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Employer Liability and Trump's DEIA Executive Orders: Discrimination Is Still Illegal

On January 20 and 21, the Trump administration issued a pair of executive orders that target diversity, equity, inclusion, and accessibility ("DEI" or "DEIA") programs. The orders threaten the government's ability to serve people from all backgrounds equally, and they are designed to intimidate and discourage employers and organizations from taking lawful steps to increase diversity, equity, inclusion, and accessibility. But every employer and organization should know that **federal civil rights laws have not changed**, and DEIA programs that complied with those laws before the executive order are still lawful now. In fact, a decision to end DEIA policies could violate those laws.

The orders are a shocking departure from decades of established anti-discrimination policy, but they cannot—and do not—overturn existing federal civil rights protections enshrined in statutes and the Constitution. Discrimination in the workplace is still against the law. In fact, the orders encourage the government and private employers to engage in potentially illegal activities, such as firing employees engaged in anti-discrimination work and rolling back initiatives to combat discrimination and ensure equal opportunity in the workplace.

In short, the orders—and the intimidating actions by the federal government surrounding them—are designed to scare those who are committed to ensuring equal opportunity for all workers. But, in reality, it is those who roll back DEIA initiatives who should be scared. They will not only lose the many benefits of a more diverse, equitable, and inclusive workforce, but they could also face liability.

I. What do the orders do?

The first order ("Ending Radical and Wasteful Government DEI Programs and Preferencing") targets a Biden-era effort to look for and fix inequities in who has access to government programs and contracting opportunities. It also terminates "to the maximum extent allowed by law" all DEI, DEIA, and environmental justice offices and positions within the federal government. Terminating these offices would be bad enough if it only undermined government efforts to create an equitable and inclusive federal workforce. But it goes much further by eliminating positions designed to fulfill the government's constitutional obligation to serve every community equally.

The second order ("Ending Illegal Discrimination and Restoring Merit-Based Opportunity") affects much more than the federal government's employees and DEI practices. It revokes a handful of executive orders—spanning *sixty years*—that put in place mechanisms for advancing equal opportunity. The revoked orders:

- Imposed heightened nondiscrimination requirements for government contractors, including affirmative steps to increase their hiring of people of underrepresented genders and races, required nondiscrimination audits of government contractors, and threatened federal contractors with losing contracts if they failed to comply with nondiscrimination requirements (EO 11246).
- Required governmental agencies to find and address disproportionately adverse human health or environmental effects of their programs and policies on minority and low-income populations (EO 12898).
- Established initiatives to promote diversity and inclusion in the federal workforce (EO 13583).
- Prohibited discrimination in the federal workforce on the basis of gender identity, and in hiring by federal contractors on the basis of both sexual orientation and gender identity (EO 13672 and 11246).

Revoking these orders changes decades of federal enforcement of anti-discrimination policies and does not offer alternatives. This will have disproportionate and negative consequences for marginalized groups seeking to benefit from governmental programs, contracts, and grants.

Besides reversing longstanding government policies, the second order also contains some affirmative mandates. Among other things, it prohibits federal contractors from considering protected traits in employment, procurement, and contracting practices—a significant departure from the government's practice of *increasing* equity by considering whether a contractor or applicant was part of a group that has been historically excluded from government programs. It also requires contractors to affirm that they do not operate DEI programs that violate anti-discrimination laws before receiving funds. While affirming compliance with anti-discrimination laws is commendable on its face, this provision seems intended to create fear of additional liability if a DEI program is found to violate the law.

Intimidation tactics are part and parcel of the enforcement mechanisms in the orders. Both orders, for example, incorrectly cast lawful efforts designed to improve equity as "forced illegal and immoral discrimination programs," "shameful discrimination," and "illegal discrimination and preferences." Although the EOs do not and cannot prescribe any direct mandate shaping DEI decisions in the private workforce, the second EO requires agency heads to encourage private companies to cut their own DEI programs and investigate up to nine non-governmental employers to determine whether they engage in "illegal discrimination or preferences" in hiring. These McCarthy-esque directives encouraging government employees to report each other and private employers are clearly designed to chill even lawful DEIA work.

II. The orders do not—and cannot—revoke decades of well-settled anti-discrimination law

Discrimination is still against the law. While these orders seek to upend longstanding federal anti-discrimination enforcement policies, **they cannot repeal laws passed by Congress or the Constitution**. So, as it was before the orders, it is today: **it is unlawful to discriminate against someone based on their membership in a protected class**. The federal government and federal contractors must still comply with civil rights laws. Federal workers and contractors still maintain the right to be free from discrimination.

Because civil rights law has not changed, the orders do not and cannot render a federal contractor or private employer's previously lawful DEIA program unlawful—even if they might subject that program to more scrutiny. While the orders use vague and threatening language to suggest that all DEIA efforts are automatically discriminatory and illegal, that's not the case. A well-designed DEIA practice or program advances equity and opportunity by eliminating barriers and widening talent pools, not by establishing quotas or racial preferences. Championing an equitable workplace is not discrimination. Although these orders seek to chill DEIA initiatives across all sectors, **federal contractors and private employers do not need to rush to change or stop their DEIA efforts**. Corporations like Costco and JPMorgan understand this, reaffirming their commitment to maintaining their lawful DEIA programs in the face of these orders.

III. Employers who eliminate DEIA initiatives could face liability

Because the executive orders do not eliminate employers' obligations under current anti-discrimination laws, employers who treat the orders as a license or mandate to drop initiatives designed to create an equal playing field for all workers will be potentially subjected to liability under employment discrimination laws or the U.S. Constitution. There are at least three ways that rolling back DEIA initiatives could create liability for employers:

First, employers—including the federal government—who fire workers responsible for ensuring compliance with anti-discrimination laws and promoting an equitable workforce may face discrimination or retaliation claims from those workers. Opposing discrimination in the workplace is a federally protected activity, and firing someone because they have done so would violate anti-retaliation laws. Firing someone because their work promotes the rights of a particular group could violate laws against intentional discrimination, and—*even if the worker is not a member of that group*—could violate laws that protect people from discrimination based on their association with a protected group. Government employers also face liability if they retaliate against employees for discussing racism or other DEIA topics, which could be a violation of those employees' First Amendment rights.

Second, a decision to end policies designed to ensure equal opportunity may leave an employer vulnerable to liability, either for disparate impact discrimination (when a neutral policy has a disproportionate impact on a protected group) or intentional discrimination. For example, imagine an employer who has taken steps to make their hiring practices more equitable after noticing they resulted in a disproportionate number of white hires compared to the pool of eligible workers. If the employer stopped taking those steps and once again had a hiring process that disproportionately excluded non-white applicants, the employer could be liable for disparate impact discrimination. If they stopped taking those steps *knowing* it would exclude more non-white applicants, they could be liable for intentional discrimination.

Finally, an employer's decision to eliminate programs designed to combat discrimination or promote equal opportunity may be used as evidence in an individual discrimination case against that employer. For example, employers have an obligation to prevent and correct harassment and discrimination by supervisors, including by providing training. If an employer stops providing information and training on combatting harassment or bias in the workplace, that fact could be used to establish employer liability in a harassment case. Employer statements suggesting that diversity, equity, inclusion, or accessibility in the workplace are unimportant or, worse, a bad thing, can also be used as evidence of bias or discriminatory animus.

The orders rescind decades of important, well-established anti-discrimination policy. In doing so, they threaten the well-being of groups that have historically faced discrimination, and they increase the likelihood of discriminatory decision-making by the government and its contractors. Given the potential for liability under longstanding discrimination statutes, however, neither government agencies nor private employers should take the orders as a license to discriminate. Indeed, the orders themselves are likely to make the federal government or private employers liable for constitutional and statutory violations.

Public Justice remains committed to its own internal DEIA policies and practices. It's still the right thing to do, and it's still the law. And as we've always done, we will act to hold employers accountable if they do not follow the law.