

New Executive Order Targets DEI in the Private Sector

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Key Takeaways

- President Trump has issued an executive order (EO) titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”, which aims to constrain “illegal” private sector engagement on diversity, equity, and inclusion (DEI).
- Notably, the EO does not prohibit all DEI programs, only those that are unlawful – most existing DEI activities are likely to remain allowable under the EO. Higher risk practices under the EO include setting quantitative diversity targets or quotas and limiting participation of any program to a specific demographic group.
- Federal contractors face heightened liability risk for any “illegal” DEI practices, as such practices could now result in False Claims Act (FCA) penalties. The EO also revokes the Equal Employment Opportunity rule and thereby requires federal contractors to wind down their Affirmative Action Plans (AAPs).
- Notwithstanding the EO, DEI integration remains an important business imperative, protecting against risk of “traditional” discrimination litigation, while also driving value creation outcomes. GPs specifically must also consider ongoing LP DEI priorities. Furthermore, there remains ongoing uncertainty around the legality of the EO, which could ultimately limit its reach.
- While private companies should review existing DEI programs and amend any found to be at risk for “illegality,” Malk advises private companies – and private market investors considering portfolio-wide initiatives – to avoid a reactive rollback of their DEI programs.

“Illegal” DEI Practices Under Scrutiny

President Trump has issued several executive orders (EOs) during his first week in office focused on diversity, equity, and inclusion (DEI), including one titled [“Ending Illegal Discrimination and Restoring Merit-Based Opportunity”](#), which targets the private sector. This EO empowers agency heads and the attorney general to take “all appropriate action” to eliminate DEI initiatives in the private sector deemed “illegal” under federal civil rights laws. **Notably, the EO does not prohibit all private employer DEI programs**, just those violating federal civil rights laws – most private employer DEI programs are likely to fall outside the definition of “illegal” practices under existing law.

The attorney general and relevant federal agencies must also produce a report by May 21st, 2025, that outlines measures to deter illegal DEI programs and strategies to encourage the private sector to end illegal DEI discrimination, which may clarify interpretation of the EO. This report must further identify up to nine potential civil compliance investigations of public companies and large non-profit organizations ostensibly engaged in “illegal” DEI activities. Agencies will then recommend “litigation potentially appropriate for federal lawsuits,

intervention, or statements of interest.” It is worth noting that private companies are not in scope of these civil compliance investigations.

Special Impacts on Federal Contractors

President Trump’s EO also [revokes the “Equal Employment Opportunity” rule](#), which had contractually obligated federal contractors to develop Affirmative Action Programs (AAPs) outlining diversity performance and programming. As a result of this rule being revoked, **federal contractors are obligated to wind down their AAPs by April 21st, 2025.**

To further complicate implementation, this EO does not change existing requirements for federal contractors related to [veterans and persons with disabilities](#). It is also worth noting that over 20 U.S. states maintain affirmative action requirements for state contractors, adding complexity for companies operating as both a state and federal contractor.

Federal contractors are contractually obligated to certify compliance with anti-discrimination laws. Any false certification, either express or implied, could result in False Claims Act (FCA) penalties for the contractor. Therefore, the FCA-related certification places **greater liability on federal contractors to ensure "legal" DEI practices** or face penalties. Going forward, employees responsible for federal contractor DEI programming may need to work more closely with contracting employees to ensure compliance.

Avoiding Reactive DEI Rollbacks

President Trump's recent EOs have had a "chilling effect" on private markets, whereby some private companies have preemptively rolled back DEI programs to avoid scrutiny. The approach to this rollback has varied – some companies and investors have simply removed DEI language from policies, while others have eliminated their DEI programs.

While it will be important for private companies and investors to review existing DEI practices to ensure legality under the EO, **Malk advises against a purely reactive DEI rollback** for the following reasons.

- *There remains ongoing uncertainty about the EO’s enforcement.* For example, the attorney general report will likely further define what constitutes an “illegal” DEI practice. It also remains to be seen how conflict between federal and state DEI requirements will be managed. Furthermore, the EO faces litigation questioning its own legality and could be overturned.
- *Companies that reactively roll back DEI programs may face relatively more significant negative consequences.* While private companies are unlikely to face DEI-related scrutiny in the short term as compared to large, public companies, there continues to be risk of [“traditional” discrimination litigation](#) if private company DEI programs are discontinued.
- *Companies that reactively roll back DEI programs may lose out on value accretive outcomes associated with DEI programs.* A [2023 Harvard Business Review study](#) found that every 0.1-point improvement in DEI ratings for a company (on a 5-point scale) was linked to a corresponding 13% increase in a company’s resilience to manage organizational change which leads to better financial performance and more engaged employees.
- *The political landscape will continue to shift, with each administration potentially taking a different stance on DEI.* Rather than reacting to political changes every 4-8 years, GPs and portfolio companies are better served by defining a DEI strategy that aligns with their long-term business objectives and adhering to it within legal boundaries. This consistency enhances authenticity with stakeholders and simplifies long-term management.

- *Many key stakeholders – including LPs, employees, and customers – still expect companies to prioritize DEI.* Companies that maintain thoughtful, legally compliant DEI programs can better meet these expectations, strengthen stakeholder trust, and preserve long-term value.

Private Sector Employer Best Practices

To mitigate risk of noncompliance with the EO, while retaining beneficial, “legal” DEI programs, private sector employers may consider the following best practices.

- *Review DEI programs for activities at higher risk for scrutiny.* “Higher risk” activities include diversity-related quantitative quotas and targets (e.g., percent of women in leadership roles, executive compensation tied to DEI targets) and limiting participation of any retention or recruitment program for a specific demographic group (e.g., employee resource groups, mentorship, or internship programs open exclusively to specific demographic groups).
- *Use inclusive hiring practices.* Ensure equal treatment across job candidates – do not make employment decisions based on an employee’s race or gender, or articulate a hiring preference for any specific demographic. Notably, as such practices were historically prohibited by law, it is unlikely that most companies are doing this now. Going forward, private companies should avoid mandatory diverse slate hiring practices and instead focus on hiring practices that promote culture and inclusion generally. Inclusive hiring practices can still include ensuring diverse interview panels, conducting “blind” resume reviews, and providing recruiters with related anti-bias training. Companies can also still partner with diversity-focused networking organizations to identify top talent.
- *Conduct inclusive anti-discrimination training.* Workforce training on anti-discrimination, unconscious bias, and intersectionality topics remains allowable under law, though it is worth noting that mandatory trainings should avoid assigning blame to any demographic group for historical inequities.
- *Address all discrimination complaints in good faith.* Continue to investigate all discrimination complaints diligently, including those involving complainants who do not belong to a historically marginalized group.
- *Focus on “protecting” DEI programming.* Instead of focusing on what needs to be removed from a DEI program under the EO, shift the company’s focus to identifying what elements can be preserved when reviewing internally and with outside counsel. This approach helps ensure the integrity and value of a DEI program moving forward.
- *Ensure messaging on DEI programming highlights the DEI business imperative.* Review messaging on DEI programming to ensure it is aligned with accurate and “legal” strategy and practices. Highlight how DEI improves business or financial outcomes.
- *Monitor the DEI legal landscape.* The DEI landscape may continue to shift and evolve going forward with implications for private market companies. Private companies and private market investors should monitor any developments and consult counsel or a trusted ESG partner, as needed, to ensure continued compliance.

Go-Forward Implications for GPs

As GPs and sponsor-backed companies navigate the evolving regulatory landscape surrounding DEI, it is critical to remain informed and respond appropriately to any new legal developments. Most recently on February 3rd, a group of organizations [filed litigation](#) seeking to halt and declare unconstitutional the Trump administration’s DEI-related EOs. While it is still too soon to predict the outcome of the suit, this emphasizes the uncertainty of the DEI landscape and the drawback of making premature changes to DEI programming at the portfolio- or firm-level.

Malk recommends that GPs take proactive steps in response to the EO to ensure firm-level alignment with DEI objectives.

- *Engage in internal consensus-building.* GPs should reach a firm-level consensus on go-forward strategy and approach to DEI considering current events. GPs should consider competing LP requirements and expectations that continue to prioritize DEI in developing this strategy.
- *Communicate expectations to portfolio companies.* GPs should engage in proactive conversations with portfolio companies, but only after reaching internal consensus on a firm-level approach. As portfolio companies will likely seek clarity from GPs on both general best practices and the GP's specific stance, engaging with portfolio companies prior to finalizing a strategy may lead to misalignment at the portfolio level.

GPs should also “stay the course” in certain regards, despite the new complexity presented by the EO.

- *Maintain focus on DEI as a business imperative.* While the EO introduces new compliance and liability risks, it does not eliminate the business case for DEI, which remains a crucial driver of risk mitigation and value creation across a GP’s portfolio. It is important to note that because GPs can influence a wide range of portfolio companies, the negative consequences from a reactive DEI rollback by a GP may be magnified across the GP’s portfolio.
- *Continue firm-level DEI programming within the bounds of the EO.* Per the private sector employer best practices above, GPs should similarly assess programming for legality under the EO. Many aspects of firm-level DEI programming are likely to remain acceptable, including firm-level diversity tracking, involvement in DEI industry groups, and retention and engagement programs that do not target a specific demographic group.

Malk will continue to monitor the legal, regulatory, and market implications of this EO, including forthcoming agency guidance, litigation outcomes, and any further legislative actions that could impact private investors and their portfolio companies.

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