

US Attorney General Opens Door to Criminal Prosecution of Private-Sector DEI Efforts

Corporations, associations, foundations, and institutions of higher education should be prepared for criminal, civil, and congressional inquiries.

On February 5, 2025, newly confirmed US Attorney General Pam Bondi issued a [memorandum](#) to implement the executive order “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” (the Order). The move comes two weeks after President Trump signed the Order, which is aimed at private-sector diversity, equity, and inclusion (DEI) efforts. (For more detailed information on the Order, see this [Client Alert](#).)

The memorandum, titled “Ending Illegal DEI and DEIA Discrimination and Preferences” (the Memorandum), reiterates that the Civil Rights Division (CRD) of the Department of Justice (DOJ) will “investigate, eliminate, and penalize” illegal DEI “preferences, mandates, policies, programs, and activities” in the private sector and at educational institutions that receive federal funds.

The Memorandum instructs the CRD and the Office of Legal Policy to submit, by March 1, 2025, a report outlining recommendations for enforcing federal civil rights laws and “taking other appropriate measures” to encourage the private sector to end “illegal discrimination and preferences, including policies relating to DEI and DEIA.” Specifically, the report must address the following components, almost all of which are drawn directly from the Order:

- Key sectors of concern within the DOJ’s jurisdiction
- The most “egregious and discriminatory” DEI/DEIA practitioners in each of those sectors
- A plan — including “specific steps” — to deter the use of DEI/DEIA programs “that constitute illegal discrimination or preferences,” including proposals for “up to nine potential civil compliance investigations” as well as “**proposals for criminal investigations**”
- Potential litigation activities to support this initiative, including interventions, statements of interest, amicus brief submission, and regulatory/sub-regulatory guidance
- “Other strategies” to end “illegal” DEI/DEIA programs and comply with all federal civil rights laws

Overall, the Memorandum adheres to the plan set forth in the Order and makes clear that DOJ plans to take enforcement seriously; per the requirements above, the report will provide both the potential targets for enforcement as well as a playbook for how to bring those cases. But the imposition of criminal liability for implementing DEI-related programs is not found within the Order, and such prosecutions would be unprecedented.

The Memorandum does not specify the criminal theories the DOJ would pursue, but one possibility may be a civil rights conspiracy pursuant to 18 U.S.C. § 241, which criminalizes an agreement between two or more individuals to injure any person in the “free exercise or enjoyment” of any “right or privilege” secured to them by the Constitution or US law. Section 241 violations are charged as felonies, with the potential for a criminal fine or up to 10 years’ imprisonment, or both.

In the context of this Memorandum, the government may argue that the individuals who established and implemented DEI policies or programs at their organization did so to injure those who did not receive the benefit of those programs, in violation of federal civil rights laws, such as Title VI, Title VII, or Title IX, or 42 U.S.C. Section 1981. Unlike other conspiracy statutes, Section 241 does not require the commission of an overt act; it does, however, require specific intent to interfere with a protected right — a high bar for the prosecution to meet, but one that would expose an organization to a potentially lengthy and difficult investigation.

In this new legal landscape under the Trump administration, corporations, associations, foundations, and institutions of higher education — particularly those that meet the asset and endowment thresholds enumerated in the Order and those described above — should be prepared for criminal, civil, and congressional inquiries, as well as the potential for litigation from private parties. Such enforcement, of course, often does not take consecutive tracks; criminal, civil, and congressional investigations can and do proceed in parallel, and organizations should take steps now to carefully assess any DEI/DEIA preferences, mandates, policies, programs, and activities in place and prepare for the possibility of parallel inquiries.

Latham & Watkins is closely following these developments and will provide updates on any additional actions taken pursuant to the Order and the Memorandum.

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