

# ACC NCR Nonprofit Year in Review

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# Today's Agenda

## Federal Funding Developments

### DEI Developments:

- Appellate Litigation
- Employment Law
- Developments Affecting Nonprofit Purposes and Activities

## Federal Law Enforcement Directives Affecting Civil Society

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# Federal Funding Developments

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# DEI Executive Orders

- **January 20, 2025**
  - E.O. 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing
  - E.O. 14168: Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
- **January 21, 2025**
  - E.O. 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

# E.O. 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing

- Sec. 2(b):

(b) Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM, as appropriate, shall take the following actions within sixty days of this order:

(i) terminate, to the maximum extent allowed by law, all DEI, DEIA, and “environmental justice” offices and positions (including but not limited to “Chief Diversity Officer” positions); all “equity action plans,” “equity” actions, initiatives, or programs, “equity-related” grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees.

- Primary takeaway: Forced agencies to stop and eliminate all internal government DEI or DEIA programs.

# E.O. 14168: Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

- Mandated that the federal government recognize only two sexes and directed agencies to:
  - Eliminate gender ideology from forms, communications, and messages.
  - End federal funding of gender ideology.
  - Review grant conditions and preferences to ensure funds do not promote gender ideology.

- Sec. 2(f):

(f) "Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true.

(□ printed page 8616) Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.

- Sec. 3(g):

(g) Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.



## E.O. 14168: Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government *cont'd*

- Revoked EOs aimed at advancing gender equity:
  - [EO 14075](#) (2022): Directs HHS to protect LGBTQI+ medical care from restrictive state and local laws, sought to limit federal funding for entities supporting conversion therapy, and aimed to eliminate regulatory barriers to federal benefits for LGBTQI+ individuals.
  - [EO 13988](#) (2021): Directs agencies to address discrimination based on gender identity and sexual orientation.
  - [EO 14020](#) (2021): Established the White House Gender Policy Council to promote gender equality, combat violence, and challenge stereotypes.
  - [EO 13672](#) (2014): Expanded federal nondiscrimination protections to include sexual orientation and gender identity.

# E.O. 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- Directed agencies, with the assistance of the Attorney General, to develop a plan to deter DEI programs in the private sector.
- The order prevents federal contractors and grantees from considering “race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws in their employment practices.”
- The order directs agencies to begin requiring contractors and grant recipients to **affirmatively certify** “that [they do] not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
- Sec. 3(iv):

(iv) The head of each agency shall include in every contract or grant award:

(A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.



## E.O. 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity *cont'd*

- The impact of this certification: Any contractor or grant recipient who continues to engage in prohibited discrimination or maintains certain affirmative action programs or DEI policies (i.e., “illegal DEI”)—contrary to the new contract terms and affirmative certifications—will risk liability under the Federal False Claims Act by virtue of submitting invoices to the government for payment.
  - The administration is encouraging whistleblowers to come forward and also requiring agencies to report contractors, grantees, and even industries for investigation.
- Contractors cannot be forced to comply with affirmative action requirements, including “[a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”

## E.O. 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity *cont'd*

- The EO also revoked a suite of EOs and directives advancing equity and inclusion:
  - [EO 13985](#) (2021): Laid out definitions of equity and underserved communities to be used by federal agencies; directed agencies to assess equity impacts and address underserved communities.
  - [EO 14031](#) (2021): Established a White House initiative to advance equity, justice, and opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders.
  - [EO 13995](#) (2021): Established the COVID-19 Health Equity Task Force at HHS and sought to improve equity data and reporting on COVID-19.
  - [EO 14035](#) (2021): Advanced DEIA in federal workforce management, training, and recruitment.
  - [EO 12898](#) (1994): Created a Working Group to address health and environmental disparities in minority and low-income communities.
  - [EO 13583](#) (2011): Directed agencies to integrate DEIA into their overall human resources strategies and develop a government-wide Diversity and Inclusion Strategic Plan.
  - [2016 Memorandum](#): Promoted diversity in the national security workforce through data collection and training.

# Key Underlying Anti-Discrimination Laws

(Non-exhaustive list—also age, disability, and veteran status)

Statute	Scope	Implementing Regs (or example thereof)
Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d <i>et seq.</i> (Triggered by receipt of federal funds)	Prohibits, generally, organization-wide discrimination in program access on the basis of race, color, or national origin.	45 C.F.R. Part 80 (HHS implementing regulations)
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e (Regulatory, no federal funds needed to trigger)	Prohibits organization-wide discrimination in employment practices on the basis of race, color, religion, sex, or national origin.	Generally enforced by EEOC
Education Amendments Act of 1972, Title IX, 20 U.S.C. § 1681 <i>et seq.</i> (Triggered by receipt of federal funds)	Prohibits, generally, organization-wide discrimination in program access on the basis of “sex” in education programs.	34 C.F.R. Part 106 45 C.F.R. Part 86 (HHS implementing regulations)
Patient Protection and Affordable Care Act (ACA) Sec. 1557 anti-discrimination provision, 42 U.S.C. § 18116 (Triggered by receipt of federal funds)	Prohibits, generally, organization-wide discrimination on the basis of race, color, national origin, sex, age, or disability in health programs and activities.	45 C.F.R. Part 92

# Impact of the 2025 EOs for Grantees

## Immediate Impact of EOs:

- Agencies scrambled to implement without guidance or regulations.
  - Some agencies issued guidance.
  - Inconsistent and raised more questions.
    - E.g., DOJ provided initial guidance, but wasn't until July until it provided detailed guidance.
- Grants reviewed for being potentially “equity-related.”
  - Both internal (to the government) and external grants evaluated.
  - Resulted in mass stop-work orders and terminations.
    - Did the government have a right to terminate?
  - Ad hoc, broad, and possibly illegal certifications.
    - But what were grantees to do—certify or risk termination?
- Grantee community took varying approaches.
  - Greatly dependent on reliance with federal funding.

# Impact of the 2025 EOs for Grantees *cont'd*

Longer term impact:

- Grant terms to eventually (likely) be asserted by funding agencies:
  - No overt funding of DEI initiatives (though not explicitly stated in the EOs).
  - No “promoting” of DEI or “gender ideology” within the scope of one’s federal grant project.
  - Violations of federal civil rights to be considered potential FCA violations, because compliance with federal civil rights laws will be asserted as a material term of payment.
    - Just a few weeks ago, GSA was seeking comments on updating SAM.gov to include DEI certifications for grantees.
- Left with many long-term questions:
  - What DEI initiatives would be viewed as problematic?
  - What constitutes promoting DEI or gender ideology?
  - How to reconcile federal prohibition with state law requirements?
  - What will be considered a violation of federal civil rights laws?

**All of this means litigation, and there has been a lot.**

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# Appellate Litigation Developments Related to DEI

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# DEI Litigation Overview

**Primarily procedural issues being resolved with government declining to litigate after some losses**

## **Remedies and Forum**

- Universal injunctions.
- Which court has jurisdiction over which claims (contract remedies vs. unlawful agency action)?

## **Challenges to “DEI” actions**

- Equal protection claims.
- Speech doctrines (vagueness/viewpoint discrimination).
- Government continuing to argue jurisdiction but backing away from some merits defenses.

# The Emergency Docket: Key Decisions

## Nationwide Injunctions, Birthright Citizenship

### *Trump v. CASA*

- Executive order limited birthright citizenship.
- District courts issued nationwide preliminary injunctions.
- Nationwide (or universal) injunctions = relief for anyone harmed, not just the plaintiffs in the case.
- The Solicitor General sought emergency relief from the Supreme Court on the nationwide injunction question, not birthright citizenship (initially).
- Held (Justice Barrett, 6-3) that universal injunctions likely exceed federal courts' statutory authority.

### Takeaway

- Limits district courts' ability to block unconstitutional or unlawful executive branch policies universally.

# The Emergency Docket: Key Decisions (cont.)

## NIH Grants Cancellation

### *National Institutes of Health v. American Public Health Association*

- NIH cancels nearly \$800 million in grants for scientific research.
- District court held that the NIH directives violated the Administrative Procedure Act (APA); district court and the First Circuit denied stays pending appeal.
- Question for Supreme Court: Which court can hear cases challenging grant terminations?
- Fractured opinions with two separate 5-4 majorities, Justice Barrett deciding:
  - Requiring payment on grants belongs in Court of Federal Claims.
  - But challenges to unlawful agency directives can proceed in the district court and First Circuit.

### Takeaway

- District courts likely cannot decide grant terminations but can hear challenges to unlawful agency action.

# Notable Cases

## Higher Education and Alleged Discriminatory Conduct

### *President and Fellows of Harvard College v. U.S. Department of Health & Human Services*

- Harvard rejected demands by federal agencies to make changes to address allegedly discriminatory conduct.
- Agencies terminated grants/funding to Harvard, largely asserting that Harvard permitted antisemitic activity.
- Harvard sued and district court held that it had jurisdiction over Harvard's First Amendment retaliation and Title VI claims and APA claims relating to funding policy, but not APA claims tied to the termination letters.
- On the merits, the court granted summary judgment on the First Amendment and Title VI theories, vacated the terminations, and entered a permanent injunction.
- Government filed a notice of appeal to the First Circuit.

### Takeaway

- District courts may continue to assert jurisdiction over certain claims against unlawful agency actions and the First Amendment may play a significant role in court decisions.

# Notable Cases

## “Anti-DEI” Executive Orders

### *National Ass’n of Diversity Officers in Higher Education v. Trump*

- EOs targeted “illegal DEI” in federal grants/contracts and required certifications by grantees/contractors.
- Plaintiffs challenged certification, termination, and enforcement threat/report provisions.
- District court granted a nationwide preliminary injunction, finding termination and certifications provisions were impermissibly vague and certification provision impermissibly restricts speech.
- Fourth Circuit issued a decision on February 6, vacating the preliminary injunction and remanding:
  - No Article III standing to challenge enforcement threat/report provision, any injury from enforcement threat/plan provision requiring agencies to prepare a plan to deter “illegal DEI” was too speculative.
  - Merits of facial constitutional challenges, termination provision likely satisfies due process, President’s direction to subordinates on funding not unconstitutionally vague (*National Endowment of Arts v. Finley*) and certification passes First Amendment, federal law already requires compliance with antidiscrimination law.

### Takeaway

- Potential for different outcome in as-applied vs. facial constitutional challenges, as concurrence stressed.

# Notable Cases

## “Anti-DEI” Executive Orders

### *Chicago Women in Trades v. Donald J. Trump, et al*

- District court granted a nationwide permanent injunction against enforcement of certification provision by the Department of Labor, holding:
  - District court had jurisdiction to hear First Amendment challenge to EOs.
  - Likely to prevail on argument that certification provision is vague and impermissibly influences speech.
  - But unlikely to prevail on challenge to termination provision given government’s discretion in funding.
- Case is on appeal to the Seventh Circuit, which heard oral argument on January 30. Government argues:
  - Nationwide injunction exceeds district court’s authority.
  - Certification provision is consistent with the First Amendment—it calls for compliance with existing laws.

### Takeaway

- Judges continue to have questions about what is meant by “illegal” DEI and questions on jurisdiction



# Notable Cases

## Department of Education “Dear Colleague” Anti-DEI Guidance

*American Federation of Teachers et al v. U.S. Department of Education*

*National Education Association v. U.S. Department of Education*

- “Dear Colleague Letter” stated that many DEI initiatives are discriminatory and unlawful under Title VI of the Civil Rights Act and schools may lose federal funds for DEI initiatives.
- DOE then required certification of compliance with Department’s interpretation of civil rights.
- Multiple plaintiffs challenged the letter.
- District court in Maryland vacated the letter and certification as unconstitutional and unlawful under the APA. The government withdrew its Fourth Circuit appeal, meaning district court’s ruling stands.
- On Feb. 3, 2026, the parties agreed to dismiss the New Hampshire case as moot in light of the Fourth Circuit’s ruling.
- **Takeaway**
- The Education Department has reportedly agreed not to rely on or enforce the letter.

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# Employment Law Developments Related to DEI

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# March 19, 2025, EEOC and DOJ Joint Guidance

## *What To Do If You Experience Discrimination Related to DEI at Work*

- ❖ “Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action **motivated**—in whole or in part—by an employee’s race, sex, or another protected characteristic.”
- ❖ DEI-related discrimination might include:
  - ❖ Disparate Treatment
  - ❖ Limiting, Segregating, and Classifying
  - ❖ Harassment
  - ❖ Retaliation

**WHAT TO DO IF YOU EXPERIENCE DISCRIMINATION RELATED TO DEI AT WORK**



Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on protected characteristics such as race and sex. Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, no matter which employees are harmed. Title VII's protections apply equally to all race, ethnic, and national origin groups, as well as both sexes.

**Before you can sue in federal court, you first must file a charge of discrimination with the EEOC.** The U.S. Equal Employment Opportunity Commission (EEOC) investigates charges of discrimination and can file a lawsuit under Title VII against businesses and other private sector employers. The Department of Justice can file a lawsuit under Title VII against state and local government employers based on an EEOC charge, following an EEOC investigation.

**What can DEI-related discrimination look like?**

Diversity, equity, and inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise “balancing” a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

<b>Disparate Treatment</b> DEI-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including: <ul style="list-style-type: none"><li>• Hiring</li><li>• Firing</li><li>• Promotion</li><li>• Demotion</li><li>• Compensation</li><li>• Fringe benefits</li><li>• Exclusion from training</li><li>• Exclusion from mentoring or sponsorship programs</li><li>• Exclusion from fellowships</li><li>• Selection for interviews (including placement on candidate lists)</li></ul>	<b>Limiting, Segregating, and Classifying</b> Title VII also prohibits employers from limiting, segregating, or classifying employees based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities. Prohibited conduct may include: <ul style="list-style-type: none"><li>• Limiting membership in workplace groups, such as Employee Resource Groups (ERGs) or other employee affinity groups, to certain protected groups.</li><li>• Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other training, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources.</li></ul>
<b>Harassment</b> Title VII prohibits workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics. Harassment is illegal when it results in an adverse change to a term, condition, or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive. Depending on the facts, DEI training may give rise to a colorable hostile work environment claim.	<b>Retaliation</b> Title VII prohibits retaliation by an employer because an individual has engaged in protected activity under the statute, such as objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge. Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.

**Who can be affected by DEI-related discrimination?**  
Title VII protects employees, potential and actual applicants, interns, and training program participants.

**What should I do if I encounter discrimination related to DEI at work?**  
If you suspect you have experienced DEI-related discrimination, contact the EEOC promptly because there are strict time limits for filing a charge. The EEOC office nearest to you can be reached by phone at 1-800-669-4000 or by AGI videophone at 1-844-234-5122.



www.EEOC.gov

# March 19, 2025, EEOC and DOJ Joint Guidance (con't)

## EEOC's FAQs *"What You Should Know About DEI-Related Discrimination at Work"*

- ❖ Unlawful DEI discrimination may occur when employers consider protected categories in access to training opportunities, mentoring, sponsorship, workplace networking, internships, fellowships, and interview selection.
- ❖ Unlawful DEI segregation can include limiting membership in employee affinity groups and separating employees based on protected categories for workplace trainings.
- ❖ No such thing as "reverse discrimination."
- ❖ Business necessity or interest or client/customer preference will not justify an employer taking an employment action based on a protected category.
- ❖ Diversity or other DEI-related training may create a hostile work environment if discriminatory in content, application, or context.

# July 29, 2025, DOJ Memo

- Applicable to Recipients of Federal Funding.
- Unlawful Preferential Treatment:
  - “Preferential treatment occurs when a federally funded entity provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons, including such practices portrayed as ‘preferential’ to certain groups.”
  - Examples: race-based scholarships or programs; preferential hiring or promotion practices; access to facilities or resources based on race or ethnicity.
- Caution regarding “proxies,” specifically:
  - “Cultural competence” requirements.
  - Geographic or institutional targeting.
  - “Overcoming obstacles” narratives—when “in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics.”

# July 29, 2025, DOJ Memo (con't)

- Segregation:
  - “Segregation based on protected characteristics occurs when a federally funded entity organizes programs, activities, or resources-such as training sessions-in a way that separates or restricts access based on race, sex, or other protected characteristics.”
  - Examples: race-based training sessions; segregation in facilities or resources.
- Converse with Respect to Sex:
  - “While compelled segregation is generally impermissible, failing to maintain sex-separated athletic competitions and intimate spaces can also violate federal law. Federally funded institutions that allow males, including those self-identifying as ‘women,’ to access single-sex spaces designed for females-such as bathrooms, showers, locker rooms, or dormitories-undermine the privacy, safety, and equal opportunity of women and girls. Likewise, permitting males to compete in women’s athletic events almost invariably denies women equal opportunity by eroding competitive fairness.”



# July 29, 2025, DOJ Memo (con't)

- Unlawful Use of Protected Characteristics:
  - “Unlawful use of protected characteristics occurs when a federally funded entity or program considers race, sex, or any other protected trait as a basis for selecting candidates for employment (e.g., hiring, promotions), contracts (e.g., vendor agreements), or program participation (e.g., internships, admissions, scholarships, training). This includes policies that explicitly mandate representation of specific groups in candidate pools or implicitly prioritize protected characteristics through selection criteria, such as ‘diverse slate’ requirements, diversity decision-making panels, or diversity-focused evaluations. It also includes requirements that contracting entities utilize a specific level of working hours from individuals of certain protected characteristics to complete the contract. Such practices violate federal law by creating unequal treatment or disadvantaging otherwise qualified candidates, regardless of any intent to advance diversity goals.”
- Examples:
  - Race-based “diverse slate” policies (specific minimum numbers).
  - Sex-based selection for contracts.
  - Race- or sex-based program participation (specific minimum quotas).

# July 29, 2025, DOJ Memo (con't)

- Training Programs That Promote Discrimination or Hostile Environment:
  - “Unlawful DEI training programs are those that-through their content, structure, or implementation-stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment. This includes training that:
    - Excludes or penalizes individuals based on protected characteristics.
    - Creates an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.”

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# DEI Developments Affecting Nonprofit Purposes and Activities

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# Private Litigation on Race-Specific Scholarships and Grants

Plaintiff groups continued active pursuit of litigation over private, non-federally funded scholarship and grant programs alleging violations of **Section 1981 of the Civil Rights Act of 1866**.

42 U.S.C. § 1981:

- Prohibits discrimination on the basis of race in the making or enforcement of contracts.
- Enacted in 1866 to remedy discrimination against Black people in the wake of the Civil War, granting all persons the same right to make and enforce contracts “as is enjoyed by white citizens.”

Many cases have ended with an agreement to end the program or change eligibility criteria.

Still no precedential authority for how Section 1981 claims will fare—courts have only ruled on injunction claims. Still, trend points to a more restrictive environment.

Section 1981 does not address gender, sex, or sexual orientation.

# IRS Determinations and Examinations

26 U.S.C. Section 7217 prohibits senior officials of the executive branch from requesting that the IRS conduct or cease an audit or other investigation of any taxpayer; exception for written requests by the Treasury Secretary to the IRS due to implantation of a change in tax policy.

No publicly reported change to IRS Exempt Organizations determinations or examinations activities to-date reflecting shift in administration approach to policy issues as reflected in executive orders on DEI (or other issues including climate, immigration, gender, LGBTQIA+).

- In the past, IRS compliance projects have focused on colleges and universities; hospitals; credit counseling agencies; housing counseling and foreclosure prevention.

IRS workforce reduced by 27% agencywide and by 30% in TE/GE:

- 541 EO division employees in FY 2023.
- We understand that EO division staff have been shifted from examinations to determinations.

In FY 2023 (most recently available data):

- roughly 2,500 exams started and closed.
- 141 revocations.

# IRS Determinations and Examinations

Exempt Status Questions: Concepts of Illegality, Violation of Established Public Policy

An organization may not qualify for tax-exempt status if it has an **illegal purpose** or if it **engages in substantial illegal activities**; illegal activities do not further an exempt purpose.

Substantiality is measured from a qualitative and quantitative perspective:

- Quantitative = time and attention
- Qualitative = seriousness, intentionality



# IRS Determinations and Examinations

## Exempt Status Questions: Concepts of Illegality, Violation of Established Public Policy

Examples of determinations relying on illegality doctrine have included groups engaged in:

### **Civil disobedience**

- Rev. Rul. 75-384

### **Use or distribution of illegal drugs**

- Priv. Ltr. Rul. 201224036 (marijuana)
- Priv. Ltr. Rul. 2020014019 (marijuana)
- *Iowaska Church of Healing v. Werfel*, No. 23-5122 (D.C. Cir. June 21, 2024) (Ayahuasca)

### **Tax fraud conspiracy**

- *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984)

### **Plural marriage**

- Priv. Ltr. Rul. 201310047

### **Decriminalizing/reforming law concerning sexual exploitation of children**

- *Mysteryboy Inc. v. Commissioner*, T.C. Memo 2010-13

# IRS Determinations and Examinations

Exempt Status Questions: Concepts of Illegality, Violation of Established Public Policy

U.S. Supreme Court in *Bob Jones University v. United States*, 461 U.S. 574, upheld the IRS's revocation of Bob Jones University's 501(c)(3) tax-exempt status due to the school's policy denying admission to persons engaged in or known to advocate for interracial marriage or dating.

The Court explained:

- a charitable organization's purpose "may not be illegal or **violate established public policy**";
- "determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected"; and
- a "declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy."

What exactly constitutes "fundamental public policy" is not clearly defined, but the Court looked to actions of all three branches of the federal government over three decades to conclude that racial discrimination in education "violates a most fundamental national public policy."

# Public Service Loan Forgiveness Program Rulemaking and “Substantial Illegal Purpose”

U.S. Dep’t of Education published final rule amending Public Service Loan Forgiveness program regulations on Oct. 31, 2025; goes into effect July 1, 2026.

DoED may prohibit 501(c)(3) employers from participating in the PSLF program if DoED determines that the employer engages in “illegal activities” such that the organization has a “substantial illegal purpose.”

Illegal activities demonstrating substantial illegal purpose include:

- aiding or abetting violations of 8 U.S.C. 1325 or other Federal immigration laws;
- supporting terrorism, including by facilitating funding to, or the operations of, cartels designated as Foreign Terrorist Organizations consistent with 8 U.S.C. 1189, or by engaging in violence for the purpose of obstructing or influencing Federal Government policy;
- chemical and surgical castration or mutilation of children or the trafficking of children to another State for purposes of emancipation from their lawful parents, in violation of applicable law;
- engaging in a pattern of aiding and abetting illegal discrimination; or
- engaging in a pattern of violating State tort laws, including laws against trespassing, disorderly conduct, public nuisance, vandalism, or obstruction of highways.

# Public Service Loan Forgiveness Program Rulemaking and “Substantial Illegal Purpose”

On each student loan borrower’s PSLF application, the borrower’s employer must certify that it did not participate in any of the “illegal activities” described in the rule.

DoED may disqualify an employer when an employer fails to certify that they did not engage in illegal activities OR when the Secretary of Education separately determines an employer engaged in illegal activities:

- Secretary will weigh the seriousness and frequency of illegal activities to determine whether they are so severe or pervasive that more than an insubstantial amount of the organization’s activities demonstrate the organization has an illegal purpose.
- Secretary is prohibited from determining an employer has a substantial illegal purpose based upon the employer or its employees exercising their First Amendment or any other constitutionally protected rights.
- Secretary is required to provide employers with notice, a transparent record of the basis for findings, and an opportunity to review, respond, and rebut the findings.

Disqualification lasts 10 years or upon entering into a “corrective action plan” with the Secretary.

# DEI Activities in 2025 and Looking Ahead



Federal grant recipients have special considerations and risks



Private plaintiffs have become aggressive



Balance mission-related considerations against risks



Ensure communications are consistent with risk tolerance

# DEI Activities in 2025 and Looking Ahead

Executive orders did not change the law.

Review and ensure compliance with existing federal anti-discrimination laws:

- Title VII of the Civil Rights Act of 1964: Prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.
- Other Federally Protected Categories in Employment:
  - Disability (Americans with Disabilities Act)
  - Age over 40 (Age Discrimination in Employment Act)
  - Genetic Information (Genetic Information Nondiscrimination Act)
  - Military Service (Uniformed Services Employment and Reemployment Rights Act)
- Title VI of the Civil Rights Act of 1964: Prohibits discrimination on the basis of race, color, or national origin. Applies only to organizations that receive federal financial assistance.
- Title IX of the Education Amendments of 1972: States that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
- Section 1981 of the Civil Rights Act of 1866: Prohibits race discrimination in contracts.



# DEI Activities in 2025 and Looking Ahead

- Scholarships/Grants likely most at risk:
  - Law remains unsettled in this area, though recent actions suggest a trend toward litigants agreeing to end race-specific grant and scholarship programs.
  - Is it a contract?
  - Consider eligibility criteria.
- Awards:
  - Less likely to qualify as a contract if it is a gift without expectation of return consideration.
  - Can further manage risk by looking at eligibility criteria.
- Affinity Groups:
  - First Amendment right of association/assembly.
  - Not a contract.
- Advocacy/Mission-Related Communications and Discussions:
  - First Amendment right to freedom of speech, association/assembly, and to petition government.
  - But see exempt status discussion.

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# Federal Law Enforcement Directives Affecting Civil Society

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# Executive Order 14173—Civil Compliance Investigations

Executive Order 14173 directed federal agencies to “enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”

Agency heads were required to advise administration within 120 days (by May 21, 2025) with recommendations for civil compliance investigations of large nonprofit corporations or associations, private foundations with assets over \$500 million, state and local bar and medical associations, and institutions of higher education with endowments over \$1 billion.

No announcements made since the May 21, 2025, deadline passed.

# NSPM-7 Countering Domestic Terrorism and Organized Political Violence

“Domestic terrorism” focus of executive orders and law enforcement directives:

- Sept. 22, 2025, Executive Order Designating Antifa as a Domestic Terrorist Organization
- Sept. 25, 2025, National Security Presidential Memorandum (NSPM-7)

There is no federal “domestic terrorism” crime and there isn’t a federal statutory basis for designating a group as a domestic terrorist organization.

Directives identify domestic terrorism with reference to ideology or viewpoint: “anti-Americanism, anti-capitalism, and anti-Christianity; support for the overthrow of the United States Government; extremism on migration, race, and gender; and hostility towards those who hold traditional American values on family, religion, and morality.”

# NSPM-7 Countering Domestic Terrorism and Organized Political Violence

Directs JTTF and its local offices to investigate potential federal crimes relating to acts of recruiting or radicalizing persons for the purpose of political violence, terrorism, or conspiracy against rights; or the violent deprivation of any citizen's rights:

- Institutional and individual funders and officers and employees of organizations that are a responsible for, sponsor, or otherwise aid and abet the principal actors engaging in the criminal conduct described above.
- Nongovernmental organizations and American citizens residing abroad or with close ties to foreign governments, agents, citizens, foundations, or influence networks engaged in violations of FARA or money laundering by funding, creating, or supporting entities that engage in activities that support or encourage domestic terrorism.

Secretary of the Treasury in coordination with the AG shall make available all resources to the maximum extent permitted by law to identify and disrupt financial networks that fund domestic terrorism and political violence.

The Commissioner of the IRS shall take action to ensure that no tax-exempt entities are directly or indirectly financing political violence or domestic terrorism. In addition, where applicable, the Commissioner shall ensure that the IRS refers such organizations, and the employees and officers of such organizations, to the Department of Justice for investigation and possible prosecution.

# IRC 501(p)—Terrorist Supporting Organization Legislation Re-introduced

H.R. 6800 introduced on Dec. 18, 2025; S.B. 3554 identical bill (Sen. Cornyn)

Amends Section 501(p) of the Internal Revenue Code to add a new paragraph (8) that would allow the Treasury Secretary to designate a tax-exempt organization as a **terrorist-supporting organization** and **suspend the organization's tax-exempt status** if upon 90 days' notice:

- the organization does not demonstrate to the satisfaction of the Secretary that the organization either:
  - did not provide material support or resources to a designated terrorist organization or
  - made reasonable efforts to have any such material support or resources returned with a certification that the organization will not provide any further material support or resources to designated terrorist organizations.

Definitions tied to statutes applicable to **foreign terrorist organizations**:

**Material support or resources** defined in 18 U.S.C. § 2339B:

- Any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.
- *See also Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).



# IRC 501(p)—Terrorist Supporting Organization Legislation Re-introduced

## Concerns:

- Designation is entirely within the discretion of the Treasury Secretary.
- No requirements regarding what evidence the Secretary may consider or rely on in making a designation or requirements for the Secretary to provide the organization with the evidence.
- Burden is on the tax-exempt organization to disprove the proposed designation.
- Options for appeal are available, but once a designation has been made, significant damage to the organization will already have been done:
  - U.S. banks may refuse to do business with the organization.
  - Potential criminal and civil investigations may be undertaken related to other federal laws that prohibit providing material support or resources to a terrorist organization.
  - Risk of further sanctions designations—i.e., Treasury's Office of Foreign Assets Control could add the organization to the Specially Designated Nationals (SDN) list, which would result in freezing all of the organization's assets, and all U.S. persons would be prohibited from engaging in any transactions with the organization.

# IRS Criminal Enforcement

*The Wall Street Journal* reported in October 2025 that the administration would install personnel at the IRS criminal investigative division (CI) to pursue criminal inquiries of “left-leaning” groups and their donors; article references NSPM-7 directives to IRS Commissioner.

IRS-CI process differs from civil process:

- Civil process involves field examinations with production of documents pursuant to information document requests; taxpayer has numerous rights in process; could result in no change, no change with advisories, closing agreement, or revocation.
- Criminal process could result in criminal convictions, financial penalties, and/or imprisonment. If you suspect government inquiry involving IRS-CI, involve white collar and tax attorneys immediately; consider working with experienced criminal counsel in advance to be prepared for how to respond to any potential criminal inquiries.

Possible charges?

- False tax return
- Conspiracy
- Money laundering
- Mail and wire fraud
- Perjury & obstruction
- Sanctions/anti-terrorism



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