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## Services

### Employment Law

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## The New EEO: Where Will It Go?

One of President Trump's first initiatives upon his return to office included signing Executive Order 14168 on January 20, 2025. This Order, titled [Defending Women from Gender Ideology Extremism And Restoring Biological Truth to the Federal Government](#), announced the federal government's return to "biological," "sex-based" categories of male and female and rescinds among other things the Equal Employment Opportunity Commission's ("EEOC") guidance on workplace harassment. Just one day later, on January 21, 2025, President Trump signed Executive Order 14173, titled [Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#). This Order eliminated the Diversity, Equity and Inclusion ("DEI") and Diversity, Equity, Inclusion and Accessibility ("DEIA") policies in place during the Biden-Harris administration and appears to discourage use of DEI and DEIA programs in private employment. Already, federal agencies such as the EEOC are taking substantial steps to enforce the new administration's stance.

### *A New Stance on Single-Sex Spaces in the Workplace*

Executive Order 14168 announces the federal government's policy to define "sex" to include only a person's "immutable biological classification as either male or female" and excludes the concept of gender identity from this definition. Pursuant to this new policy, the Order requires the United States Attorney General to issue guidance ensuring "freedom to express the binary nature of sex and the right to single-sex spaces in workplaces." Further, this Order mandates the Attorney General, Secretary of Labor and EEOC to prioritize investigations and litigation to enforce these rights.

The EEOC responded quickly to this executive mandate. In a [press release](#) on January 28, 2025, Acting Chair of the EEOC, Andrea Lucas, announced the agency's intent to dismantle what she called "the Biden administration's gender identity agenda" and to prioritize protecting women from sexual harassment and discrimination in the workplace. Acting Chair Lucas announced that a priority will be compliance, investigations and litigation "to defend . . . women's rights to single-sex spaces at work," eliminate internal and external agency materials promoting or otherwise relating to gender ideology, and initiate a close review of the EEOC's mandatory "Know Your Rights" workplace poster.

While Acting Chair Lucas does not have the authority to unilaterally rescind the EEOC's guidance regarding workplace harassment, she has described the agency's workplace harassment guidance in place during the Biden-Harris administration as "fundamentally flawed" and "imping[ing] on all employees' rights to freedom of speech and belief." She urges EEOC members to vote in favor of rescission. Of note, however, voting on this issue and others is stalled until the five-seat EEOC reaches a quorum of at least three members. The EEOC has lacked a quorum since the departure of Commissioners Burrows and Samuels in late January 2025; currently, the only Commission members are Acting Chair Lucas and Commissioner Kalpana Kotagal.

### ***Good-bye to “Illegal” DEI?***

Executive Order 14173 describes DEI/DEIA policies as “illegal” and violative of both “the text and spirit” of longstanding federal civil rights laws. The Order sweeps broadly in its dismantling of DEI/DEIA programs. Indeed, executive departments and agencies are required to end “all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements.”

Significantly, not only must federal agencies revamp their own policies, but they also are charged with overseeing the elimination of DEI/DEIA programs in the private sector as well. Specifically, the Order provides that all agencies must “enforce our longstanding civil-rights laws and combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.” In lieu of any DEI-based preferences, agencies are to enforce a policy of “individual initiative, excellence, and hard work.”

To encourage the private sector to end “Illegal DEI Discrimination and Preferences,” the heads of all agencies are tasked to assist the Attorney General in providing a report, within 120 days of the Order, identifying: (i) key sectors of concern within each agency’s jurisdiction; (ii) the “most egregious and discriminatory DEI practitioners” in each sector of concern; (iii) a plan of specific steps or measures to deter DEI programs or principles, including identification of “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; (iv) other strategies to encourage the private sector to end “illegal DEI discrimination and preferences”; (v) litigation that would be appropriate for federal intervention; and (vi) potential regulatory action and sub-regulatory guidance.

The new administration’s efforts to eradicate “illegal” DEI programs has met with some resistance. As one recent example, on March 27, 2025, a federal judge in Chicago issued an order temporarily blocking the Trump administration from requiring Labor Department grant recipients to certify that they do not operate “illegal” DEI programs on First Amendment grounds. This temporary order will remain effective for two weeks while the court considers issuing a more permanent injunction. Of note, however, the scope of the temporary order does not prohibit the administration from barring issuance of most equity-related grants. It will be important to monitor the challenges raised in response to the administration’s efforts regarding DEI issues.

### ***New EEOC Guidance on DEI-Related Workplace Discrimination***

On March 19, 2025, the EEOC published new technical guidance about DEI-related workplace policies, titled [What You Should Know About DEI-Related Discrimination at Work](#), and [What To Do If You Experience Discrimination Related to DEI at Work](#). This guidance explains, in simple terms, the meaning of “DEI” for employees and lists examples of possible instances in which workplace DEI programs may result in Title VII violations, including hiring, firing, promotion, demotion, limiting membership in employee resource groups, exclusion from training or mentorships or providing different training to groups based on race, sex or another protected characteristic.

Further, the guidance warns that reasonable opposition to DEI-related discrimination or DEI training may constitute protected activity for purposes of a Title VII retaliation claim “if the employee provides a fact-specific basis for his or her belief that the [DEI] training violates Title VII.”

Significantly, to address unlawful workplace harassment, the new guidance states that, depending on the facts of a specific situation, an employer’s “DEI training may give rise to a colorable hostile work environment claim” by an employee. Of note, the guidance does not limit the scope of this potential risk only to mandatory DEI trainings.

This new guidance urges private employee, applicants, training or apprenticeship program participants and any other person claiming to be aggrieved to file a charge of discrimination with the EEOC if they believe they have been subjected to DEI-related workplace discrimination.

### ***Effect on Private-Sector Employers***

What do these new developments mean for private-sector employers? In essence, President Trump has delegated express authority to executive agencies to enforce the dismantling of DEI programs in both public and private sectors. Practically, this means agencies may begin conducting civil compliance investigations and audits of both public- and private-sector employment policies, seeking to eliminate any “illegal DEI” policies—i.e., any employment policies that are not based on individual merit, but rather, in some way give preference based on DEI grounds.

Private employers also may receive EEOC inquiry letters similar to the ones received by 20 law firms on March 17, 2025. Acting Chair Lucas’s [March 17 letter](#) to those firms requested extensive information about their DEI practices and voiced concerns about allegedly unlawful discriminatory programs. Lucas stated the “EEOC is prepared to root out discrimination anywhere it may rear its head, including in our nation’s elite law firms.” These letters may likely signal the first step in the EEOC’s in-depth investigation of those private firms’ employment practices. Such investigation likely will expand into other industries.

Now is the time for employers to conduct an audit of all company policies, procedures and practices for alignment with the new administration’s merit-based policy focus. Items that should be audited include, but are not limited to, equal employment opportunity policies, hiring and promotion practices, training materials, affinity groups and plans or programs providing incentives for diverse hiring. Employers should also scrutinize their procedures for conducting investigations of employee complaints to ensure all complaints are handled in a systematic manner and fully investigated, regardless of the demographic characteristics of complainant and accused.

In addition to auditing your workplace policies, due to the EEOC’s March 19, 2025 guidance, we recommend employers seek legal counsel to assist in carefully scrutinizing any workplace trainings or presentations to ensure they express no preference for diverse individuals or those in protected categories, do not indicate or imply any particular group holds bias, and the requirements of such trainings are identical for all individuals. Private employers should be cautious of conducting any such trainings or similar presentations until they are reviewed by employment counsel.

Similarly, given President Trump’s stated intent to ensure single-sex spaces in the workplace, employers should consider evaluating the private spaces available to their employees, specifically, restrooms and lactation areas. If possible, employers should make single-sex spaces available to ensure all employees can obtain privacy.

In addition, based on Acting Chair Lucas’ stated policy stance, and pursuant to the EEOC’s sweeping enforcement mandate under Executive Order 14168, the EEOC may soon rescind or drastically rework its current workplace harassment guidance. At such point, employers may need to carefully review their harassment policies and training materials for compliance.

Finally, as employers are likely aware, the EEOC requires a [Know Your Rights poster](#) to be conspicuously displayed to employees in the workplace. However, this posting requirement may soon be revised pursuant to Acting Chair Lucas’s current review of all EEOC poster material. We will be closely monitoring changes to EEOC posting requirements.

If you would like to discuss a review of your employment policies, to request advice on preparing for a potential EEOC compliance investigation, or if you would simply like more information to determine whether your current policies may need to be revised, please contact your Kutak Rock attorney or any of the attorneys in the firm's [National Employment Law Group](#), and we would be happy to discuss this with you. You may also visit us at [www.kutakrock.com](http://www.kutakrock.com).

