

Guidance to Defendants Regarding Preliminary Injunction Issued in *National Association of Diversity Officers in Higher Education v. Trump*, 25-cv-333 (D. Md. Feb. 21, 2025)

On February 21, 2025, the United District Court for the District of Maryland issued a preliminary injunction with respect to three provisions of the following two Executive Orders: Executive Order 14,151, 90 FR 8339, entitled *Ending Radical and Wasteful Government DEI Program and Preferencing*; and Executive Order 14,173, 90 FR 8633, entitled *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (collectively “the EOs”). The Court’s preliminary injunction order is attached.

- **Termination Provision:** “Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM ... terminate, to the maximum extent allowed by law, . . . ‘equity-related’ grants or contracts.” EO 14,151, § 2(b)(i).

The Court ordered that all defendants, and all other persons who are in active concert or participation with them, shall not “pause, freeze, impede, block, cancel or terminate any awards, contracts or obligations (‘Current Obligations’), or change the terms of any Current Obligation, on the basis of the Termination Provision.”

- **Certification Provision:** “The head of each agency shall include in every contract or grant award : (A) [a] term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code, and (B) [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.” EO 14,173, § 3(b)(iv)(A), (B).

The Court ordered that all defendants, and all other persons who are in active concert or participation with them, shall not “require any grantee or contractor to make any ‘certification’ or other representation pursuant to the Certification Provision.”

- **Investigation Provision:** directing the Attorney General, in consultation with federal agencies, to write a report “containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying ... [a] plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated ‘DEI’ or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall 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. EO 14,173, § 4(b)(iii).

The Court ordered that all defendants, and all other persons who are in active concert or participation with them, shall not “bring any False Claims Act enforcement action, or other enforcement action, pursuant to the Enforcement Threat Provision, including but not limited to any False Claims Act enforcement action premised on any certification made pursuant to the Certification Provision.”

REQUIRED ACTIONS:

Guidance Regarding the EOs:

- In response to any guidance/announcement that was made to grantees/contractors regarding the two EOs, you should send a follow-up message stating: “In compliance with the Preliminary Injunction issued on February 21, 2025, in the United District Court for the District of Maryland, *National Association of Diversity Officers in Higher Education v. Trump*, 25-cv-333, the U.S. Department of [name] is rescinding the following communications effective immediately: [title of guidance/announcement/training].”

Termination Provision:

- Pursuant to the Court order, do not “pause, freeze, impede, block, cancel, or terminate” any “equity-related” awards, contracts, or obligations or “change the terms” of any such “equity-related” awards, contracts, or obligations on the basis of the Termination Provision. We construe “on the basis of the Termination Provision” to mean that the current obligations cannot be altered or terminated based upon the Termination Provision (*i.e.*, by citing the EO or relying on the EO for legal authority or policy direction), but not to include alterations or terminations that rely exclusively on other legal authorities and were executed by the agency exclusively as a matter of its own independent authority and discretion, as opposed to being based on the EO.
 - In other words, we do not read the injunction as forbidding actions taken in good faith based on separate authority and made wholly independent of the President’s directive in the Termination Provision. To minimize litigation risk, however, agencies should clearly document their independent decisions to avoid any misimpression that it was taken “on the basis of the Termination Provision.”
- To the extent you have issued a currently in-effect “Stop Work Order” on the basis of the Termination Provision, rescind the notice immediately: “In compliance with the Preliminary Injunction issued on February 21, 2025, in the United District Court for the District of Maryland, *National Association of Diversity Officers in Higher Education v. Trump*, 25-cv-333, the U.S. Department of [name] is rescinding the following notice effective immediately: [Stop Work Order notice].”

- If any contracts/grants were terminated and/or modified on the basis of the Termination Provision after 6:20pm EST on February 21, 2025, the termination/modification must be rolled back immediately.
- If any contracts/grants were terminated and/or modified on the basis of the Termination Provision prior to 6:20pm EST on February 21, 2025, please identify those contracts/grants internally and provide that information to litigation counsel. At this time, we do not read the injunction as requiring any retroactive relief; so you need not roll back any such termination/modification.

Certification Provision:

- If you have included a certification/representation provision in your contracts or grant awards with respect to the Federal anti-discrimination laws as detailed in the Certification Provision (i.e. requiring the contractor/grantee to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws), remove those provisions from any new contracts/agreements or make clear in writing to the counterparty that such certifications or representations are voluntary and are not required to execute the contract or grant.
- With respect to pending requests for certification/representation, you should follow up with the following message: “In compliance with the Preliminary Injunction issued on February 21, 2025, in the United District Court for the District of Maryland, *National Association of Diversity Officers in Higher Education v. Trump*, 25-cv-333, recipients are no longer required to certify or make any representation that they (A) agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of 31 U.S.C. § 3729(b)(4) and (B) that they do not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

Investigation Provision:

- We are still assessing the scope of the injunction with respect to this provision, but for now, do not bring any enforcement action (under the False Claims Act or otherwise) in reliance on the Investigation Provision or the two EOs more generally (including the Certification Provision). We will provide further guidance specifically related to the report identified in EO 14,173, § 4(b)(iii) at a later date. We do not understand anything in the Court’s order to restrain or enjoin routine enforcement of applicable laws outside the context of the EOs.

Compliance Tracker:

- Please ensure that communications are sent to all agencies and sub-agencies that issue contracts or grants in your agency or Department. Please keep and maintain a compliance tracker for your and our records of your communications with internal agency officials as well as contractors/grantees regarding the above, as well as any modifications/roll backs of any grant/contract termination.

As the Court's Order reflects, the above terms are temporary as litigation in the case is ongoing. At present, however, the Court's Order is in effect and must be complied with.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

NATIONAL ASSOCIATION OF
DIVERSITY OFFICERS IN HIGHER
EDUCATION, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants

Case No. 1:25-cv-00333-ABA

PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, and upon consideration of the Motion for a Temporary Restraining Order and/or Preliminary Injunction filed by Plaintiffs National Association of Diversity Officers in Higher Education, the American Association of University Professors, Restaurant Opportunities Centers United, and the Mayor and City Council of Baltimore, Maryland (ECF No. 27) (the “Motion”), Defendants’ memorandum in opposition to the Motion (ECF No. 35), Plaintiffs’ reply brief (ECF No. 39), and the exhibits to those submissions, and having held a hearing on the Motion on February 19, 2025, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED as follows:

1. The Motion is GRANTED IN PART and DENIED IN PART.
2. This Order addresses the following provisions in Exec. Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, Executive Order of January 20, 2025, 90 Fed. Reg. 8339 (Jan. 29, 2025) (the “J20 Order”), and Exec. Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based*

Opportunity, Executive Order of January 21, 2025, 90 Fed. Reg. 8633 (Jan. 31, 2025)

(“J21 Order”):

J20 Order § 2(b)(i) (in part) (the “**Termination Provision**”):

Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM, as appropriate, shall take the following actions within sixty days of this order:

(i) terminate, to the maximum extent allowed by law, . . . all . . . “equity-related” grants or contracts[.]

J21 Order § 3(b)(iv) (the “**Certification Provision**”):

The head of each agency shall include in every contract or grant award:

(A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) 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.

J21 Order § 4(b)(iii) (the “**Enforcement Threat Provision**”):

To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall submit a report to the Assistant to the President for Domestic Policy containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and

preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying

. . . (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated ‘DEI’ or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall 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.

3. Defendants other than the President, and other persons who are in active concert or participation with Defendants (the “Enjoined Parties”), shall not:

- a. pause, freeze, impede, block, cancel, or terminate any awards, contracts or obligations (“Current Obligations”), or change the terms of any Current Obligation, on the basis of the Termination Provision;
- b. require any grantee or contractor to make any “certification” or other representation pursuant to the Certification Provision; or
- c. bring any False Claims Act enforcement action, or other enforcement action, pursuant to the Enforcement Threat Provision, including but not limited to any False Claims Act enforcement action premised on any certification made pursuant to the Certification Provision.

Date: February 21, 2025

_____/s/
Adam B. Abelson
United States District Judge