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Trump Second Term: Legal Tracker

NATIONWIDE PRELIMINARY INJUNCTION PARTIALLY BLOCKS FEDERAL DEI EXECUTIVE ORDERS

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SUMMARY

During his first two days in office, President Donald Trump signed a series of executive orders aimed at diversity, equity, and inclusion ("DEI"). Our team recently summarized these executive orders, including Executive Order 14151, which seeks to eliminate DEI programs and spending in the federal government, and Executive Order 14173, which rescinds most federal contractor affirmative action obligations and seeks to discourage DEI programs in the private sector. Late Friday, a federal court granted a nationwide preliminary injunction temporarily blocking several significant aspects of these executive orders.

BACKGROUND

While the president has significant authority to issue executive orders, such orders must still comply with the U.S. Constitution. As such, on February 3, 2025, several industry groups and the City of Baltimore filed a lawsuit challenging the constitutionality of three aspects of Executive Orders 14151 and 14173. The case is *National Association of Diversity Officers in Higher Education, et al. v. Trump*, No. 1:25-cv-00333, and is pending in the US District Court for the District of Maryland (the "NADOHE Litigation").

In addition to the NADOHE Litigation, civil rights and industry organizations have also filed litigation challenging Executive Orders 14151 and 14173 (and more) in the U.S. District Court for the District of Columbia and the U.S. District Court for the Northern District of California.

THE NADOHE LITIGATION'S PRELIMINARY INJUNCTION

On February 21, 2025, U.S. District Court Judge Adam Abelson granted a nationwide preliminary injunction enjoining the federal government from enforcing the following provisions of Executive Orders 14151 and 14173:

- Executive Order 14151's requirement that federal agencies terminate "equity-related" grants or contracts (the "Termination Clause");
- Executive Order 14173's requirement that federal contracts include provisions under which federal contractors and grantees: (i) agree that they comply with federal anti-discrimination laws (which, as our client alert highlights, the Executive Order made enforceable through the False Claims Act); and (ii) certify that they do not operate any programs promoting DEI that violate federal anti-discrimination laws (collectively, the "Certification Clause"); and
- Executive Order 14173's requirement that the Attorney General take measures to "encourage the private sector to end illegal discrimination and preferences" including through threats of civil compliance investigations (the "Enforcement Clause").

Judge Abelson concluded that Executive Orders 14151 and 14173's failure to define critical phrases (including "DEI," "equity-related," "illegal-DEI," and "illegal discrimination and preferences") means that the plaintiffs are likely to prove that the Termination Clause and Enforcement Clause are unconstitutionally vague in violation of the Fifth Amendment of the U.S. Constitution. Namely, federal contractors/grantees are unable to evaluate whether their contracts are "equity-related" (and thus must be terminated under Executive Order 14151), and private sector organizations are unable to determine whether their specific DEI programs, policies, or communications are "illegal" (and thus subject to the enforcement threats under Executive Order 14173).

Judge Abelson also concluded that the plaintiffs were likely to prove that the Certification Clause and Enforcement Clause violate the First Amendment's freedom of speech protections, because, among other things, the Certification Clause applies to any federal contractor DEI program, not just those funded by the government (through federal contracts), and the Enforcement Clause does not include similar threats of enforcement against private organizations promoting anti-DEI principles.

Because the preliminary injunction is nationwide, the Court's Order temporarily prohibits the government from enforcing the Termination Clause, Certification Clause, and Enforcement Clause against not just the plaintiffs, but all similarly situated contractors, grant recipients, and private sector entities.

LIMITATIONS OF THE PRELIMINARY INJUNCTION

While the preliminary injunction is significant, it does have very specific limitations:

- **Temporary in Nature:** Unless appealed, the preliminary injunction will only remain in place until the merits of the NADOHE Litigation can be decided, including whether a permanent injunction is appropriate. Moreover, it is likely that the Trump Administration will appeal the preliminary injunction. As such, for multiple reasons, the challenged clauses could ultimately become enforceable again in the future.

- **Does not Impact Federal Contractors' Affirmative Action Obligations:** The preliminary injunction only relates to the three provisions outlined above. As such, Executive Order 14173's revocation of Executive Order 11246 (which outlines federal contractors' equal employment opportunity requirements and affirmative action obligations with respect to minorities and women) and curtailment of the Office of Federal Contract Compliance Programs remain effective.
- **Still Permits the Attorney General to Prepare an Enforcement Report Generally**: The Court's Order specifically permits the Attorney General to otherwise comply with Executive Order 14173's directive that she prepare a report for President Trump that contains each federal agency's recommendations for enforcing federal civil rights law in the private sector and engaging in investigations.
- **Does Not Impact Private Parties' Right to Challenge DEI Programs**: The preliminary injunction does not impact private parties', including employees, applicants, and advocates, right to challenge the legality of employers' DEI programs under other federal civil rights laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

CONCLUSION

While the NADOHE Litigation provides a limited reprieve for employers, DEI remains a lightning rod for legal activity. As such, all employers should continue to evaluate their DEI, supplier diversity, and affirmative action programs. As part of their review, employers should work with legal counsel to continue to monitor developments in this area and determine whether any potential changes to their DEI, supplier diversity, and/or affirmative action programs are required or recommended.

BCLP has a team of knowledgeable employment lawyers and other professionals who can help with this process. If you or your organization would like more information on this or any other employment issue, please contact any attorney in our Employment and Labor Practice Group.

RELATED PRACTICE AREAS

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