

ACC Chicago

The Year Ahead

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This presentation and its accompanying materials should not be used as a substitute for legal advice on a particular matter. Any information provided herein (as well as responses to questions) are necessarily general in nature.

Agenda

- Executive Orders
- What Should We Do About It?
- Immigration
- Agency Commissioners

The Executive Orders

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Why it Matters to all Employers

- Signals increased investigations and plans for private employer compliance
- Encourages whistleblowers
- More internal complaints, external complaints
- More request for religious accommodations



EO: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

The Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- “[i]t is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work.”
- Directs federal agencies to “terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements.”
- Signals increased enforcement measures across multiple executive agencies: investigations and litigation
- Orders all agencies to enforce “our long-standing civil-rights [sic] laws and to combat illegal private sector DEI preferences, mandates, policies, programs, and activities.”
- Also speaks to federal contractor AAPs – note that this program is focused on DEI initiatives and not an overview on the AAP aspects of the EO, but the principles discussed today generally apply to all employers – the risk assessment, however, is different for federal contractors, recipients of federal funding

The Ending Illegal Discrimination and Restoring Merit-Based Opportunity: Messages to ALL Employers (not just Federal Contractors)

- Directs federal agencies, in coordination with the Attorney General to take action to implement the principles of the EO
- Requires the Attorney General in consultation with the agency heads to **submit a report within 120 days** that identifies:
 - “**key sectors of concern,**” “**egregious and discriminatory practitioners,**” and a **plan to deter illegal DEI programs**
 - “up to nine potential civil compliance investigations of **publicly traded corporations, large non-profit corporations or associations, foundations with assets of \$500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars**”
 - “other strategies” **to encourage the private sector to end illegal DEI discrimination and preferences, including appropriate potential litigation for the administration to pursue.**
- Ending “discriminatory” DEI programs a priority for new EEOC

The Ending Illegal Discrimination and Restoring Merit-Based Opportunity: For Federal Contractors

- Eliminates federal contractor AA plan obligations regarding race and gender (as had been required by EO 11246) and enforcement activity by the OFCCP regarding race or gender affirmative action plans. Contractors should review any currently pending OFCCP audit requests to determine whether the information requested stems from Executive Order 11246.
- Does not impact obligations under VEVRAA or Section 503. Contractors should continue to prepare VEVRAA and Section 503 Affirmative Action plans.
- Calls for a new contract term in federal contracts requiring contractors to agree that “compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions...”
- The EO requires contractors to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

What Is “Illegal DEI?”

- The EO does not define the term “Illegal DEI”
- Instead, the EO describes “illegal DEI” as policies, activities, programs, etc. that violate Civil Rights laws.
- Therefore, actions that comply with Civil Rights laws should not be considered “illegal DEI,” whether or not the actions have been described as “DEI”

Examples of “Illegal DEI”

- Practices prohibited by Civil Rights laws:
- Making employment decisions based on “protected classes,” such as race, sex, color, religion, or national origin (Title VII; Section 1981 for race), disability (ADA), age (40+) (ADEA).
 - For purposes of federal law, for now, “sex” includes gender, gender identity, and sexual orientation
- Establishing preferences or quotas based on a protected characteristic
- So-called “reverse discrimination” – discrimination against individuals in “majority” groups (e.g., men, White individuals, heterosexuals is equally prohibited as discrimination against women, other races, members of the LGBTQ+ community)
- *Muldrow* – “some harm”
- Section 1981 – making and enforcing contracts, including whether to enter them

What is “Legal DEI?”

- Practices that operate to encourage qualified individuals to *compete* for employment benefits and contracting opportunities, without excluding anyone based on their protected characteristic.
- Expanding outreach.
- Evaluating policies, practices, and communications to identify and remove barriers.
- Focusing on inclusion and wellness.
- Training on unlawful bias and implementing structural changes to interrupt it.
- Ensuring communications reflect a commitment to equal employment opportunity.

Examples of “Legal DEI”

- Avoid unnecessary mandatory qualifications that are not required to perform the role in position descriptions and job announcements
- Ensure the position descriptions and job posting do not inadvertently signal an unlawful preference (such as descriptions that use only “he” or only “she” to refer to the ideal candidate).
- Provide career path information and development opportunities to prepare employees for promotion
- Seek to recruit candidates from a broad array of sources. Seeking applicants from HBCUs or trade associations of minorities or women are legal, provided that the posting is clear that hiring decisions are not based on race or gender and sources are wide-ranging.



EO: Defending
Women from Gender
Ideology Extremism
and Restoring
Biological Truth to the
Federal Government

Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

- It is the “policy of the United States to recognize two sexes, male and female”
- Directs federal agencies and employees acting in an official federal capacity use the term “sex” and not “gender”
- Directs agencies to act to ensure intimate spaces are designated for single-sex use based on sex as defined in the order, and not by gender identity
- Rescinds the EEOC’s “Enforcement Guidance on Harassment in the Workplace” (April 29, 2024),
- Directs the Attorney General, the Secretary of Labor, the General Counsel and Chair of the EEOC, and every other agency head with enforcement responsibilities under the Civil Rights Act to “prioritize investigations and litigation to enforce the rights and freedoms identified.”
- Directs the attorney general to issue guidance to ensure the “freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964”

Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

- The EO applies to federal agencies, but it is likely that future directives and restrictions will be applied, through agency action, to federal contractors and recipients of federal funding.
- Certain state and local anti-discrimination statutes (including Illinois) include gender identity as a protected class and require that individuals be able to use the designated “intimate space” that comports with their gender identity. A more specific analysis is needed for these jurisdictions.
- Employers generally should anticipate more requests for religious accommodations and complaints from employees and others that the employer’s DEI programs are unlawful, and an increase in retaliation/whistleblower claims emanating from such accommodation requests and complaints.
- Employers generally should anticipate the EEOC and other agencies to take enforcement action based on this EO.



What Should We Do
Now?

What To Do Now: Audit and Assess

1

Take Stock of Your Risk Profile

2

Take Stock of Your DEI-Related Practices

3

Make Changes to Align Risk Profile with DEI Practices

4

Communicate!


Examples: What To Look At

- Diversity Statements and Communications
- The Numbers: Goals, Data Collection
- Talent Acquisition, Recruiting, Hiring Practices
- Diverse Slate Initiatives
- Development Programs/Professional Conferences
- Training
- ERGs
- Supplier Diversity
- Board Diversity

Communications

- Do not forget the importance of maintaining privilege.
- Educate HR, DEI offices, and Managers on how to communicate about these issues
- Develop a communication plan in advance, not when you are in crisis
 - What type of situations can you anticipate?
 - Can you create advance drafts?
 - Who is the final decision-maker?
 - Who is the communicator?
 - Who is within the circle of privilege?

A photograph of a stack of books with a blue spine. The top book has a white label with a scales of justice icon and the text "Immigration Law". A silver pen with a black grip lies on a document in front of the books. The image is partially covered by a dark purple rounded rectangle on the right side.

 Immigration Law

Immigration

Executive Orders & Impacts

Immigration EOs

- Jan. 20, 2025, President Trump signed 12 immigration-related Executive Orders (EOs) and rescinded 5 Biden-era EOs
- Enhanced Visa Vetting
- Recission Order Deferring to Prior Approval
- Recission of Humanitarian Parole & TPS
- Enhanced Interior Immigration Enforcement

Impact on Employers

- Increased scrutiny of employer visa petitions and denials
- Increasing costs and processing times
- Limiting employer sponsorships
- Disruption to HR and other internal operations
- Increased Requests for Evidence, Notices of Intent

Don't Wait for an Audit or Raid – Prepare Now

1

Address SSA, IRS, other No Match indicators

2

Timely reverify expiring Work Authorization documents

3

Conduct a **privileged** internal review of I9s and onboarding processes

4

Know and review your contractors

Know Your Contractor

Consider taking the following steps when dealing with independent contractors:

- Review Contracts with Service Providers - Ensure that they contain immigration-related provisions explicitly making the completion of contract employee Form I-9s contractor's responsibility
- Avoid practices suggesting knowledge of the contractor's employment of unauthorized workers and/or control over the contractor's employees such that they were, in effect, employees of the company
- Evaluate the Overall Relationship with Contractors



NLRB and EEOC Post-Inauguration Update

Current Board Status

- On January 27, 2025, President Trump made the unprecedented move in removing Democrat Board Member Gwynne Wilcox from office prior to her term ending
- Board now consists of two members, 1 Democrat and 1 Republican
 - Three-member quorum is required to issue decisions, so Board is inoperative until a third member is confirmed

A New Board General Counsel

- President Trump fired General Counsel Jennifer Abruzzo on January 27, 2025
- Los Angeles Regional Director William Cowen appointed interim General Counsel

Trump Board Agenda

- Focus on overturning recent employee-friendly decisions, including
 - Unionizing without an election
 - Bargaining orders
 - Unfair labor practice remedies
 - Bargaining unit definitions
 - Non-compete and confidentiality/non-disparagement provisions
 - Work rules and employee handbook policies
 - Captive audience ban

Certain Labor Rights & Regulations Expected to be Maintained

- Class action waivers in arbitration agreements
- *Weingarten* rights
- Use of office computers for non-work purposes
- Obligation to bargain over discipline post-certification but before CBA negotiation
- Compliance-search for work for discriminatees
- Joint employer standard

Current EEOC Status

- On January 28, 2025, President Trump removed Democratic EEOC Commissioners Charlotte Burrows and Jocelyn Samuels
- Commission now consists of two commissioners, 1 Democrat and 1 Republican
 - Three-member quorum is required to issue decisions, so Commission is inoperative until a third commissioner is confirmed

A New EEOC General Counsel

- President Trump fired EEOC General Counsel Karla Gilbride, on January 28, 2025
- Andrew Rogers appointed interim General Counsel



Thank you.

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