SULLIVAN & CROMWELL LLP

S&C memo

January 22, 2025

President Trump Acts to Roll Back DEI Initiatives

Executive Orders:

- **Require Attorney General to Recommend Measures to Encourage Private Sector to End Illegal DEI Practices**
- **Establish Federal Policy of Two Genders Only, Cease Virtually All DEI-Related Activities in the Federal Workforce, and Cancel Affirmative Action Requirements for Federal Contractors**

SUMMARY

Consistent with President Trump's campaign promises, the White House has taken swift and significant actions to roll back diversity, equity, and inclusion ("DEI") programs and initiatives through executive orders. The executive orders direct the Attorney General, in consultation with the heads of relevant federal agencies, to identify private sector companies with "egregious and discriminatory" DEI programs, signaling potential investigations of publicly traded corporations and large non-profits as well as litigation and potential "regulatory action and sub-regulatory guidance" impacting the private sector. The executive orders establish a federal policy of recognizing two genders only, cease virtually all DEI-related activities in the federal workforce, and rescind a number of DEI-related executive orders issued by prior administrations, including Executive Order 11246, which requires federal contractors to implement affirmative action programs.

EXECUTIVE ORDERS

On January 21, 2025, President Trump signed an Executive Order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the "January 21 DEI Order"). Earlier, on January 20, 2025, President Trump signed two DEI-related executive orders titled "Defending Women From Gender Ideology Extremism

and Restoring Biological Truth to the Federal Government" (the "Gender Order") and "Ending Radical and Wasteful Government DEI Programs and Preferencing" (the "January 20 DEI Order").

A. The January 21 DEI Order

The January 21 DEI Order includes a section titled "Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences," which instructs all federal agencies to "take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work." The Attorney General, in consultation with the heads of all "relevant agencies," is also directed to issue a report within 120 days that contains "recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI." The report will contain a "strategic enforcement plan" which identifies:

- "Key sectors of concern within each agency's jurisdiction";
- "The most egregious and discriminatory DEI practitioners in each sector of concern";
- "A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated 'DEI' or otherwise) that constitute illegal discrimination or preferences";
- As part of the plan described immediately above, each agency is required to identify "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 1 billion dollars";
- "Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws";
- "Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest"; and
- "Potential regulatory action and sub-regulatory guidance."

Significantly for federal contractors, the January 21 DEI Order revokes Executive Order 11246, which required federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin," and also required federal contractors (via the Department of Labor's implementing regulations) to, among other things, develop formal written affirmative action plans and submit annual reports with data on their employee demographics to the Office of Federal Contract Compliance Programs ("OFCCP").[1] The January 21 DEI Order provides that, notwithstanding the revocation of Executive Order 11246, "[f]or 90 days from the date of this order, Federal contractors ***may*** continue to comply with the regulatory scheme in effect on January 20, 2025" (emphasis added).[2]

In connection with the revocation of Executive Order 11246, the OFCCP must "immediately cease":

- "Promoting 'diversity'";

- "Holding Federal contractors and subcontractors responsible for taking 'affirmative action'"; and
- "Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin."

Going forward, federal contracts and grants must include terms (i) "requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions"; and (ii) "requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

Additionally, the January 21 DEI Order instructs the Attorney General and the Secretary of Education to "jointly issue guidance to all State and local educational agencies that receive Federal funds, as well as all institutions of higher education that receive Federal grants or participate in the Federal student loan assistance program under Title IV of the Higher Education Act . . . regarding the measures and practices required to comply with *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U.S. 181 (2023)," the Supreme Court decision striking down race-based affirmative action programs in university admissions.

Note that the January 21 DEI Order "does not apply to lawful Federal or private-sector employment and contracting preferences for veterans of the U.S. armed forces or persons protected by the Randolph-Sheppard Act," which gives certain preferences to blind persons in the operation of vending facilities on federal property.[3] The January 20 and 21 DEI Orders do not expressly address the interaction of those Orders with other federal statutes requiring affirmative action, including the Vietnam Era Veterans' Readjustment Assistance Act (which requires certain federal contractors to take affirmative action with respect to veterans)[4] or Section 503 of the Rehabilitation Act of 1973 (which requires certain federal contractors to take affirmative action with respect to certain individuals with disabilities).[5]

B. The Gender Order

The Gender Order establishes "the policy of the United States to recognize two sexes, male and female" with respect to "all Executive interpretation of and application of Federal law and administration policy."

The Gender Order requires federal agencies to:

- "enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes";
- "remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology," which is defined as "an ever-shifting concept of self-assessed gender identity"; and
- "assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology."

The Gender Order asserts that the Supreme Court's decision in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020)—which held that an employer violates Title VII of the Civil Rights Act of 1964 if it discriminates against an employee because of their sexual orientation or gender identity—does not "require[] gender identity-based access to single-sex spaces." It also directs the Attorney General to "issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964," and directs federal agencies to rescind any "guidance documents" inconsistent with the Gender Order, which expressly includes the EEOC's April 2024 Enforcement Guidance on Harassment in the Workplace.

C. The January 20 DEI Order

The January 20 DEI Order requires the federal Office of Management and Budget ("OMB") to "coordinate the termination of all discriminatory programs, including illegal DEI and 'diversity, equity, inclusion, and accessibility' (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear," and requires that "[f]ederal employment practices . . . reward individual initiative, skills, performance, and hard work" and "not under any circumstances consider DEI or DEIA factors, goals, policies, mandates, or requirements." As part of that mandate, federal agencies will be required to "terminate . . . all DEI, DEIA, and 'environmental justice' offices and positions." The January 21 DEI Order includes a similar provision requiring "all executive departments and agencies . . . to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."

The January 20 DEI Order affects federal contractors, including by terminating of (i) "all 'equity action plans,' 'equity' actions, initiatives, or programs, 'equity-related' grants or contracts"; and (ii) "all DEI or DEIA performance requirements for employees, contractors, or grantees." The OMB also must generate lists of (i) "Federal contractors who have provided DEI training or DEI training materials to agency or department employees"; and (ii) "Federal grantees who received Federal funding to provide or advance DEI, DEIA, or 'environmental justice' programs, services, or activities since January 20, 2021." The January 20 DEI Order does not specify how these lists will be used.

In a memorandum issued shortly after the January 20 DEI Order, the Office of Personnel Management directed the heads of all federal agencies to, among other things, close any federal agency DEIA offices, place the employees of those agencies on paid leave, take down any outward facing media (such as websites and social media accounts) of any such DEIA offices, and "terminate any DEIA-related contractors" by January 22, 2025. Additionally, the federal agencies are directed to submit written plans "for executing a reduction-in-force action regarding the employees who work in a DEIA office" by January 31, 2025. The federal agencies also must "ask[] employees if they know of any efforts to disguise these programs by using coded or imprecise language" and submit a "a list of all contract descriptions or

personnel position descriptions that were changed since November 5, 2024 to obscure their connection to DEIA programs."

EEOC: APPOINTMENT OF ACTING CHAIR

On January 21, 2025, President Trump appointed EEOC Commissioner Andrea R. Lucas as the Acting Chair of the EEOC. The EEOC is composed of five presidentially appointed commissioners, with staggered terms that are expected to give the three current Democrat-appointed Commissioners control of the five-member panel until 2026, when Commissioner Jocelyn Samuel's term is scheduled to expire. As a result, Lucas likely will have limited ability to implement significant policy changes until 2026.

In a written statement accompanying the announcement of her appointment as Acting Chair, Lucas said, "Consistent with the President's Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

TAKEAWAYS

Although these Executive Orders are directed at federal agencies and federal contractors, the January 21 DEI Order specifically directs federal agencies to submit reports identifying, among other things, private sector companies with the most "egregious and discriminatory" DEI programs; potential civil compliance investigations of publicly traded corporations and large non-profits; litigation that "would be potentially appropriate for Federal lawsuits, interventions, or statements of interests"; and potential "regulatory action and sub-regulatory guidance." We strongly recommend that private sector employers carefully monitor the changing landscape as we expect further developments in this area.

* * *

ENDNOTES

1 *See* 41 C.F.R. §§ 60-1.1 to 60-2.36.

2 In addition to revoking Executive Order 11246, the January 21 DEI Order also revokes: (i) Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations); (ii) Executive Order 13583 of August 18, 2011 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce); (iii) Executive Order 13672 of July 21, 2014 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity); and (iv) the Presidential Memorandum of October 5, 2016 (Promoting Diversity and Inclusion in the National Security Workforce).

3 *See* 20 U.S.C. § 107.

4 *See* 38 U.S.C. § 4212.

5 *See* 29 U.S.C § 793.

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 900 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.