Patterson Belknap

Employment Law Alert
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The Fourth Circuit Rejects Facial Challenges to Executive Orders Addressing DEI Initiatives and Programs

Trump Executive Orders

Shortly after taking office on January 20, 2025, President Trump issued several executive orders intended to end Diversity, Equity, and Inclusion (DEI) initiatives within the federal government and among federal contractors. Collectively, these Executive Orders, which we summarized in a prior client alert, included requirements that:

(1) the Attorney General, "in consultation with the heads of the relevant agencies" :

a. prepare a report recommending a "plan of specific steps or measures to deter DEI programs or principles" within 120 days ("Report Provision")

b. "take other appropriate measures to encourage the private sector to end illegal discrimination" ("Enforcement Threat Provision")

(2) every federal contract or grant contain a clause requiring the contractor or grantee to certify that they do not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws" ("Certification Provision")

(3) all federal agencies, departments, and commissions in consultation with the Attorney General and the directors of the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM) "terminate, to the maximum extent allowed by law" all DEI positions in their offices as well as "equity-related" grants and contracts ("Termination Provision")

The Executive Orders, including the Report Provision, Enforcement Threat Provision, Certification Provision, and Termination Provision (collectively, the "Provisions") were subject to swift legal challenges. The Fourth Circuit Court of Appeals recently rebuffed an attempt to invalidate the Provisions *in their entirety* but left the door open to challenges that the Provisions are unconstitutional *as applied to individual circumstances*. Both in its holding and reasoning, the Fourth Circuit closely followed the decision of the U.S. District Court for the District of Columbia in *Nat'l Urban League v. Trump*, 783 F. Supp. 3d 61 (D.D.C. 2025), which addressed identical challenges to the Executive Orders.

The Lawsuit and Lower Court Decision

The City of Baltimore, the National Association of Diversity Officers in Higher Education ("NADOHE"), and the American Association of University Professors ("AAUP") sued a variety of federal agencies and departments seeking an injunction (or order) preventing the enforcement of the Provisions *in any circumstance.* In their complaint, Plaintiffs described how the National Science Foundation refused to approve travel requests for AAUP members; how an institutional member of the NADOHE was forced to cancel a conference because the Department of Labor withheld funds; how the City of Baltimore received letters from the Department of Health and Human Services to cease their DEI-related programs and demanded certification consistent with the executive orders.

Plaintiffs argued that the Report Provision, Enforcement Threat Provision, and Certification Provision constituted content-based and viewpoint discriminatory speech that violated the First Amendment. Moreover, these provisions also had a chilling effect on speech because expressing or participating in any activity that may be DEI-related could potentially draw scrutiny from the

Administration. And because the Enforcement Threat and Termination Provisions' vagueness invited arbitrary and discriminatory enforcement, Plaintiffs argued that the provision violated the Fifth Amendment.

As brief background, there are two types of legal challenges to statutes and other government actions:

- *As-Applied Challenges*: Argues invalidity only as to a particular plaintiff and set of facts
- *Facial Challenges:* Argues general invalidity (a much higher bar to meet)

On February 21, 2025, the U.S. District Court for the District of Maryland held that Plaintiffs had "shown a likelihood of success on the merits," and preliminarily enjoined (1) the Termination Provision, (2) Certification Provision, and (3) Enforcement Threat Provision of these executive orders, but declined to preliminarily enjoin (4) the Report Provision. *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 289-290 (D. Md.). The preliminary injunction precluded the government defendants from enforcing these provisions for the duration of the legal proceedings until the district court finally determined the legality of the challenged Provisions of the Executive Orders. The government defendants appealed to the United States Court of Appeals for the Fourth Circuit, seeking a ruling that enforcement of the Provisions could continue during the pendency of the legal proceedings.

The Fourth Circuit Upholds the Executive Orders

The Fourth Circuit reversed the District Court and vacated the preliminary injunction, emphasizing the high burden for a successful *facial challenge*, namely that: "the provision is unconstitutional in all of its applications, or that it lacks any plainly legitimate sweep." *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189 (4th Cir. Feb. 6, 2026). A summary of the key aspects of the decision follows.

Report and Enforcement Threat Provisions

The Fourth Circuit reversed the district court and held that Plaintiffs likely lacked standing to challenge the Report and Enforcement Threat Provisions because they could not show any concrete, particularized "injury in fact." Specifically, the Court held that the direction to the Attorney General and the heads of agencies to prepare a policy to deter DEI programs does not present an "imminent danger of an injury" to Plaintiffs. The Court held, however, that the Plaintiffs had standing to challenge the Termination and Certification Provisions, and moved to the "merits" of those Provisions.

Termination Provision

The Court rejected Plaintiffs' argument that the Termination Provision likely violated the Fifth Amendment on the grounds that it was excessively vague. While the executive order did not provide any guidance on what constituted "equity-related" grants and contracts slated for termination, such vagueness in funding policies was likely both rational and constitutional, and accordingly likely permissible under existing legal precedent. This is because the government enjoys wide latitude in determining its own spending priorities.

Certification Provision

Finally, the Fourth Circuit held that the First Amendment challenge to the Certification Provision was unlikely to succeed, explaining that the Certification Provision simply asks contractors and grantees to confirm they are following laws already on the books, not to abandon lawful DEI efforts. Crucially, the Fourth Circuit clarified that the Certification Provision "does not say that all DEI programs [are] illegal under existing antidiscrimination law." Accordingly, if the Administration enforced this provision in an arbitrary manner to shut down DEI programs contrary to federal anti-discrimination law, then Plaintiffs could bring an as-applied challenge (rather than a facial challenge).

Key Takeaways

The Fourth Circuit's decision signals that plaintiffs cannot rely on a "shortcut" by facially challenging the Provisions. Instead, challengers will likely need to demonstrate how the Provisions violate their rights in their specific circumstances. From a practical standpoint, the Fourth Circuit's decision changes little for employers. Before the ruling, employers operated under the assumption that the Provisions could be enforced against them—and they should continue to do so. Recommended steps include conducting privileged reviews of DEI-related policies and practices and training staff on applicable anti-discrimination standards. These risk mitigation measures are covered in more detail in previous client alerts here and here.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

Lisa E. Cleary	**212.336.2159**	**lecleary@pbwt.com**
Douglas L. Tang	**212.336.2844**	**dtang@pbwt.com**
Ryan J. Kurtz	**212.336.2405**	**rkurtz@pbwt.com**
Bharath Palle	**212.336.2135**	**bpalle@pbwt.com**

Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036–6710
212.336.2000
www.pbwt.com