

Publications

Diversity, Equity and Inclusion Back on the Chopping Block after Federal Appeals Court Ruling

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On Friday, March 14, 2025, a unanimous panel of the U.S. Court of Appeals for the Fourth Circuit stayed, pending appeal, the injunction previously entered by Judge Adam Abelson of the U.S. District Court for the District of Maryland against two Trump administration executive orders (EOs) targeting diversity, equity and inclusion practices in the case *National Association of Diversity Officers in Higher Education, et al. v. Trump, et al.* This ruling means the EOs are back in effect and the government can eliminate funding for Diversity, Equity and Inclusion-related activities and require grantees to certify (under threat of False Claims Act liability) they are not operating diversity, equity and inclusion programs that violate existing anti-discrimination law.

Background

Judge Abelson issued an injunction on February 21, 2025, against EOs 14151 ("[Ending Radical and Wasteful Government DEI Programs and Preferencing](#)") and 14173 ("[Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#)"). Judge Abelson determined that the EOs likely violate the First Amendment by imposing viewpoint and content restrictions on private speech and the Fifth Amendment's due process clause for being vague and inviting arbitrary enforcement. The Trump Administration first sought a stay pending appeal from Judge Abelson but that request was denied.

The Fourth Circuit Stays the Injunction, Pending Appeal

The Fourth Circuit took a different view and stayed the injunction until the appeal can be heard on the merits. The Fourth Circuit stayed the injunction under the Supreme Court's standard that requires the moving party (here, the Trump Administration) to demonstrate, among other things, a strong showing of likely success on the merits. The Fourth Circuit ruled that the Trump Administration satisfied the standard for a stay of enforcement of the preliminary injunction pending appeal. Because the Trump Administration demonstrated a

strong showing of likely success on the merits in staying the injunction, it seems likely that the Trump Administration may ultimately win its appeal.

In its motion for a stay pending appeal, the Trump Administration attempted to give some color to the undefined terms in the EOs by assuring the Fourth Circuit that the EOs only apply to behavior that violates existing anti-discrimination law. This appears to have placated the judges' concerns of arbitrary enforcement or First Amendment retaliation. The [EEOC guidance](#) published on March 19, 2025, clarifies the Trump Administration's stance on the legality of certain diversity, equity and inclusion practices and activities. Specifically, it provides that some diversity, equity and inclusion training programs may create a hostile work environment and that certain programs that promote diversity, equity and inclusion may improperly exclude or favor certain groups over others.

All three judges on the panel issued separate concurrences. Judge Diaz and Judge Harris (both appointed by President Barack Obama) emphasized that the EOs themselves are narrow and apply only to conduct that violates existing anti-discrimination law. Judge Diaz and Judge Harris wrote that behavior outside the scope of the EOs, such as using agency action to punish speech with which the Trump Administration disagrees or engaging in arbitrary enforcement, would present significant constitutional concerns.

Judge Rushing (appointed by President Trump) concurred and raised potential issues regarding standing and ripeness because there was no specific agency action challenged.

Takeaways

Employers of all types will face increased scrutiny for any activities or programs supporting diversity, equity and inclusion and federal contractors in particular face additional risk due to the potential for False Claims Act lawsuits. Employers should continue to proceed with caution and undertake privileged reviews of their existing diversity, equity and inclusion policies and practices. Contact your Vorys lawyer if you have questions about workplace diversity, equity and inclusion issues.