

BLOCKING OUT THE NOISE

Defending Diversity, Equity & Inclusion During the Second Trump Presidency

To assist with navigating this tumultuous moment, we created this FAQ to help you block out the noise and focus on the fight.

During his first week in office, **Donald Trump signed 60 Executive Orders** repealing numerous actions of the Biden administration, attacking diversity, equity and inclusion and terrorizing immigrant communities.

Despite the fervor with which Trump churned out these executive orders, the President has little ability to make actual policy change. **As the head of the executive branch, Trump does not have the authority to make laws, a function that exclusively belongs to the legislative branch of government.** Thus, the functional power of Trump's pen is limited to federal agencies, federal employees, and federal funds. While he is unable to require action of private citizens through executive order, Trump can still do harm through his executive actions. Many of the Trump Executive Orders push harmful narrative, divide society, create confusion and chaos, and sow seeds of distrust and dissent.

LET'S GET TO WORK

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Stand firm.
Stay in touch.**

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1 DID TRUMP END FEDERAL DEI PROGRAMS?

Not exactly. The Executive Orders purport to end “unlawful” discrimination in the federal government.

The Executive Order entitled “Ending Radical and Wasteful Government DEI Programs and Preferencing” directs the Office of Budget Management (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.” To this end, federal agencies have been directed to terminate all DEI offices, positions and programs. Federal Agencies must also provide OMB with (1) a list of federal contractors who have provided DEI training or DEI materials to federal employees and (2) federal grantees who have received federal funds to provide or advance DEI, DEIA, or environmental justice programs, services or activities since January 20, 2021. However, the legality of terminating several of these programs is under question, given that many were created by federal statute and cannot be rescinded by presidential order.

2 ARE DEI PROGRAMS NOW UNLAWFUL?

No. Trump does not have the power to unilaterally change the law.

To the extent that your DEI program was lawful prior to January 20, 2025, it is still lawful. Indeed, the Executive Order entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” which is intended to discourage DEI programming in the private sector references “illegal DEI and DEIA policies.” This language choice tacitly confirms that all DEI programs are not inherently unlawful; if they were then there would be no need to highlight the “illegal one.”

DEI and DEIA programs that are exclusionary, discriminate against one group in favor of another group, or make employment decisions based solely on protected categories are (and have been) unlawful under Title VII of the Civil Rights Act of 1964. It is not discriminatory or preferential to (1) assess your hiring and promotion practices to determine whether people of color and women are being hired or promoted at rates lower than what you would expect based on their portion of the population and (2) identify the source of this disparate outcome and (3) implement policy changes to remove the artificial barriers that are preventing or limiting the hiring and advancement of people of color and women.

It is, however, discriminatory and preferential to create a quota of women employees that you want to hire and ignore male candidates as result. However, it is not unlawful to create an environment where all employees may thrive. Thus, it is not discriminatory and preferential, to look at whether your policies are heteronormative and gender exclusive and rewrite them in a way that allows your employees from all backgrounds to know and understand that this workplace is theirs as well. It is not discriminatory or preferential, to recognize that having buildings named after enslavers may create an uncomfortable environment for employees who are descended from the enslaved. It is not discriminatory or preferential to be cognizant of employee childcare responsibilities when scheduling meetings or work activities. Instead, doing these things creates a work environment that enhances the productivity of all employees. On the contrary, having a “diversity” event and stating that white male employees are not welcome or allowed to attend is discriminatory and unlawful.

3 WHAT OPERATIONAL CHANGES DO I NEED TO MAKE IN LIGHT OF THE NEW EXECUTIVE ORDERS?

DEI PROFESSIONALS:

The Executive Order entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” directs all federal agencies to enforce existing civil rights laws and “combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.” Thus, you should closely review your DEI programs to ensure that they are lawful under Title VII of the Civil Rights Act of 1964 (“Title VII”) and 42 USC § 1981 (“Section 1981”). Title VII prohibits discrimination and harassment based on race, color, gender, religion, and national origin. And Section 1981 prohibits race discrimination in contracting, which includes employment. Programs, initiatives, or events that are only available to employees because of their race, color, gender, religion, and national origin will likely be found to violate Title VII and Section 1981, if the decision is race-based. Similarly, any terms, conditions, or benefits of employment which rely on race, color, gender, religion, and national origin to determine whether they are offered or not offered are likely not lawful. While DEI initiatives are not inherently unlawful, now more than ever, it is important to ensure that your programs operate within the bounds of the existing legal framework. Maintaining a lawful DEI program will not prevent you from being targeted, but it will mean that any attacks will ultimately fail.

NON-PROFITS:

The Executive Order entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” directs the more than 100 federal agencies to each identify at least nine corporations, large non-profits, large universities, large foundations, and bar and professional associations for potential civil compliance investigations into the lawfulness of their activities under the existing civil rights laws. It is likely that this witch hunt will attempt to target all entities that have social conscious missions or activities. Thus, it is important to make sure that your programs are legally compliant while staying true to your mission.

It is also important to be very familiar with your funding sources and how you are currently using federal funds. The Executive Order also directs that federal contracts and grants must now include (1) language requiring compliance with all federal civil rights laws and (2) a certification by the grantee that it “does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.” Further it is clear under the Executive Order entitled “Ending Radical and Wasteful Government DEI Programs and Preferencing” that the Trump Administration will not allow federal funds to be used on any DEI programs regardless of their lawfulness or aim. Thus, you should begin identifying alternative funding sources for any programs that advance or promote diversity, equity, and inclusion related ideals or aims.

PHILANTHROPISTS:

The Executive Order entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” directs the more than 100 federal agencies to each identify at least nine corporations, large non-profits, large universities, and “foundations with assets of 500 million dollars or more” for potential civil compliance investigations into the lawfulness of their activities under the existing civil rights laws. It is likely that this witch hunt will attempt to target all entities that have social conscious missions or activities. Thus, it is important to make sure that your programs are legally compliant while staying true to your mission.

Title VII of the Civil Rights Act of 1964 (“Title VII”), which prohibits discrimination based on race, color, gender, religion, and national origin, only applies to your actions as an employer and not to how you distribute your resources to grantees or organizations. Thus, you can continue to make funding decisions that are guided by your religious beliefs and gender and national origin preferences without concern about violating federal law. 42 USC § 1981 (“Section 1981”), on the other hand, prohibits race discrimination in contracting and applies to your business operations as well as your actions as an employer. Thus, you cannot refuse to contract with someone on the basis of race. However, race is a very narrow category. Thus, while it is risky to have a fund that is solely for Black children, it is less risk to offer a grant for the descendants of individuals enslaved in the state of South Carolina. With the latter fund, race is not the determination because many Black people will be excluded as well—those individuals who are not the descendants of the enslaved and those individuals who are descended from those enslaved outside of the state of South Carolina.

4 CAN I STILL MAINTAIN MY DEI PROGRAMS?

Yes. It is important that you continue to engage in your lawful diversity, equity, and inclusion work.

The societal conditions that made the work necessary in the first instance did not disappear simply because the Trump Administration have attempted to deny their existence. Indeed, the hatred of the current administration have made DEI efforts more important than ever. You should not be terrorized into silence or submission. Continue to fight for right, justice, equity (and where equity exists equality) and send the message that you will not allow for the erasure of history or the mischaracterization of your good work.

5 CAN I STILL SUPPORT MY LGBTQIA EMPLOYEES?

They need your support now more than ever.

The Executive Order entitled “Defendant Woman from Gender Ideology Extremism & Restoring Biological Truth” attempts to erase gender non-conforming and transgender citizens. In addition, to declaring the existence of only two genders (male and female) determined by genitalia at birth and immutable, the Executive Order directs that (1) all government forms be modified to only allow for male and female as gender options, (2) persons present in federal prisons be housed according to the gender identified on their birth certificate at birth, and (3) the Equal Employment Opportunity Commission prioritize investigations and litigation to “ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities.”

The Executive Order also demands that by February 19, 2025, the Assistant to the President for Legislative Affairs draft and present a bill codifying the narrow gender definitions included in the Executive Order so that the existence of two genders will be the law of the land. Unfortunately, there is no reason to doubt that the administration will find a congress person to support and introduce this bill by March 2025. However, this legislation will be required to follow the existing process to become federal law, which normally takes several months, and will likely face opposition.





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6 WHAT ELSE SHOULD I KNOW?

The most significant impact of the Trump Executive Orders is their ability to foster fear and create chaos – not to change the actual laws of our nation.

Stay focused on your work and your mission and remember that the President cannot create law. We have three branches of government, and both Congress and the judiciary have a role to play. As long as your programs comply with the legal framework that currently exists, they should withstand attack. **At APR, we are ready and willing to help you ensure that they do.**



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