



# DEI Under Fire

## Exploring the potential impact of new executive orders

by: Greg Goldberg, BTA General Counsel

The flurry of executive orders (EOs) spilling out of the Oval Office in the opening days of the second Trump administration has been nothing short of overwhelming. Less than one full month into his second term, the president had signed more than 60 EOs, which represents the highest number of EOs signed in the first 100 days of a presidential administration in the last four decades. The pace, scope and quantity of new presidential directives has

ignited a broad range of reactions, including some celebrations, legal challenges, outright confusion and even blanket retractions. Even though EOs do not operate with the same force and effect as bills passed by congress and signed into law by the president, the impact of EOs remains far-reaching.

This month, Legal Perspective tackles a controversial subject, exploring the president's use of EOs to curtail diversity, equity and inclusion (DEI) initiatives and the impact on U.S. employers. The principle behind DEI programs in the workplace is to promote equal treatment and full participation of all people, particularly among demographic groups that are historically marginalized or underrepresented. The genesis of DEI dates back to the Civil Rights Act of 1964, which made it illegal for U.S. employers to discriminate based on race, ethnicity, religious preference or gender. Modern-day DEI programs take on many forms, including eliminating gender pay inequity, providing accessibility for people with disabilities and widening recruitment to broader communities. Many opposed to DEI claim the programs are unfair and undermine merit-based advancement.

Count the president among those individuals who are hostile to DEI programs. One presidential EO seeks to eliminate DEI across the federal government, canceling DEI programs at both government agencies and government contractors. Another EO aspires to expand anti-DEI policy beyond the public sector by instructing the Department of Justice (DOJ) to provide the administration with recommendations for using federal civil rights laws to encourage private-sector employers to eliminate "illegal" DEI initiatives. In response, several prominent U.S. companies, including Amazon, Ford, Target and Goldman Sachs, among others, have already relaxed DEI requirements or suspended DEI programs altogether. In turn, some of those companies now face boycotts.



It is difficult to say whether the president's DEI EOs reflect a bona fide law enforcement priority at the DOJ or whether the mere threat of litigation is meant to pressure U.S. employers to discontinue DEI programs. While the idea that the U.S. government utilizing its limited prosecutorial resources to target domestic private-sector companies with lawsuits attacking DEI practices may seem farfetched, business leaders evidently take the threat seriously

enough to align with the president's policy agenda rather than champion DEI priorities. Perhaps they are also accounting for the parallel threat posed by state attorneys general. Just last month, the Missouri attorney general sued Starbucks, alleging its DEI program — intended to hire and promote more women and people of color — violates antidiscrimination laws.

The decision to cancel DEI initiatives may reflect sound business judgment if doing so eliminates the risk of protracted litigation or negative publicity. Nevertheless, employers considering the fates of their DEI programs should remember that DEI is not illegal. What runs afoul of the law is discrimination. Therefore, the safest course for U.S. employers and the best defense against legal action is to implement policies that prevent workplace discrimination based on modern protected class status, such as race, gender, ethnicity, sexual orientation, age, national origin or religious preference. This is particularly important for employers using artificial intelligence (AI) technology in the hiring or promotion process.

Looking ahead, it is safe to bet there will be more EOs emerging from the Trump White House intended to provoke strong reactions across the political spectrum and prolong the culture wars that swept the president back into office after four years away. It is important to remember that EOs are only as strong as the president who signs them and, unlike federal laws, may be retracted by future presidents with the stroke of a pen. Watch this space for more information about EOs and how they may affect your business over the next four years. ■

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