Employment Alert

Guidance for Massachusetts Employers Regarding Diversity, Equity, Inclusion, and Accessibility Policies and Procedures

February 2025

The President's recent Executive Orders addressing Diversity, Equity, and Inclusion (DEI) and Diversity, Equity, Inclusion, and Accessibility (DEIA) have resulted in a great deal of confusion and panic among employers. On February 21, 2025, a federal district court in Maryland issued a preliminary injunction, preventing the federal government from enforcing many key provisions of the orders. In light of this evolving situation, Massachusetts employers should note that while all existing state and federal anti-discrimination laws remain in place, it is important to evaluate with legal counsel all employment policies and practices to ensure compliance with civil rights laws and protections.

THE EXECUTIVE ORDERS AND THE COURT'S PRELIMINARY INJUNCTION

On January 20 and 21, 2025, President Trump signed two Executive Orders related to DEI and DEIA policies and programs. The Orders, respectively entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," asserted that DEI and DEIA programs are illegal under federal law and sought to impact the private sector, federal contractors and federal executive agencies as follows:

- Private Sector: The heads of all government agencies, with the assistance of the Attorney General, were directed to prepare reports with recommendations for "encouraging the private sector to end illegal DEI discrimination and preferences", including a requirement that each agency prepare enforcement plans against up to nine large private employers.
- Federal Contractors: Federal contractors were required to certify compliance with federal anti-discrimination laws and that the contractor does not operate any DEI/DEIA programs that violate federal anti-discrimination laws.
- Federal Executive Agencies: Executive departments and agencies were

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directed to terminate all DEI and DEIA programs and mandates and to terminate all "equity-related" grants or contracts within 60 days.

On February 21, 2025, a federal district court in Maryland issued a preliminary injunction largely preventing the enforcement of these Executive Orders. The Court determined that the Orders lack clear definitions of relevant terms, violate separation of powers principles, and unconstitutionally restrict free speech. Specifically, the Court enjoined the requirements related to federal contractors and equity-related grants and contracts. The Court also barred the Trump Administration from taking enforcement action against employers in the private sector, though it permitted the Attorney General to continue preparing enforcement reports and conducting investigations into private employers' DEI/DEIA practices. The Court's injunction is temporary, pending further litigation.

GUIDANCE FOR PRIVATE SECTOR EMPLOYERS (EXCLUDING FEDERAL CONTRACTORS)

Prior to the decision of the Maryland court, in response to the Executive Orders, on February 13, 2025, Massachusetts Attorney General Andrea Campbell issued Guidance for private sector businesses in the Commonwealth which are not federal contractors, as part of an effort by 16 attorneys general to "Emphasize the Legality and Importance of Diversity, Equity, Inclusion and Accessibility Initiatives in Hiring, Retention, and Employee Engagement."

The Attorney General's Guidance emphasizes that existing federal and state anti-discrimination laws continue in full force. Under these laws, appropriate DEI/DEIA policies have been recognized for decades by both federal and state courts to be legal for the purpose of ensuring lawful treatment of employees and avoiding and/or limiting liability for unlawful discrimination.

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Employers who choose to eliminate or materially roll back their DEI/DEIA policies and programs risk legal claims and potential liability for any resulting violation of anti-discrimination laws. At the same time, it is critical that all employers promptly take action to ensure that all of their policies and programs are compliant with current law and do not involve any intended or unintended disparate treatment of or disparate impact on any employees because of their race, color, religious creed, national origin, sex, pregnancy, sexual orientation, gender identity or expression, military service, veteran status, age, ancestry, genetic information or disability race, sex, national origin, etc., regardless of whether employees are members of any of these or any other traditionally recognized protected class.

ACTION ITEMS

All employers are urged to promptly review with employment counsel all employment programs, policies, practices, procedures and initiatives, regardless of whether they are formally entitled DEI or DEIA. For the purpose of identifying any aspect that might be unlawful or inadvisable, such review should include, but not be limited to, employee handbooks and related policies and practices, recruitment and hiring policies and practices, workplace training, disciplinary policies and practices, benefits, workplace affinity groups, and advancement and promotion policies and practices.

CONTACT

To discuss your company's policies and procedures, or anything related to Massachusetts employment laws, please contact a member of our Employment Law Practice.

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Davis Malm. You should seek professional counsel before taking any action on this information.

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