

Updates

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The Dismantle DEI Act: One Potential Blueprint for Forthcoming Attacks on DEI



With the next administration soon to take office, employers have been watching closely to see what tools the returning administration may leverage to make good on its campaign promises to roll back diversity, equity, and inclusion (DEI) policies and practices.

At the same time, the new administration's anti-DEI posturing has not been clearly mirrored by the courts, with courts handing employers legal victories over their DEI policies and practices in several recent high-profile cases. Additionally, despite serious concerns that the Supreme Court of the United States would weigh in on DEI programs in the much-discussed case, [*Muldrow v. City of St. Louis*](#), the Court chose instead to stay out of the fray.

Amidst this fractious backdrop, one bill that was making its way through the last Congress, and is expected to be reintroduced soon, may provide employers with key insights into DEI opponents' next strategies: [The Dismantle DEI Act \(the Act\)](#). The Act, proposed by Republican Congressman Michael Cloud (TX-27) and previously co-sponsored by Vice President-elect (then-Senator) JD Vance, has not yet passed either chamber of Congress. However, the Act's provisions may form the basis for an early executive order by the new president that would likely focus not only on internal government operations but also federal contractor requirements.

In this Update, we cover the contents of the proposed Act and how its provisions may form the basis for a new anti-DEI executive order.

What Does the Bill Provide?

Primarily, the Act seeks to strike all DEI activity—including trainings, DEI offices, and other standard diversity practices—from internal federal agencies, and to make certain DEI topics broadly unlawful. Some portions also seek to rein in DEI practices for federal contractors. Broadly, the goal is to prohibit the use of federal funds for certain DEI activities. In sum, the Act would:

- **Set new specified limitations on protected classifications.** Adding a new Title XII to the Civil Rights Act of 1962, entitled “Prohibited Diversity, Equity or Inclusion Practice Defined,” proposed Title XII identifies the classifications protected under the Act as “race, color, ethnicity, religion, *biological* sex, or national origin.” (emphasis added). The inclusion of ‘biological’ appears intended to prevent application of *Bostock*’s reasoning to the Act.
- **Rescind executive orders related to DEI.** Proposed Section 101 would rescind a number of existing executive orders, including:
 - Executive Order 13985, which relates to advancing racial equity through the federal government.
 - Executive Order 13988, which prevents discrimination on the basis of gender identity and/or sexual orientation.
 - Executive Order 14020, which establishes the White House Gender Policy Council.
 - Executive Order 14035, which promotes DEI and accessibility in the federal workforce.
 - Executive Order 14091, which (like Executive Order 13985) advances racial equality and support for underserved communities through the federal government.
- **Prohibit certain types of DEI trainings (for government employees and federal contracts exceeding \$10,000).** Proposed Section 201 prohibits trainings for government employees that address “diversity, equity, and inclusion, critical theory (relating to race, gender, or otherwise), intersectionality, sexual orientation or gender identity, or any substantially similar theory or policy.” Similarly, proposed Section 301(a)(5) forbids contracting with an entity that requires or subjects its employees to a training that “asserts that a particular race, color, ethnicity, religion, biological sex, or national origin is inherently or systemically superior or inferior, oppressive or oppressed, or privileged or unprivileged” (hereafter, “anti-racism training”).
- **Prohibit race-conscious activities and taking adverse actions for failing to participate in a DEI event.** Proposed Section 302 forbids discrimination in a federal program or activity and states that an individual “may not be subject to or required to comply” with anti-racism programming. “Federal agencies” would enforce the provision pursuant to “Title VI principles.” Similarly, proposed Section 106 forbids agencies from taking personnel actions against Federal employees and applicants for failing to participate in DEI events and trainings or refusing to sign certain DEI-related statements.
- **Prohibit the use of federal funds for certain DEI activities.** Proposed Section 303 prohibits the use of federal funds for maintaining a DEI office, paying for a DEI officer, or developing DEI training courses, which include education on sexual orientation or gender identity. Anti-racism training courses would also be included.
- **Wind up government DEI programs and offices and prevent rehire of affected employees.** Proposed Section 105 would close DEI offices in federal agencies and require those agencies to undertake a reduction in force for all affected employees, preventing their rehire.
- **Prohibit the use of federal grant money for DEI offices, DEI officers, and anti-racism trainings.** Proposed Title IV would require federal grant agreements and cooperative agreements to specify that no federal funds will be used to maintain a DEI office, employ a chief DEI officer, or engage in anti-racism training. Of note, the proposed language does not include a requirement that such agreements include nondiscrimination or retaliation provisions for requiring employees to participate in DEI training.
- **Create exceptions for certain Equal Employment Opportunity (EEO) or American Disability Act (ADA) offices and the use of nonfederal funds.** The proposal includes exceptions for (1) “maintenance and funding of an Equal Employment Opportunity office, as historically organized and operated”; (2) an office enforcing the ADA; and (3) use of nonfederal funds by a federal contractor.

We note that the Act’s text is silent as to which federal agencies would spearhead compliance and enforcement for its federal contractor-related provisions. Enforcement may end up proceeding through the procurement process, which would entail contracting agencies adding new clauses related to the Act’s provisions into federal

contracts. The Act's text also does not include clear language requiring potential claimants to file with the U.S. Equal Employment Opportunity Commission prior to bringing a federal claim under it, which would distinguish causes of action brought under the Act from other, garden-variety discrimination claims.

How Might the Act Form the Basis for a New Executive Order?

For now, it is unclear whether the bill will pass or instead get lost amidst the numerous other priorities of the new administration. However, if passed, the Act would likely trigger a challenge from many organizations that remain committed to diversity as a core value and business imperative. Here, we note that similar efforts (*i.e.*, Florida's Stop Woke Act and the 2020 DEI training ban) were previously struck down on First Amendment grounds.

Instead, the Act may form the basis for anticipated executive action to limit DEI in the federal government and federal contracts. We anticipate that the new administration will similarly seek to eliminate federal funding for DEI initiatives in the workplace and implement new regulations pertaining to federal contractors via executive action. In particular, any DEI-related executive orders from the new administration would likely include the Act's proposed bans on anti-racism training and adverse actions for refusing to participate in DEI-related activities and impose new requirements for federal contractors to avoid the use of federal funds for DEI offices and officers. Biden administration executive orders pertaining to diversifying the federal workforce, including Executive Order 13988, which prevents discrimination on the basis of gender identity and/or sexual orientation, are also likely to be rescinded.

How Should Federal Contractors Prepare?

Regardless of whether the Act becomes law or morphs into an eventual executive order, federal contractors and federal grant recipients should consider taking the following preemptive actions to lower risks associated with the new administration's anti-DEI push:

- **Review DEI funding.** Federal contractors should determine whether any federal monies are being used for DEI purposes. The Act's prohibition on the use of federal funds for DEI purposes makes it imperative that federal contractors know how it would be impacted by its restrictions. As a reminder, the Act would allow nonfederal funds to continue to be used for DEI purposes.
- **Review DEI programs for coverage.** Although the Act focuses significantly on DEI offices and DEI trainings, including trainings related to sexual orientation or gender identity, many widely used trainings would likely remain outside the Act's coverage, such as sexual harassment trainings. The current text also does not forbid other forms of DEI programming, including the use of focus group programming that are open to all, diversity recruiting tools, and employee resource groups, among others. Moreover, standard EEO practices—such as investigating internal discrimination and harassment claims and providing reasonable accommodations—appear to remain viable. As such, the proposal, in even its most restrictive reading, would likely allow many common DEI practices to continue. However, DEI programs should be reviewed to identify the extent to which they cover impermissible topics, in particular topics that address privilege, oppression, or bias, especially when those topics discuss the inherent or systemic nature of those phenomena.
- **Evaluate sexual orientation and gender identity programming.** As drafted, the Act takes special aim at training courses related to sexual orientation or gender identity, which is consistent with the new administration's strong opposition to these protected categories. While the language here is vague, the Act is likely a harbinger of where much anti-DEI focus will be directed.
- **Review personnel policies.** In addition to divesting DEI funds from any federal funding streams, federal contractors should review the mandatory nature of any DEI-related trainings they may offer, in addition to

personnel policies related to DEI activities. Mandatory trainings and adverse actions against employees who refuse to participate are specific targets of the Act.

Finally, as always, federal contractors should continue to seek advice from trusted outside counsel regarding the latest DEI developments. As courts continue to grapple with how to analyze workplace DEI efforts, and a new administration takes aim at standard DEI practices, it will be essential for federal contractors to stay up to date on this ever-shifting legal topic. Perkins Coie will continue to closely monitor developments in this space.

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