



Navigating Recent Presidential Executive Orders and Federal Guidance

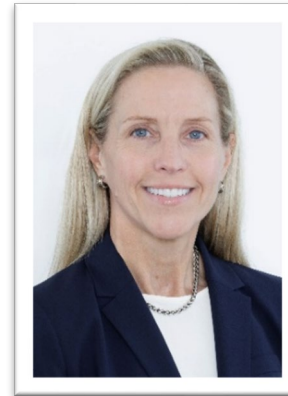
Today's Presenters

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Agenda

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- Background on Executive Orders and Anti-Discrimination Laws
- Diversity, Equity & Inclusion
- LGBTQ+ & Gender Identity
- Immigration
- Key Take-Aways
- Q&A

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Setting the Stage

Taking a Breath and a Step Back

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- ☐ What is an Executive Order?
- ☐ What are the limitations?
- ☐ When does an Executive Order override Congressional or judicial authority?

Overview of Federal & State Laws

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- Federal Laws

- Title VII

- Title VI

- Title IX (Educational Programs)

- Shift in interpretation under previous administrations and presently

- Massachusetts

- c. 151B

- Federal and State Law Tension

EO Impacts on DEI Initiatives

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- ❑ On their face, EOs relating to DEI are extraordinarily far-reaching while also extremely confusing and ambiguous.
- ❑ Let's take a look at:
 - ❑ What they say
 - ❑ What they actually mean
 - ❑ And how will they impact your organization, if at all?

What it means...

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- ❑ EOs conflate unlawful discrimination (hiring preferences) with best practices for promoting DEIA in the workplace
- ❑ Discrimination *is* illegal; DEIA is *not*; is not the same as affirmative action

Significant litigation challenges combing back the EOs

**Nat'l Assoc. of Diversity Officers
in Higher Ed v. Trump (D. Md. Feb.
21, 2025)**

**Chicago Women In Trades v.
Trump (N.D. Ill. Apr. 15, 2025)**

**Nat'l Council of Nonprofits v.
Office of Budget Mgmt. (D.D.C.
Feb. 25, 2025)**

- ❑ Court indefinitely extended injunction on federal funding freeze.

Other challenges

- ❑ (e.g., immigration, policy changes, such as rescission of memo regarding immigration enforcement in places of worship and schools; transgender participation in athletics; ban on gender affirming care)

What it means...

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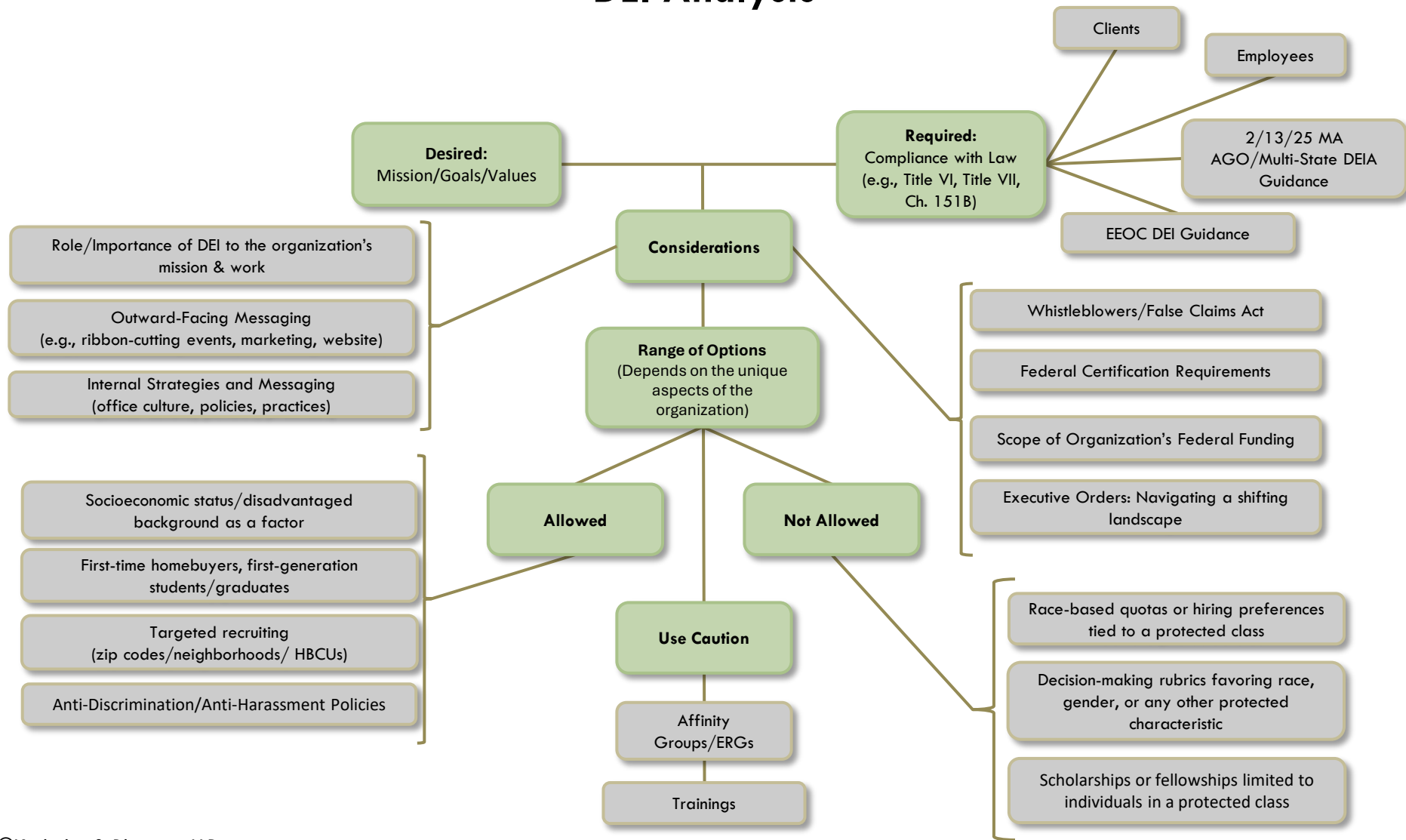
- ❑ Multi-State AGO Guidance Concerning DEI Employment Initiatives (2/13/25)
- ❑ Policies and practices that promote diversity are not the same as preferences in hiring or promotion based upon protected characteristic which is unlawful except in narrow circumstances.
- ❑ EOs do not prohibit otherwise lawful practices/policies promoting DEIA.
- ❑ Employment policies that incorporate DEIA best practices reduce litigation risk to employer by affirmatively protecting against discriminatory conduct that violates the law.
- ❑ Employment discrimination laws generally require employers to pay attention to the impact their practices have on different groups based upon protected characteristics.

Potential Impacts/Risks to You

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- Keep a close eye on how cases play out + whether the gov't complies with the decisions with respect to, e.g.,
 - Federal funding freeze
 - Whistleblower claims and False Claims Act as enforcement tools (DOJ 5/19/25 Memorandum Announcing Civil Rights Fraud Initiative Encouraging Use of FCA)
 - Federal labor force reductions (may mean longer waits for cases at EEOC, etc.)

DEI Analysis



Best Practices (likely still permissible)

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In the Workplace

DEI-based mission – emphasizing inclusion, fair access and opportunity for all

Teaching, PD and curriculum that discuss DEI topics and provides equal access

Initiatives focusing on different perspective, experiences, not tied to a particular protected class

Race/gender neutral approaches

Crediting personal experience/demonstrated ability/actions to address discrimination, bias, bigotry

Programming/curricula focusing on particular groups (e.g., race, gender, sexual orientation)

☐ Affinity groups/Employee Resource Groups (that are open to all)

Policies/Procedures: Anti-harassment policies/trainings (e.g., unconscious bias, inclusive leadership, disability awareness)

☐ BUT **cannot** require certain racial groups to attend certain trainings, however.

Recruitment/Hiring

Focus on experiences/barriers faced by students/employees from specific groups (but are available to all)

Recruitment widespread to attract larger pool of candidates

Set criteria for evaluating applicants/students focusing on experience, skill

Finding your organization's risk tolerance level

LGBTQ+ and Gender Identity

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- EO 14168 - Only 2 sexes: M&F
 - ▣ *Bostock v. Clayton County, Georgia* 590 U.S. 644 (2020)
- EEOC: Has moved to dismiss pending transgender bias cases and paused processing of transgender bias charges.
 - ▣ Workers may still pursue discrimination claims based upon gender identity in MA state courts/MCAD
- Gender Identity/Preferred Pronouns

Balance of Employee Rights

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- First Amendment Considerations
 - Free Speech
 - Religion
- Conflicts between employees can be tricky to navigate
 - Follow your discrimination/harassment and reasonable accommodation policies with fidelity
 - Consult with counsel
- Be clear in employee handbooks and staff trainings that any posts made outside of one's professional responsibilities must not reference the organization or suggest that views are that of the organization.

Immigration EOs

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- ❑ Scope of enforcement unclear, but prior protections for ICE enforcement at schools, religious organizations rescinded.
- ❑ Adopt an ICE Policy and Protocol
 - ❑ If ICE comes to the organization, how will employees be expected to respond; how will safety be maintained?
- ❑ Expect increase in I-9 Notices of Inspection
- ❑ Importance of Internal I-9 Audits
 - ❑ Consider working with counsel and designating findings as privileged.

Key Take-Away: Risk Analysis

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- Assess and monitor internal risks/compliance and strategize
 - Review existing internal and external facing narratives and social media
 - Review and update relevant policies as needed—e.g., ICE Policy
- Affinity Groups/ERGs are not illegal but need to be thoughtful about promoting them.
- Train staff on anti-discrimination policies/procedures; implement equitably and with fidelity
- Stay informed
 - Federal and State Guidance (AGO)
 - Communicate with other organizations with similar missions/interests
- Communicate with counsel as needed
 - If you receive notice or correspondence from a federal agency—don't sit on it!

Questions?



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