

# The San Diego Union-Tribune

## **DEI Trumped: What the diversity executive order means for private employers**

The impact of Trump's DEI order will depend on how challenges arising from the order to particular private sector DEI programs fare in the courts of law

By [Dan Eaton](#) PUBLISHED: February 10, 2025 at 5:30 AM PST

Federal and California laws bar discrimination based on race, sex, ethnicity, and other categories. Generally, neither federal nor California law requires private employers to seek diversity, equity, and inclusion (DEI) in their workplaces.

On January 21, 2025, President Donald Trump signed an executive order that asserts that DEI programs "can violate" federal civil rights laws. The executive order, among other things, directs all federal agencies "to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."

Here are key parts of the executive order affecting private sector employers.

### **Federal contractors must certify they don't have unlawful DEI programs**

The federal government annually buys billions of dollars in goods and services from private companies and awards billions more in grants. Any federal contractor or grant recipient now will have to certify "it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." A contractor or grant recipient later determined (by a court? the Office of Federal Contract Compliance Programs?) to operate an unlawful DEI program may lose federal funding.

### **Private employers' DEI policies will be scrutinized**

To encourage private sector for-profit and nonprofit firms to end illegal DEI programs, federal agencies are directed to work with the U.S. Attorney General to develop a plan "to deter DEI programs or principles (whether specifically denominated 'DEI' or otherwise) that constitute illegal discrimination or preferences." Each agency must identify "up to nine potential civil compliance investigations of publicly traded corporations," large nonprofits, and other significant private sector entities.

The Justice Department is ordered to consider filing federal lawsuits and joining lawsuits filed by private parties to challenge suspect DEI programs.

### **Defining unlawful DEI programs**

Broadly speaking, a DEI policy is one intended to advance, if not necessarily achieve, diversity, equity, and inclusion in the workplace. But what makes such a policy unlawful?

For example, is a mentorship program with the stated goal of increasing the racial or gender diversity of a company's upper ranks unlawful, even if the program is open to all? Does a company's general statement of commitment to a diverse and inclusive workplace make its hiring and retention practices presumptively unlawful?

Recent Supreme Court rulings provide guidance. In its 2023 ruling in *Students for Fair Admissions v. Harvard*, the high court barred considering race in college admissions. In a concurring opinion, Justice Neil Gorsuch asserted the court's reasoning should apply to disputes under Title VII, the federal law barring employment discrimination based on race and other protected characteristics.

DEI programs in which participation or professional advancement is in any way influenced by race, sex, or ethnicity will be vulnerable to legal attack, an attack potentially backed by the federal government.

### **Exclusionary means may not be used to pursue inclusionary ends.**

The Supreme Court's 2024 ruling in *Muldrow v. City of St. Louis* may further help the Trump administration dismantle diversity policies that, by favoring some categories of employees, disfavor others. In *Muldrow*, the court majority held that an employee claiming discrimination under Title VII need only show a discriminatory action left the complaining employee "worse off, but need not have left her significantly so."

For Justice Brett Kavanaugh, writing separately, proven discrimination, without more, is harm enough.

### **Where is DEI headed?**

Months before President Trump issued his executive order, many private companies had dropped their DEI programs. On Jan. 31, 2025, the [U-T Economist published](#) 10 local experts' answers to the question "Is it a good move for companies to roll back DEI programs?" Reflecting the national divide, six answered no and four answered yes.

The experts – on both sides – focused primarily on ethical considerations. Manpower's Phil Blair said "Forget the law, DEI is the right thing to do. We are a very diverse world and we need to reflect it." Economist Ray Major, by contrast, said "DEI programs introduced more, not less racism and divisiveness into the workforce leading to hostile work environments and reduced productivity."

Ethics debates are abstract and general. Verdicts are rendered in the court of public opinion. Legal disputes are concrete and specific. The scope and duration of the impact of Trump's DEI executive order will depend on how challenges arising from the order to particular private sector DEI programs fare in the courts of law.

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