

The First 100 Days: A Whirlwind of Activity

A look at President Trump's first 100 days in office and the impact of a flurry of Executive Orders and litigation on employers.

Agenda

Executive Orders

Agency Memoranda & Announcements

Recent Litigation

What to do now? Tips for Responding to the Current Legal Landscape

Executive Orders



- What are they?
- What are they not?
- When do they take effect?

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What is an Executive Order?

What Executive Orders Are

- Const., Art. II vests the president with executive power to “take care that the laws be faithfully executed.”
- Executive Order = directive to the government to take specific actions to ensure “the laws be faithfully executed.”
- Examples:
 - Directing the EEOC or DOL to implement a certain rule
 - Declaring a new policy priority.

What Executive Orders Are Not

- Executive orders cannot override federal laws and statutes.
- The president can’t write a new statute, but an order can tell federal agencies how to implement a statute.
- Example: Congress can declare a certain drug illegal. An E.O. can direct the DOJ to make prosecuting certain drug cases a priority.

When Do Executive Orders Take Effect?



Some executive orders take effect as soon as the president signs the order.



Many orders, however, do not have any impact until a government agency takes some additional steps. Very often, an executive order requires a federal agency to write a report, undertake an investigation, or promulgate a new regulation. Those steps can often take months, and sometimes years.



The order may provide a deadline (like telling an agency it has 60 days to make a certain recommendation for action).

Executive Orders and Other Government Activity Related to DEI

The First 100 Days

Executive Order 14173

“Ending Illegal Discrimination and Restoring Merit-Based Opportunity”

Executive Order 14173 – January 21, 2025

Summary

Section 3(b)(i): Revoked Executive Order 11246 which required government contractors to have in place affirmative action plans for minorities and women.

Targets

- Affirmative action plans that relate to women and minorities.

Action Item

- Federal Contractors should document that affirmative action plans related to women and minorities were discontinued as of April 20, 2025.

Unaffected Plans, Programs, or Policies

- Affirmative action plans to the extent they relate to veterans and disabled individuals.

Executive Order 14173

Federal Contractor Sector Requirements

- Companies will be required to agree that (1) its compliance with applicable Federal anti-discrimination laws is material to the government's payment decisions; and (2) that it does not operate any programs promoting DEI that violate any applicable Federal discrimination laws.

False Claims Act Implications

The FCA is a federal statute that allows individuals (**qui tam relators**) to bring lawsuits for misrepresentation about a contractor's compliance with statutory, regulatory or contractual requirement material to the government's decision.

Those who knowingly submit false claims to the government may be liable for three times the government's damages plus a penalty under the Act.

Relators are entitled to 15-30% of any recovery by the DOJ in an FCA action.



Executive Order 14173- Private Sector

- Section 4: Directed the Attorney General, by May 21, 2025, to submit a report containing 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.”

Executive Order 14173- A.G. Report



Executive Order 14173-A.G. Report

Litigation “that would be potentially appropriate for Federal lawsuits, intervention or statements of interest

Potential regulatory action and sub-regulatory guidance

The Report should identify:

Each federal agency is to identify up to nine potential civil compliance investigations.

Executive Order 14173 – Potential Targets

Potential Targets

- **DEI policies and programs** that engage in workforce balancing based on race, color, sex, sexual preference, religion or national origin and policies/programs that have quotas, preferences or express aspirational goals for the hiring/retention of a certain number of individuals in a particular protected category.
- **Job postings** that state that individuals of a protected category are favored or encouraged to apply.
- **Recruiting policies** that focus on increasing the diversity of candidate pools and/or employees.
- **Training** of hiring personnel that focuses on increasing diversity among candidates and hires.

Executive Order 14173 – Potential Targets

Potential Targets

- **Employee Resource Groups** that are open only to employees of a particular protected category.
- **Website pages** that promote demographics of employees and express aspirations to increase the diversity of candidate pools and employees.
- **ESG reports** that provide employee demographics and express a goal of increasing the number of diverse candidates and employees.
- **Unconscious or implicit bias training programs** that teach or imply that certain categories of employees are more likely to be biased against particular minority groups or other protected categories.

Executive Order 14173

Employer Considerations

- **Audit all DEI policies and programs** that are potential targets for federal agency investigation and modify accordingly.
- **Consider nomenclature change** to emphasize inclusion and belonging as opposed to diversity and equity.

Executive Order 14151

“Ending Radical and Wasteful Government DEI Programs”

Executive Order 14151

Summary

- Terminated all “discriminatory programs, including illegal DEI and ‘diversity, equity, inclusion and accessibility’ (DEIA) mandates, policies, programs, preferences and activities of the Federal Government, **under whatever name they appear.**”

Summary

- Requires the Director of OMB to provide a list of (i) every federal contractor who has provided DEI training or materials to an agency or department employee and (ii) every federal grantee who receives federal funding to provide or advance DEIA.

Executive Order 14151

Summary

- Directed each agency, by March 20, 2025, to terminate all DEIA offices and positions, equity action plans, equity-related grants or contracts, and all DEIA performance requirements for employees, contractors and grantees.

Summary

- Directed the Director of OPM to revise “all existing Federal employment practices, union contracts, and training policies or programs to comply with this order.”
- Indicated that all federal employment practices, including federal employee performance reviews, “shall reward individual initiative, skills, performance, and hard work and shall not under any circumstances, consider DEI or DEIA factors, goals, policies, mandates or requirements.”

Executive Order 14151



Potential Targets

- Federal contractors and grantees that provide DEIA programs to federal government employees.

Other Considerations

- The government will be terminating all DEIA performance requirements for contractors and grantees.

Executive Order – 4.23.25

“Restoring Equality of Opportunity and Meritocracy”

Executive Order 4.23.25

- Eliminates the use of disparate-impact liability across all federal agencies
- Directs the AG to initiate appropriate action to repeal or amend the implementing regulations of Title VI of the Civil Rights Act for all federal agencies to remove disparate impact liability
- Orders the EEOC (and other agencies) to “deprioritize enforcement of all statute and regulations to the extent they include disparate-impact liability”
- Directs the AG to determine whether state laws that impose disparate-impact liability based on federally-protected characteristics, such as race, sex or age, are pre-empted

What is Disparate Impact?

- Policies that are neutral on their face but result in disproportionately adverse outcomes for protected group.
- Supreme Court recognized disparate impact liability under Title VII in *Griggs v. Duke Power Co.* (1971). Court held that requiring a high school diploma or a passing score on an intelligence test was unlawful because these practices had a disproportionate impact on black employees and were not proved to be job-related.
- Codified in the Civil Rights Act of 1991, ADEA and the ADA.

Attorney General Memorandum (February 5, 2025)

“Ending Illegal DEI and DEIA Discrimination and Preferences”

Attorney General Memorandum

Summary



Directed the Civil Rights Division and Office of Legal Policy to submit a report with recommendations for enforcement actions and other measures to “encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA” by March 1, 2025.

The report should also identify the “most egregious and discriminatory DEI and DEIA practitioners in each sector of concern” and include a plan with “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 up to 9 potential civil compliance investigations.

Attorney General Memorandum

Potential Targets

- Programs, initiatives, or policies that “discriminate, exclude or divide individuals based on race or sex”

Not Targets

- 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” NOT prohibited

OPM Acting Director Memorandum (Feb. 5, 2025)

**“Further Guidance Regarding Ending DEIA Offices, Programs
and Initiatives”**

OPM Acting Director Memorandum

Summary



Directed federal departments and agencies to “eliminate DEIA offices, policies, programs, and practices” that “unlawfully discriminate in any employment action,” based on protected characteristics

Defines “unlawful discrimination” to include taking action “motivated, in whole or in part, by protected characteristics” and that a “protected characteristic does not need to be the sole or exclusive reason for an agency’s action.”

OPM Acting Director Memorandum-Potential Targets

“Diverse slate” policies= “unlawful diversity requirements for the composition of hiring panels, as well as for the composition of candidate pools”

ERGs that “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”

Programs that promote DEIA based on protected characteristics in any employment action or other term, condition or privilege of employment, including recruiting, interviewing, hiring, training, professional development, internships, promotion, retention, discipline and separation

EEOC Activity

EEOC Acting Chair Announcement

**“Vows to Protect American Workers from Anti-American
Bias”**

EEOC Acting Chair Announcement – February 19, 2025

Summary

- Announced that the EEOC would be increasing enforcement of Title VII “against employers that illegally prefer non-American workers, as well as against staffing agencies and other agents that unlawfully comply with client companies’ illegal preferences against American workers.”

Potential Targets

- Employment of legal and illegal aliens (including visa holders) where the EEOC believes the company is expressing a preference for foreign workers over American workers.

Other Considerations

- Increasing number of national origin discrimination suits brought by the EEOC and American workers.

EEOC Joint Technical Assistance Document with DOJ and EEOC FAQs

“What To Do If You Experience Discrimination Related to DEI at Work”

“What You Should Know About DEI-Related Discrimination at Work”

EEOC Technical Assistance Document FAQs

Summary

- Lists what it considers unlawful disparate treatment
- Claims EEOC does not require a higher showing of proof for “reverse” discrimination claims.
- No “business necessity” exception for DEI programs excusing hiring/classifying an employee based on a protected trait



EEOC Technical Assistance Document FAQs

Unlawful Disparate Treatment

- Separating workers into groups based on protected categories when administering DEI or any trainings, workplace programming, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources



Other Considerations

- Employee may be able to “plausibly allege or prove” that a training created a hostile work environment by pleading or showing that training was “discriminatory” in content, application, or context (i.e., in training’s design, content, or execution).

EEOC Technical Assistance Document FAQs

Limiting access to training (leadership development programs, mentoring, sponsorship and workplace networking programs) to certain groups


Limiting access to internships, fellowships, or summer associate programs to certain groups;

Unlawful Disparate Treatment

Basing selection for interviews, (including placement or exclusion from a candidate “slate” or pool) to certain groups

Limiting access to employer-sponsored activities (including ERGs) to certain groups

Potential Targets



ERGs, training, leadership, mentorship, and sponsorship programs, internships, fellowships and summer programs that exclude individuals outside a protected category

Training programs that separate individuals by protected category, even if the program content and resources are the same

Limiting access to candidate pools outside of a protected category

EEOC AI Guidance Dropped

- 2023 EEOC technical assistance document stated that improper application of AI could violate Title VII when used for recruitment, hiring, and employment decisions.
- As of April 24, 2025, this guidance has been removed from the EEOC's website.

Executive Orders & More on LGBTQ+ Rights

Bostock v. Clayton County

Executive Order 14168

**EEOC Acting Chair
Announcement**

Executive Order 14168 – January 20, 2025

Summary

- Recognized only two biological sexes (male & female) as determined at conception.
- Removed “gender identity” from definition of “sex” protected by Title VII and stated that *Bostock* decision does not require gender identity-based access to single-sex spaces.
- Directed AG to issue guidance to ensure the “freedom to express the binary nature of sex and the right to single-sex spaces in workplaces”
- Directed the EEOC to “prioritize investigations and litigation to enforce the rights and freedoms” of the “binary nature of sex”
- Agency heads to report by May 20, 2025 on “agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order.”

Executive Order 14168 – January 20, 2025

Potential Targets

- Federal contractors who allow bathrooms, locker rooms and other private places to be used by individuals of the opposite biological sex.



EEOC Acting Chair Announcement

**“Removing Gender Ideology and Restoring the EEOC’s Role
of Protecting Women in the Workplace”**

EEOC Acting Chair Memorandum – January 28, 2025

Summary



Announced the priority for compliance, investigations and litigation is to “defend the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces at work.”

Acknowledged cannot unilaterally remove or modify the EEOC Enforcement Guidance on Harassment in the Workplace

But expressed opposition to the Guidance’s position that it is harassment to deny access to bathroom or sex-segregated facility consistent with individual’s gender identity or use name/pronoun inconsistent with an individual’s known gender identity

EEOC Acting Chair Announcement – January 28, 2025

Likely Impact

- Expect increase in claims brought by EEOC and individual employees that allowing an employee to use the bathroom or locker room of the opposite biological sex is harassment under Title VII.

Changes to EEO-1 Reporting



- **EEO-1 reports will no longer permit employers to categorize workers as non-binary.**

Executive Orders & More on Religion

Groff v. DeJoy

• EEOC Acting
Chair
Announcement

• Executive Order
14202

• Executive Order
14188

Groff v. DeJoy (2023)

Title VII's prohibition against discrimination on the basis of religion requires employers to reasonably accommodate an employee's religious observance or practice unless it would create an undue hardship on the employer's business.


Prior to decision, the standard for undue hardship = “more than a *de minimis* cost”

****Supreme Court held that Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in “substantial increased costs in relation to the conduct of its particular business”****

EEOC Acting Chair Announcements

- **Made clear that she intends to focus on “protecting workers from religious bias and harassment”**

Potential Targets



Employers who do not have a religious accommodation policy

Employers who deny a religious accommodation request

Employers who fail to document reason for denial and are unable to show request would cause substantial increased cost to business

Executive Order 14202

“Eradicating Anti-Christian Bias”

Executive Order 14202 – February 6, 2025

- Established DOJ task force to “eradicate anti-Christian bias.”
 - Task Force to review activities of all departments/agencies and identify/terminate any “anti-Christian policies, practices, or conduct of an agency contrary to the purpose or policy of this order”
- Task Force is directed to identify deficiencies in existing laws, enforcement and regulatory practices that have contributed to unlawful anti-Christian governmental or private conduct and make recommendations for actions that agencies may take to remedy failures to fully enforce the law against acts of anti-Christian hostility, vandalism and violence.

Executive Order 14188

“Additional Measures to Combat Anti-Semitism”

Executive Order 14188 – January 29, 2025

Summary

- Policy to combat anti-Semitism “using all available and appropriate legal tools, to prosecute, remove or otherwise hold to account the perpetrators of unlawful anti-Semitic harassment and violence.”
- Directed department/agency heads to submit a report identifying civil/criminal actions that might be used to curb/combat anti-Semitism.

Other Considerations

- Employers should ensure that their equal employment and anti-harassment policies apply to Jewish workers and protect against anti-Semitism in the workplace.

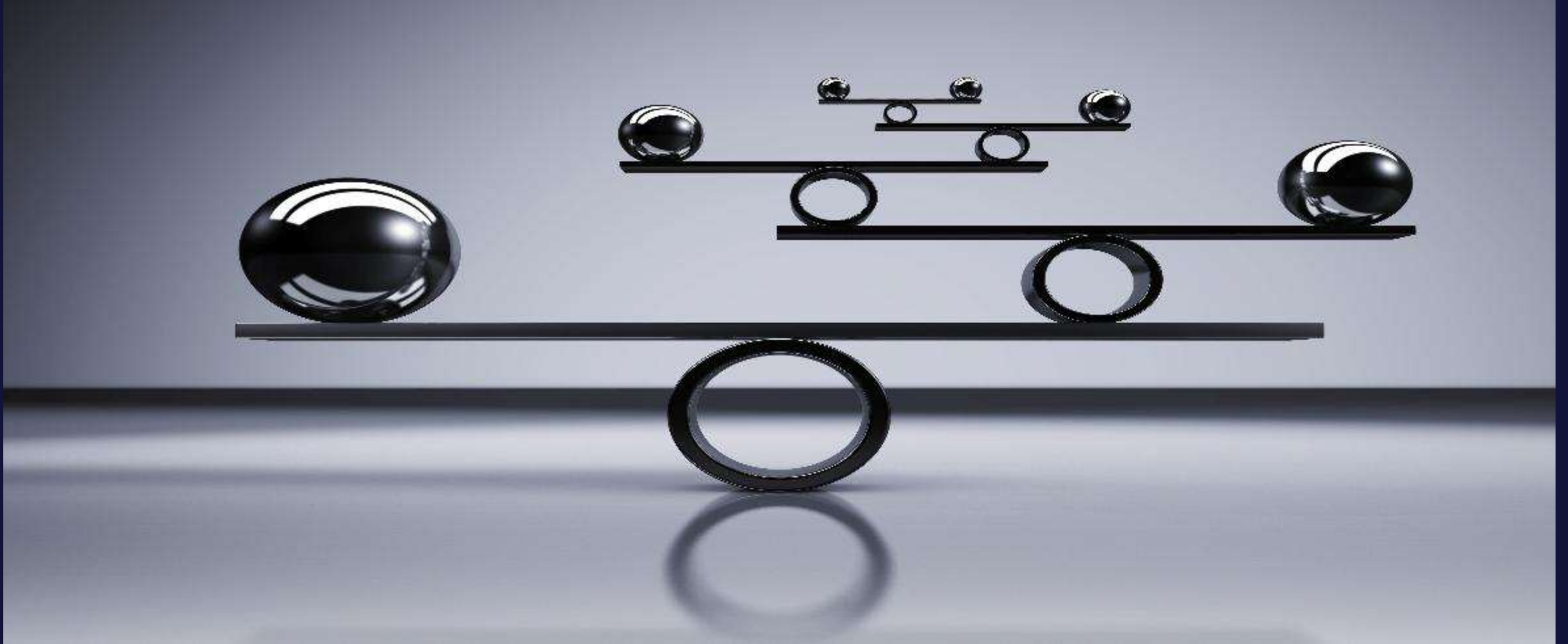
Reverse Discrimination- *Ames v. Ohio Department of Youth Services*

Facts

- Plaintiff claims she was not promoted, and was demoted because she was heterosexual.
- Supreme Court to determine whether a majority-group plaintiff must show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”

- **Currently, five circuit courts use the “background circumstances” test (7 do not)**
- **If Court rules in favor of employee, the number of reverse discrimination cases will increase**

What to do now?



Federal Contractors

- **Discontinue affirmative action programs for women and minorities**
- **Document that these programs have been terminated**

All Employers

- Audit existing DEI programs
- Assess potential legal risks of existing programs
- At a minimum, eliminate quotas, preferences, exclusionary practices, and aspirational goals
- Focus on inclusion and belonging and ensuring that all employees have equal employment opportunities.
- Ensure there are religious accommodation policies in place





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