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Steer Clear of 'Illegal DEI' With Leveling—Not Lifting—Programs

- ***NYU Law professors analyze the meaning of "illegal DEI" in EO***
- ***Proposed framework helps organizations avoid becoming a target***

President Donald Trump's executive order on "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" repeatedly invokes the idea of "illegal DEI." But what exactly does the term "illegal DEI" mean? Answering this question has become urgent.

The order instructs federal agencies to draw up a list of organizations potentially engaged in illegal diversity, equity, and inclusion activities to target with "civil compliance investigations." It also requires federal contractors and grant recipients to certify that they don't operate any unlawful DEI programs. While the order is currently subject to legal challenge, it could have sweeping implications for the practice of DEI if upheld in court.

Nowhere does the order offer a working definition of "DEI," let alone provide a list of specific DEI activities that the administration considers illegal. Nevertheless, we can intuit the answer from a variety of legal sources.

First, and most importantly, the definition of "illegal DEI" will be set by the US Supreme Court interpreting acts of Congress, not by the executive branch acting on its own. As we have argued elsewhere, the Supreme Court's *Students for Fair Admissions v. Harvard* decision indicated that illegal DEI would have to exhibit preferences for protected groups, such as those based on race or sex. That suggests that DEI policies will only be "illegal" if they target protected groups for special treatment, as opposed to removing biases that preclude such groups from competing on a level playing field.

The executive order reflects that understanding in its insistence on "merit-based" decisionmaking. Similarly, the new acting chair of the Equal Employment Opportunity Commission, Andrea Lucas, has stated that organizations should "ditch DEI" and "return to EEO" (equal employment opportunity) and "merit." While both the executive order and Lucas at times seem to suggest that all DEI is problematic, they are actually leaving ample room for DEI initiatives that comport with principles of meritocracy or equal opportunity.

Put another way, the difference between illegal DEI and legal DEI could be styled as the difference between what we call "lifting" DEI and "leveling" DEI. The contrast can be seen through example. In 1970, less than 5% of musicians in the top symphony orchestras were women. We could solve such a problem in one of two ways. Lifting DEI would give a "bump," or preference, to women in the audition process. Leveling DEI would de-bias the audition process by removing gender from the equation altogether. In fact, the orchestra directors chose the leveling strategy and had everyone audition behind a screen, arguably leading to a dramatic increase in the number of women musicians.

However unfairly, anti-DEI advocates have primarily trained their sights on lifting DEI. The vast majority of anti-DEI lawsuits are challenging programs that limit eligibility to members of underrepresented groups, government initiatives that explicitly consider race, and other alleged "preferences" or "quotas" in the workplace. Hiring set-asides, tiebreaker practices, and tying manager compensation to meeting diversity goals are all examples of lifting DEI. Organizations that adopt or continue such practices risk being targeted by the new administration.

In our experience, leveling DEI garners much wider support. It includes structured recruitment and promotion processes to minimize bias, opening gender- and race-based affinity groups to all-comers, expanding mentorship programs, establishing procedures for fair work allocation, and building DEI initiatives around concepts like "allyship" and "inclusive leadership" to benefit people of all identities and backgrounds. It also includes rhetorical shifts: The statement "Talent is everywhere but opportunity is not; DEI closes the gap" (leveling) differs from "We use diversity hiring to recruit people from historically disadvantaged groups" (lifting).

Survey data lends support to the idea that leveling DEI is popular. Most Americans oppose taking race and ethnicity into account in hiring and promotion decisions, yet there is wide support for "opening doors" so that "people who have traditionally had less access to opportunities get the chance to be considered."

To be clear, not all DEI practices can be neatly bucketed into the categories of "lifting" and "leveling." Yet the distinction provides a rough-and-ready guide for anyone trying to navigate a complex landscape. Many corporate leaders are anxious about doing DEI work that could make them the target of a damaging lawsuit, a social media pressure campaign, or now a federal investigation. For such leaders, embracing leveling DEI provides a useful off-ramp from the seemingly binary choice of "DEI or not."

Indeed, it isn't necessary to use the term "DEI" to embrace leveling practices. They could just as easily be called "equal opportunity" initiatives. What matters is that, at least for now, no one—not even this vehemently anti-DEI administration—is stopping organizations from removing bias from workplace systems to create a level playing field for all.

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