



# **Make it Make Sense: Navigating the Impact of Recent Executive Orders on Massachusetts Employers**

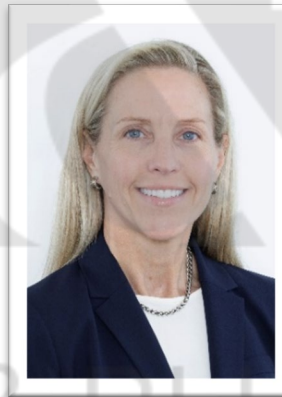
# Today's Presenters

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# Agenda

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- ❑ Background on Executive Orders and Anti-Discrimination Laws
- ❑ Federal – State Law Tension
- ❑ Diversity, Equity & Inclusion
- ❑ LGBTQ+ & Gender Identity
- ❑ Immigration
- ❑ NLRB Guidance Rescissions
- ❑ EEOC Enforcement
- ❑ Key Take-Aways
- ❑ Q&A

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# Key Executive Orders/Areas of Impact

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## Diversity, Equity, and Inclusion

### EO 14151:

Ending Radical and Wasteful Government DEI Programs and Preferencing

### EO 14173:

Ending Illegal Discrimination and Restoring Merit-Based Opportunity

### EO 14148:

Initial Rescissions of Harmful Executive Orders and Actions

### EO 14201:

Keeping Men Out of Women's Sports (Less directly relevant here)

### EO 14168:

Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

## Immigration

### EO 14159:

Expedited Removal

### EO 14163:

Suspension of US Refugee Admissions Program

### DHS Revocation of Temporary Protected Status

DHS Revocation of Temporary Protected Status

### Proclamation 10888:

Prohibiting Non-Citizens from Invoking Asylum Protection

# 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?

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# Overview of Federal & State Anti-Discrimination Laws

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## □ Federal Laws

- Title VII

- Title VI

- Title IX

- Shift in interpretation under previous administrations and presently

## □ Massachusetts

- c. 151B

- c. 151C and Charter School regulations

# Federal Law vs. State Law Tension

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- ☐ Supremacy Clause
- ☐ Preemption
- ☐ Examples

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# 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?

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# EO 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing (1/20/25)

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Focus on “**illegal** and **immoral** discrimination programs, going by the name, ‘diversity, equity, and inclusion’ (DEI)”

Directs termination of “all discriminatory programs, including **illegal** DEI and [DEIA] . . . mandates, policies, programs, preferences, and activities . . . , under whatever name they appear.”

Directs termination within 60 days “**to the maximum extent allowed by law** . . . all ‘equity action plans,’ ‘equity’ actions, initiatives, or programs, ‘equity-related’ grants or contracts; and all DEI or DEIA performance requirements for . . . contractors, or grantees.”

Directs agency heads to provide OMB Director with a list of all “Federal grantees who received Federal funding **to provide or advance** DEI, DEIA, or ‘environmental justice’ programs, services, or activities since January 20, 2021.”

# EO 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

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Employers “actively use **dangerous, demeaning, and immoral race-** and sex-based preferences under the guise of so-called ‘diversity, equity, and inclusion’ (DEI) or ‘diversity, equity, inclusion, and accessibility’ (DEIA) that can violate the civil-rights laws”

Encourages “private sector to end **illegal** DEI discrimination and preferences”

Terminate “**all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements**” and enforce “our longstanding civil-rights laws and to combat illegal private-sector **DEI preferences, mandates, policies, programs, and activities.**”

Grant recipients/contractual counterparties must “**certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.**”

“Excise references to DEI and DEIA principles, under whatever name they may appear, from . . . contracting, grants . . .”

Directs AGO/Sec’y of Education, within 120 days, to “jointly issue guidance to all State and local educational agencies that receive Federal funds” re complying with Students for Fair Admissions, Inc. (2023)

# 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)

- ❑ PI granted: EOs unconstitutionally vague and may violate free speech
  - ❑ Employers NOT required to “certify” compliance with EOs re DEIA
  - ❑ Fed. gov’t can’t enforce compliance with EOs (stop funding/permit remedies under False Claims Act)

### 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 Guidance Concerning DEIA Employment Initiatives \(2/13/25\)](#)
  - Issued to “help businesses, nonprofits, and other organizations . . . understand the continued viability and important role of [DEIA] efforts . . . in creating and maintaining legally compliant and thriving workplaces.”
  - DEIA “best practices are not illegal”
  - Cannot, through an EO, prohibit[ ] otherwise lawful activities in the private sector or mandate[ ] the wholesale removal of these policies and practices within private organizations, including those that receive federal contracts and grants.”
  - “Well-designed [DEIA] initiatives also call on employers to pay attention to the (intentional and unintentional) impact their policies and practices have on different groups of current and prospective employees.”

# What it means...

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- ❑ 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 these cases play out and whether the gov't complies with the court decisions, with respect to, e.g.,
  - Federal funding freeze
  - Whistleblower claims and False Claims Act as enforcement tool
  - Federal labor force reductions [may mean longer waits for cases at EEOC, etc.]

# Proactive Compliance Measures

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## ❑ Clearly Prohibited:

- ❑ Direct hiring/recruiting to specific protected class (likely legal challenges will follow)
- ❑ Quotas or admissions targets based on protected class
  - ❑ See *Students for Fair Admission v. President & Fellows of Harvard College* (S. Ct.) (explicit consideration of race as a factor in making admissions decision for school receiving federal funding is unlawful)

# 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
- EO 14201 – Federal government will interpret Title IX using definition in EO 14168
- *Bostock v. Clayton County, Georgia* 590 US 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

# LGBTQ+ and Gender Identity (continued)

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## □ Gender Identity/Preferred Pronouns

### □ Recent First Circuit cases

- *L.M. v. Town of Middleboro* (Petition for writ of cert. pending at SCOTUS)
- *Foote v. Ludlow School Committee* (Petition for writ of cert. pending at SCOTUS)

**Charter Schools:** Required by state charter school statute (M.G.L. c. 71, § 89(m)) and regulations (603 CMR 1.05(2)) to include nondiscrimination statement that prohibits discrimination on basis of gender identity.

# 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 Executive Orders

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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.

# NLRB Guidance Rescissions

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- On February 14, 2025, National Labor Relations Board (“NLRB”) Acting General Counsel issued a memo rescinding several memos issued by the former General Counsel.
- Key memoranda rescissions and implications:
  - **GC 21-03: Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines.**
  - **GC 23-05: Guidance in Response to Inquiries about the *McLaren Macomb* Decision.**
  - **GC 23-08: Non-Compete Agreements that Violate the National Labor Relations Act.**
    - However, MA has its own Non-Compete Law that went into effect in 2018.

# EEOC Enforcement

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- Acting EEOC Chair signaled change in EEOC's enforcement priorities, which include “rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.”
- The U.S. Department of Justice has signaled plans to withdraw from enforcement of EEOC's pregnant worker accommodation rule that was challenged by Catholic groups opposed to provisions including abortion as a medical condition related to pregnancy that employers must reasonably accommodate.
  - **MA PWFA:** Also prohibits employment discrimination on the basis of pregnancy or pregnancy-related condition.
- Employers who rely heavily on the H1-B visa program could be subject to increased scrutiny.

# Key Take-Away: Risk Analysis

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- ❑ No need to rush to change existing policies BUT:
  - ❑ Assess your risk
  - ❑ Review existing internal and external facing narratives and social media to be aware of anything that might trigger a challenge
  - ❑ Review and update relevant policies as needed—e.g., ICE Policy
- ❑ While Diversity/Affinity groups are not illegal—need to be thoughtful about promoting them.
- ❑ Monitor Internal Compliance
  - ❑ Pay attention to any subsidiaries and partner organizations as well.
- ❑ Make sure staff are trained on anti-discrimination policies and procedures
  - ❑ Be sure policies are implemented equitably and with fidelity.
- ❑ Stay informed –Federal and State Guidance (AGO; DESE); 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!

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