

TO: Interested Parties
FROM: Democracy Forward
DATE: May 20, 2025
RE: As Deadline Approaches, Trump Administration May Face Legal Hurdles to their Efforts to Chill Private Sector Conduct

In his Executive Order “[Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#),” President Trump instructed federal agencies, assisted by the U.S. Attorney General, to identify and make plans to root out so-called “illegal DEI” in the private sector, setting a deadline for these plans and reports of 120 days (~May 20, 2025). On May 19, 2025, the Department of Justice announced the establishment of the [Civil Rights Fraud Initiative](#), “which will utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws.” In a statement, the Attorney General said, “Institutions that take federal money...to promote divisive DEI policies are putting their access to federal funds at risk.”

While it is unclear what information or proposals the Attorney General and heads of agencies will provide the President pursuant to the Executive Order, it is important to recognize that **a range of the President’s initiatives to stamp out diversity, equity, inclusion, and accessibility (DEIA) have been found by federal courts in early stages of litigation to be unlawful.** It is also notable that a number of institutions are showing solidarity with each other, a marked shift from the President’s earlier attempts to “divide and conquer” sectors like the private bar.

This Interested Parties Memo (1) provides a summary of the President’s Executive Order as it relates to attempts to regulate private entities and, in particular, the EO deadline; (2) discusses the legal hurdles that the President’s anti-DEIA agenda has encountered to date in federal courts and other legal obstacles the President’s plan may face; and (3) highlights various solidarity efforts that have emerged among sectors in anticipation of the EO deadline and implementation.

I. The “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” Executive Order

On January 21st, the President issued an Executive Order titled [Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#) that purports to redefine civil rights laws in such a way that would prohibit certain equity measures and seeks to chill the private sector from prioritizing diversity, equity, inclusion, and accessibility.

The Order required that within 120 days of the Order, heads of federal agencies, with the assistance of the Attorney General and the Office of Management and Budget, submit to the White House recommendations for enforcement of the administration’s views of the civil rights laws as well as steps that private sector entities are taking that constitute what the administration dubs

as “illegal DEI.” The Executive Order specifically directs federal agencies to “identify 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” as candidates for investigations. For entities that contract with the federal government, the Order requires that agencies identify “a term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.” If an entity makes such a certification and the federal government determines that the certification is false, the entity could be subjected to allegations it violated the False Claims Act.

The EO also requires that the Attorney General and Secretary of Education issue guidance to all states and institutions of higher education that receive federal grants or funds under Title IV of the Higher Education Act regarding measures and practices it maintains are required to comply with the U.S. Supreme Court’s decision in *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 US 181 (2023).

The private sector and higher education communities, philanthropic institutions, and non-profit organizations have expressed alarm regarding what these reports will identify. The administration has already taken punitive measures against law firms, universities and others utilizing DEIA as a means to expand access and opportunity for all Americans, raising profound concerns about retaliation, viewpoint discrimination, and abuse of power.

II. Legal Hurdles to the President’s Anti-DEIA Agenda

The sweeping reach of the President’s Executive Order threatens to roll back decades of progress and risks deepening inequities and reducing equal representation in the private sector. Communities that have historically faced barriers to opportunity, such as people of color, women, LGBTQ+ individuals, and people with disabilities, are at risk of losing critical protections. **Yet, the administration’s attempts are likely to face a range of legal hurdles in the courts – as courts have already handed down substantial setbacks to the administration’s agenda.**

Democracy Forward – along with a broad coalition of civil rights and legal organizations, unions, state and local officials, and educational institutions – has already mobilized to protect and defend the private sector’s right to express support for diversity, equity, inclusion, and accessibility. As the legal challenges continue, we have seen two important trends:

- ❖ The courts have shown concern about **due process rights and constitutional violations** with the President’s anti-DEIA orders; and,
- ❖ **Litigation has shown to be an important tool** that institutions targeted can resort to in order to continue their work.

Below we highlight some examples of the ways in which the administration's attempts to stamp out DEIA initiatives may run afoul of the courts.

Every court to have considered this issue has expressed concern that attempts to penalize the private sector or deter them from engaging in support for DEIA initiatives may violate the First Amendment and the Constitution's guarantee of due process.

- ❖ **Courts have struck down, or found constitutional problems with, the President's anti-DEIA executive orders.** In [*National Association of Diversity Officers in Higher Education et al v. Trump et al.*](#), a federal court issued a [nationwide preliminary injunction](#) against certain provisions, including the provision that requires that entities "certify" their compliance, finding it likely violates the Constitution. The injunction has been stayed by the Fourth Circuit presently. Another court in *Chicago Women in Trade v. Trump et al*, blocked the Department of Labor from requiring certifications of compliance with the President's Executive Orders, finding it to be unconstitutionally vague and a violation of free speech. A third, *National Urban League et al v. Trump et al*, is challenging the executive orders on behalf of three non-profit organizations committed to DEI principles. While these cases are in their early stages, they highlight some of the legal problems that the administration may face.
- ❖ **Every court to have considered the issue has paused, blocked, and/or preliminarily struck down, or found constitutional problems with the Department of Education's "Dear Colleague Letter,"** which threatens educational institutions with prosecution or loss of vital federal funding if they teach students history, sociology, and other lessons referencing race and racism, or provide support to students and foster healthy school communities through DEI programming. The three pending cases are: [*American Federation of Teachers \(AFT\) et al. v. U.S. Department of Education et al.*](#), *NEA v. U.S. Department of Education et al*, and *NAACP v. U.S. Department of Education et al*. Again, while these cases are in early stages, they suggest that the federal government's attempt to condition funding or otherwise disfavor entities that do not ascribe to the administration's view concerning DEIA raises substantial constitutional concerns. Several state attorneys general [have issued guidance](#) regarding the Dear Colleague Letter, which describes some of the legal issues with the administration's approach.
- ❖ **Courts have expressed concern and blocked attempts to target private entities for DEIA programs.** In *Perkins Coie v. DOJ*, a court considered an [executive order](#) that targeted Perkins Coie for its representation of the President's political adversaries and also sought to deter the firm from engaging in so-called "illegal discrimination" through standard DEIA-related practices. The Executive Order directed sweeping sanctions, such as not allowing Perkins attorneys into federal buildings, suspending their security clearances, and seeking to review government contracts the firm had or was handling. The order purported to require that the Equal Employment Opportunity Commission (EEOC) investigate the firm's DEIA practices.

The U.S. District Court for the District of Columbia issued a [decision](#) permanently enjoining enforcement of the executive order, concluding it “violates the Constitution and is thus null and void.” This is the most significant rebuke of the President's agenda against private entities to date. The Judge noted, *“No American President has ever before issued executive orders like the one at issue in this lawsuit targeting a prominent law firm with adverse actions to be executed by all Executive branch agencies (...) In a cringe-worthy twist on the theatrical phrase 'let's kill all the lawyers,'”* she added in her ruling, Trump's executive order *“takes the approach of 'let's kill the lawyers I don't like,' sending the clear message: lawyers must stick to the party line, or else.”*

The court explained that the firm's diversity fellowship program was open to all and not discriminatory, that its participation in the “Mansfield Rule” (considering diverse candidates for leadership roles) involved no quotas or unlawful preferences, and that there was not a basis to claim it is “illegal.” The court also chastised the government for seeking to penalize the private firm for expressing support for diversity and inclusion. Judge Howell noted, *“[T]he government's briefing reveals the true motivation lurking behind the façade of discrimination allegations: the administration's disapproval of plaintiff's speech in favor of diversity.”* The court went on to note that, to the extent that the government relied on public statements (like a press release) to claim that the private firm is engaged in “illegal discrimination,” such a move, again, runs afoul of the First Amendment.

By voiding the order, the court sent a clear message that the administration cannot weaponize federal power to intimidate the legal profession or deter lawyers from working on behalf of clients and that its assertions about “illegal discrimination” are likely not to hold up with court scrutiny.

Other cases also show that the federal courts are blocking a retributive agenda. Last week, [a federal judge issued an order](#) blocking the Department of Justice's attempts to cancel grants that the American Bar Association held, finding it was unlawful retaliation.

In addition to these matters, other pending cases raise concerns before the federal courts.

- ❖ **[Harvard University Sues the Trump Administration](#)**: Several universities and student organizations have come under federal scrutiny for their perceived support of DEIA efforts. After Harvard refused to dismantle its campus DEIA programs, the administration retaliated by freezing billions in federal funding to the university – a move Harvard argues violates its First Amendment rights and the statutory provisions of Title VI of the Civil Rights Act. “Defendants’ actions threaten Harvard's academic independence and place at risk critical lifesaving and pathbreaking research that occurs on its campus,” the lawsuit reads.

Federal agencies are scrutinizing additional universities and scholarship programs. By mid-March, the Department of Education had opened investigations into over 40 colleges for alleged “race-exclusionary” DEIA practices.

- ❖ [**DOE v. Equal Employment Opportunity Commission**](#): In March, the acting head of the EEOC sent letters to 20 law firms, demanding that they hand over detailed personal information about their applicants and employees, dating back 6 to 10 years. The sensitive data includes law students' names, sex, race, academic performance, compensation, participation in affinity groups, and numerous details about their employment history. This move was seen as part of the administration's escalating attack on the incorporation of equity programs and practices at large, influential, industry-leading law firms that have attempted to ensure their talent pools are reflective of the profession.

Democracy Forward represents a group of law students in a [lawsuit](#) challenging this attack on the legal profession. The lawsuit argues that the EEOC's demand for detailed information is an unlawful attempt to intimidate legal professionals who challenge its policies. The EEOC's requests violate statutory protections and fundamental privacy rights. The lawsuit seeks to halt the EEOC's unlawful investigation, prevent any further data collection without proper legal justification, and mandate the destruction of any data already collected.

Depending on how the administration operates as the EO's deadline approaches, we anticipate that many of their attempts will be met with legal skepticism, as many courts have already ruled that elements of the President's anti-DEIA agenda pose constitutional concerns.

III. The Civil Society Community has Shown Great Acts of Solidarity in Opposing the Administration's Attempt to Target Entities

A number of civil society organizations and foundations have expressed public solidarity with each other – seeking to send a message that the administration will not be able to “divide and conquer” in its assault on DEIA practices. Examples of these statements include:

- ❖ [Council on Foundations: A Public Statement from Philanthropy](#)
- ❖ [Statement of Solidarity with Harvard University \(nonprofit and charitable organizations\)](#)
- ❖ [Joint Statement from 13 Attorneys General: President is Misleading the American People on the Purpose of Diversity, Equity, Inclusion and Accessibility Initiatives](#)

As the May 20 deadline approaches, Democracy Forward and other pro-democracy partners remain at the forefront of the legal battle against the Trump administration's anti-DEIA efforts. The fight for DEIA is a fight for fundamental civil rights. Our legal actions remain focused on safeguarding constitutional rights and statutory protections under federal laws, on behalf of all people and communities.

*Democracy Forward is a national legal organization that advances democracy and social progress through litigation, policy, public education, and regulatory engagement.
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