

Litigation Update: Executive Orders on DEI and More

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Over the last month, legal actions challenging the new administration's executive orders (EOs) and other directives based on those EOs continue to make their way through the federal courts. In some cases, the court has issued a temporary restraining order (TRO) or preliminary injunction (PI) prohibiting the federal government from implementing all or portions of certain executive actions. CAPLAW is particularly [focused on EOs](#) that directly impact federal grantees and private employers. While we continue to review the many court filings, orders, opinions, and memoranda associated with these cases, the key takeaways thus far are as follows:

- **[National Council of Nonprofits v Office of Management and Budget](#)**: This is one of two cases challenging the Office of Management and Budget's memorandum M-25-13 that attempted to pause federal financial assistance implicated by certain EOs (the Pause Memo). A TRO issued in this case was replaced on February 25 by a PI. The PI prohibits the federal government from implementing or reinstating a national funding freeze based on the Pause Memo and will remain in effect until further court action occurs.
- **[New York v Trump](#)**: This is the second of two cases challenging the Pause Memo. A court ruling is expected soon following a PI hearing on February 21. The TRO issued on January 31 remains in effect and prohibits the federal government from implementing the Pause Memo or freezing grants other than on the basis of existing law. Despite this, certain federal funds remain frozen and could invite further action. For example, in response to unreleased FEMA funding, a motion to enforce the TRO specific to FEMA was filed on February 28 and is currently pending before the court. It is possible that motions to enforce the TRO against other federal agencies that continue to freeze funds may be filed. For more information about the TRO, [see CAPLAW's news alert issued February 3](#).
- **[National Association of Diversity Officers in Higher Education v Trump](#)** (NADOHE Case): This case is challenging specific sections of two EOs focused on diversity, equity and inclusion (collectively, DEI EOs): EO 14151, *Ending Radical and Wasteful DEI Programs and Preferencing* (DEI Programs EO) and EO 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (Merit-Based EO). The court issued a partial PI on February 21 which is addressed in greater detail below. The PI prohibits the administration from (1) terminating or pausing "equity-related grants"; (2) requiring certification that programs promoting DEI do not violate antidiscrimination laws; and (3) bringing any False Claims Act or other enforcement action premised on a certification or to deter private employers' DEI programs or principles. On February 25, the administration appealed the PI to the Fourth Circuit, which is currently pending. The PI will remain in place until further court action occurs.



- ***PFLAG v Trump***: A national LGBTQ+ advocacy organization is challenging two EOs establishing the administration’s policies on sex, gender and gender-affirming care (collectively, Gender EOs): EO 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* and EO 14187, *Protecting Children From Chemical and Surgical Mutilation*. The Gender EOs each contain provisions that restrict the use of federal funding to “promote gender ideology” or provide gender-affirming care. A nationwide TRO issued on February 13 prohibits the federal government from conditioning or withholding federal funding under these portions of the Gender EOs based on an entity providing gender-affirming medical care to patients under age 19. The TRO was recently extended through March 5 and a ruling on a PI is expected to follow.
- ***Denver Public Schools v Noem***: This case is challenging the Department of Homeland Security’s **rescission of its “sensitive areas” policy** that restricted its agents from conducting immigration enforcement actions in certain areas, including schools. The court is expected to rule on a pending motion for a TRO and PI soon.

Additional Information About the *NADOHE* Case

Late last week in the *NADOHE* case, the court granted a partial PI prohibiting the federal government from implementing specific portions of the DEI EOs. At this stage, the court only has to determine if *NADOHE*’s arguments are likely to succeed at later stages of the case. The court’s lengthy opinion supporting the PI order focused on the arguments about whether the DEI EOs might violate constitutional rights. It could take significant time before there are any final decisions in this and other EO-related cases.

The court noted that the DEI EOs permit the federal government to take action on “equity-related grants or contracts”, “illegal DEI”, and programs “promoting DEI” but do not define the terms or clarify the kinds of programs or activities at issue. The court explained that the level of vagueness runs up against due process rights under the Fifth Amendment because it prevents entities from understanding what their obligations are under the law and allows the administration to potentially arbitrarily enforce the DEI EOs. The court was also concerned about the federal government targeting certain views (i.e., support or promotion of DEI) for adverse action, which is a particularly harmful form of First Amendment violation. Further, although the federal government is generally allowed to determine what kinds of projects it wants to fund, it cannot infringe on the First Amendment rights that federal contractors and grantees have by retaliating against them for exercising protected free speech.

It is important to note that the terms of the *NADOHE* PI are specific and limited to the provisions of the DEI EOs cited in the court’s order. The order does not address other EOs or portions of the DEI EOs, such as the language in Section 3(c)(ii) of the Merit-Based EO requiring federal agencies to “[e]xcise references to DEI and DEIA principles” from federal grants. The PI also does not prohibit the U.S. Attorney General from preparing the report the president requests in the Merit-Based EO on enforcing federal



antidiscrimination law and DEI, or from engaging in investigations generally. Briefly, the PI order states that the administration cannot:

- (1) pause, cancel, terminate, etc. or change the terms of any awards, contracts, or obligations on the basis of Section 2(b)(i) of [the DEI Programs EO](#), which addresses “equity-related” grants and contracts;
- (2) require any grantee or contractor to make any “certification” or other representation pursuant to Section 3(b)(iv) of the [Merit-Based EO](#); or
- (3) bring any False Claims Act or other enforcement action premised on a certification or to deter a private employers’ DEI programs or principles pursuant to Sections 3(b)(iv) and 4(b)(iii) of the Merit-Based EO.

On February 25, the administration appealed the PI to the Fourth Circuit, which is currently pending. The PI will remain in place until further court action occurs.

The practical implication of this PI is that a federal agency cannot take adverse actions against a grantee or private employer based on compliance with the challenged parts of the DEI EOs. In other words, a federal agency cannot terminate or pause a grant based on it being “equity-related”; require grantees to certify they are in compliance with the DEI EOs and use that certification as a basis of a False Claims Act violation; or deter a private employer’s DEI programs or principles. However, the PI does not necessarily prevent federal agencies from reviewing and cutting out references to DEI principles from federal grants.

The legal framework of federal antidiscrimination law is currently unchanged. Title VII of the Civil Rights Act of 1964 still prohibits adverse employment decisions based on certain protected categories (i.e., race, color, religion, sex, national origin) and Title VI still prohibits discriminating in the provision of federal financial assistance based on certain categories (i.e., race, sex, national origin). Although every administration has priorities that it attempts to integrate within the existing legal framework, Community Action funding continues to be focused on improving the ability of those with low incomes to respond to and cope with the high cost of living.