;
- “Identifying federal contractors, suppliers, vendors, and grantees who have provided DEI training or DEI training materials to agency or department employees since January 20, 2021”;
- “Identifying federal grantees who received federal funding to provide or advance DEI, DEIA, or ‘environmental justice’ programs, services, or activities since January 20, 2021”;
- “Assessing the operational impact (e.g., the number of new DEI hires) and cost of the prior administration’s DEI, DEIA, and ‘environmental justice’ programs and policies”; and
- “Recommending actions to align Department programs, activities, policies, regulations, guidance, employment practices, enforcement activities, contracts (including set-asides), grants, consent orders, and litigating positions with requirement of equal dignity and respect.”

The DOJ Practices Memo notes that the DOJ will pay attention to “ending references to DEI or DEIA in (1) training and programs, including references to ‘unconscious bias,’ ‘cultural sensitivity,’ ‘inclusive leadership,’ and any emphasis on race- or sex-based criteria rather than merit; (2) policies and guidelines, including hiring, promotion, or performance evaluation policies; and (3) vendor contracts and budget materials.”

Both DOJ memoranda state in a footnote that they are not intended to “prohibit educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.”

Note that litigation has already been filed in federal district court in Maryland challenging President Trump’s January 2025 Executive Orders on DEI, including a lawsuit jointly filed by the National Association of

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Diversity Officers in Higher Education, the American Association of University Professors, Restaurant Opportunities Centers United, and the Mayor and City Council of Baltimore, Maryland, which argues, among other things, that the Executive Orders exceeded the President's constitutional authority and violate the First Amendment's free speech clause.

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### OFFICE OF PERSONNEL MANAGEMENT MEMORANDUM

Also on February 5, 2025, OPM issued a [memorandum](#) to the heads of all federal agencies titled *Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives* (the "OPM Memo"). Consistent with President Trump's January 2025 Executive Orders, the OPM Memo directs federal agencies to "terminate all illegal DEIA initiatives," including by eliminating "DEIA offices, policies, programs, and practices . . . that unlawfully discriminate in any employment action or other term, condition, or privilege of employment, including but not limited to recruiting, interviewing, hiring, training or other professional development, internships, fellowships, promotion, retention, discipline, and separation, based on protected characteristics like race, color, religion, sex, national origin, age, disability, genetic information, or pregnancy, childbirth or related medical condition." The OPM Memo states, however, that "agencies should not terminate or prohibit accessibility or disability-related accommodations, assistance, or other programs that are required by" statutes that provide protections for disabled workers, including the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.

The OPM Memo takes the position that "[t]o be unlawful, a protected characteristic does not need to be the sole or exclusive reason for an agency's action. Among other practices, this includes ending unlawful diversity requirements for the composition of hiring panels, as well as for the composition of candidate pools (also referred to as 'diverse slate' policies)." Such diverse slate policies have become increasingly common in the private sector in recent years, and, although the OPM Memo is limited in its applicability to the federal workforce, it provides insight into how the federal government may view such hiring practices going forward.

The OPM Memo also takes the view that employee resource groups ("ERGs")—which are sometimes referred to as affinity groups—should be prohibited to the extent they "promote unlawful DEIA initiatives or advance recruitment, hiring, preferential benefits (including but not limited to training or other career development opportunities), or employee retention agendas based on protected characteristics." Notwithstanding the foregoing, "agency heads retain the discretion to allow employees to host affinity group lunches, engage in mentorship programs, and otherwise gather for social and cultural events," so long as doing so is consistent with President Trump's January 2025 Executive Orders and "the broader goal of creating a federal workplace focused on individual merit." If such activities are conducted by federal agencies, the agencies "must ensure that attendance at such events is not restricted (explicitly or functionally) by any protected characteristics, and that attendees are not segregated by any protected characteristics during the events." Moreover, "to the extent that an agency exercises its discretion to permit ERGs, affinity group events, or other similar events, the agency may not draw distinctions based on any

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protected characteristic in granting permission to groups and events. For example, an agency cannot permit the formation of ERGs only for certain racial groups but not others, or only for one sex, or only certain religions but not others.”

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### TAKEAWAYS

For employers, the potential for criminal investigations of private sector entities' DEI practices represents a significant escalation of the administration's efforts to root out DEI and DEIA programs. Moreover, OPM's position on practices such as diverse slate hiring and employee resource groups may have significant ramifications for the private sector. Employers should closely examine their DEI programs in light of these developments, and continue to carefully monitor the changing political, legal, and industry landscape.

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