



Federal EO Update for Higher Education

February 27, 2025

**Bricker
Graydon**

Reminders

- This information is good as of now. In an hour, it might not be. Stay tuned for new Executive Orders (EOs) and judicial or legislative responses.
- The political aspects of this are undeniable, but our first priority is simple: clarity.
- Remember not to lose the forest for the trees. What is the big picture? That will help guide our next steps.

Disclaimers

We can't help ourselves. We're Lawyers.

- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- You will receive slides for today's presentation after we've concluded.
- No, we aren't recording this – because we expect things to shift quickly.
- Please use the Q&A to ask questions.

Agenda

- PWFA Litigation Update
- USDA/Ed. Maine Title IX Investigations
- DOGE/Ed. Litigation Update
- OCR Investigations
- Funding Freezes
- DEI EO Litigation Update

Themes:

- What does this mean now?
- What does it tell us about what's coming next?
- What can/must you be doing now?

PWFA Litigation Update

- 17 states filed suit against the EEOC in 2024, challenging the implementation of the Pregnant Workers Fairness Act regulations.
 - EEOC's regulations stated that the PWFA covers abortion-related accommodations, such as time off to obtain an abortion and recover from the procedure.
 - June 2024 – lower court dismissed the case for lack of standing.
- Feb 20, 2025 – Eight Circuit reversed; held that the 17 states do have standing to sue because they are subject to the PWFA's rules.
- Next steps: Keep an eye out for litigation updates. The EEOC cannot rescind its own rules because it does not currently have quorum.
 - Current EEOC Acting Chair, Andrea Lucas, says she will reconsider the potentially unlawful provisions of the regs once quorum is re-established.

Maine – U.S. Dep't of Education Investigation

- OCR announced it would investigate the Maine Department of Education (MDOE) and Maine School Administrative District # 51.
- OCR said that it was initiating the investigation into the MDOE "amid allegations that it continues to allow male athletes to compete in girls'" athletics and "denied female athletes female-only intimate facilities."
- The investigation into District #51 alleges that "at least one male student" is competing in athletics.
- On February 20, 2025, the President stated that Maine would risk federal funding if it did not comply with the February 5, 2025 EO, "Keeping Men Out of Women's Sports."

Maine – U.S. Dep't of Agriculture Investigation

February 22, 2025

- The Department of Agriculture informed the State of Maine, the University of Maine System, and the Maine Attorney General of its intent to launch a "compliance review" based on "indications" that the State of Maine "is openly disregarding" EO 14201.
- According to the Notice, the University of Maine receives over \$100 Million in funding from the Agricultural Research Service and National Institute of Food Agriculture
- Cited Authority: 7 C.F.R. Part 15a

Takeaways

- Review Transgender athletics participation policies for compliance with state, federal, and local laws.
- Be prepared to see enforcement from Ed. OCR and other agencies that distribute federal funding to your campus.

DOGE/Ed. Litigation Update (1 of 3)

- American Federation of Teachers v. Scott Bessent, et al.
 - Standing
 - Plaintiffs alleged that granting DOGE access to their personal information (bank accounts numbers, SSNs, birth dates, physical and email addresses, disability status, marital status, etc.) invades their privacy and increases their risk of identity theft.
 - Government argued that the plaintiffs had not suffered an injury because plaintiffs' sensitive personal information had not been publicly disclosed (no actual violation of the Privacy Act, so no injury-in-fact)
 - Court held that Plaintiffs have suffered an injury in fact: Unauthorized disclosure of sensitive personal information invades privacy.
 - "The DOGE affiliates who have been granted unauthorized access to the plaintiffs' records at OPM and Education could use the information available to them to create a comprehensive picture of the plaintiffs' familial, professional, or financial affairs."
 - Court relies on "intrusion upon seclusion" principle.

DOGE/Ed. Litigation Update (2 of 3)

- American Federation of Teachers v. Scott Bessent, et al.
 - Temporary Restraining Order
 - Plaintiffs showed that they are likely to succeed on the merits. Plaintiffs have shown that Ed. And OPM likely violated the Privacy Act by disclosing their personal information to DOGE without their consent.
 - Court disagrees with government's assertion that they have a "need" for the sensitive personal information. (Govt. has not adequately argued the "need to know" exception.)
 - Government has not adequately explained why DOGE needs "comprehensive, sweeping access to the plaintiffs' records" in order to audit student loan programs for "waste, fraud, and abuse or to conduct cost-estimate analyses."
 - "In other Privacy Act cases where the need-to-know exception is invoked, the dispute typically involves the alleged unauthorized disclosure of one record. This case involves the alleged unauthorized disclosure of millions of records. Even under existing precedent, this appears to be unlawful."

DOGE/Ed. Litigation Update (3 of 3)

- American Federation of Teachers v. Scott Bessent, et al.
 - Holding:
 - "It may be that, with additional time, the government can explain why granting such broad access to the plaintiffs' personal information is necessary for DOGE affiliates at Education to do their jobs, but for now, the record before the court indicates they do not have a *need* for these records in the performance of their duties."
 - Ed. is enjoined from disclosing PII of the plaintiffs (and members of the plaintiff organizations) to any DOGE affiliates until March 10, 2025.

DOGE Executive Order

- Last night, the White House issued a new EO entitled "The President's 'Department of Government Efficient' Cost Efficiency Initiative"
 - Promises to "commences a transformation in Federal spending on contracts, grants, and loans to ensure Government spending is transparent and Government employees are accountable to the American public."
 - Requires each agency to develop software to track and justify every expenditure, which shall be posted publicly.
 - Excludes certain contracts and grants regarding immigration enforcement, law enforcement, the military, public safety, the intelligence community, etc.

About that DOGE...

Agency Efficiency Leaderboard

Most Total Savings

Least Total Savings

1. **ED** (Department of Education)
2. **GSA** (General Services Administration)
3. **EPA** (Environmental Protection Agency)
4. **DOL** (Department of Labor)
5. **OPM** (Office of Personnel Mgmt)
6. **DOI** (Department of the Interior)
7. **USDA** (Department of Agriculture)
8. **Treasury** (Department of the Treasury)
9. **SSA** (Social Security Administration)
10. **HHS** (Department of Health and Human Services)

Funding Freeze

- There are multiple cases suing over various funding freezes that are affecting IHEs.
- *Nat'l Council of Nonprofits v. OBM* (DDC) - Feb. 25 – Preliminary injunction issued against blanket freeze of funding
- *AIDS Vaccine Advocacy Coalition v. Dep't of State* – Feb. 25/26 - DDC judge orders government to turn foreign aid funding back on; continued non-compliance results in announcement by gov't attorney that it will take weeks; judge sets 2/26 deadline; Supreme Court issues stay on the deadline

Reminders about Funding Freezes

- Please be incredibly diligent about projecting cash flow.
- If you see that you will not be able to make payroll, you need to consult with counsel immediately.
- Do not allow individuals to work if they will not be able to be paid for the time spent working.
- Failure to make payroll can result in lawsuits, personal liability, fines, and even criminal charges (for willful violations).
- If you anticipate mass layoffs, consider your obligations under the WARN Act.

DEI EO Litigation Update (1 of 5)

- Nat'l Assn. of Diversity Officers in Higher Education v. Trump
- Memorandum focuses on two EOs:
 - Ending Radical and Wasteful Government DEI Programs and Preferencing ("J20 Order")
 - Ending Illegal Discrimination and Restoring Merit-Based Opportunity ("J21 Order")
- Three provisions at issue:
 - J20 Order Termination Provision
 - J21 Order Certification Provision
 - J21 Order Enforcement Threat Provision

DEI EO Litigation Update (2 of 5)

- Government's Implementation of the J20 and J21 Orders
 - January 22 – Fact Sheet: "President Donald J. Trump Protects Civil Rights and Merit-Based Opportunity"
 - States that the J21 Order "expands individual opportunity by terminating radical DEI preferencing in federal contracting and directing federal agencies to relentlessly combat private sector discrimination."
 - Directs all departments and agencies to "take strong action to end private sector DEI discrimination, including civil compliance investigations."
 - Reiterates goal of "colorblind and competence-based workplace"
 - Blames DEI for "intergroup hostility and authoritarianism," "prejudicial hostility" and exacerbation of "interpersonal conflict."

DEI EO Litigation Update (3 of 5)

- Government's Implementation of the J20 and J21 Orders
 - January 22 – DOL Memorandum
 - Directs grantees to "cease all award activities related to [DEI or DEIA] under their federal awards."
 - January 28 – DOD Memorandum
 - Instructed contracting officers to "cancel or amend solicitations and terminate or partially terminate existing contracts...that contain...[DEI and DEIA] requirements."
 - January 29 – CDC Letter to Grantees
 - Directed grant recipients to "immediately terminate...all programs, personnel, activities, or contracts promoting [DEI]...at every level and activity...that are supported with funds from this award."
 - February 5 – DOJ Memoranda

DEI EO Litigation Update (4 of 5)

- Other key incidents cited by the court:
 - February 7 – Bluesky post stated that a "non-government business that contracts with the federal government" received a notice requiring certification that it "does not operate any programs promoting [DEI] that violate any applicable federal anti-discrimination laws."
 - February 7 – OSHA removed several web-based publications and called for disposal of "wallet cards" that include language on DEI or gender ideology
 - February 10 – DOGE announced that Ed. terminated 29 "training grants for [DEI] that total \$101 million."
 - February 11 – FCC Letter to Comcast
 - Letter expressed concern that Comcast and NBCUniversal "may be promoting invidious forms of DEI in a manner that does not comply with FCC regulations."
 - Letter cited to Comcast's website statement that DEI was a "core value" of the business
 - February 12 – NEA New Rules
 - Released new rules requiring grant applicants to agree not to "operate any programs promoting...[DEI] that violate any applicable federal anti-discrimination laws."

DEI EO Litigation Update (5 of 5)

- Takeaways:
 - Court emphasizes the Administration's lack of clear definition of "illegal DEI" or "illegal DEIA."
 - "In all cases, [plaintiffs'] objectively reasonable fears [regarding their legal activities and expression] arise from the vague language in the Orders..."
 - "The Certification and Enforcement Threat Provisions, squarely, unconstitutionally, 'abridge[] the freedom of speech.'" (citing to U.S. Const. amend. I).
 - Government action that seeks to deter principles the government disagrees with, when that restriction is based on expression of a "message, its ideas, its subject matter, or its content," is viewpoint discrimination
 - "Plaintiffs have adequately shown that their speech has been and will continue to be chilled in light of the Challenged Orders based both on actions currently being taken by Defendants and based on Plaintiffs' reasonable fears."

Takeaways from DEI Injunction

- Based largely on unlawful violations under the First Amendment, private colleges and universities are in a narrower space, because while they accept federal grants, the First Amendment's application is limited
- "The White House and Attorney General have made clear, through their ongoing implementation of various aspects of the J21 Order, that viewpoints and speech considered to be in favor of or supportive of DEI or DEI/A are viewpoints the government wishes to punish and, apparently, attempt to extinguish. And, as the Supreme Court has made clear time and time again, the government cannot rely on the "threat of invoking legal sanctions and other means of coercion" to suppress disfavored speech."

Other DEI News Items

- Feb. 25, 2025 – ACE submits letter requesting DEI DCL be rescinded; signed by nearly 70 educational associations - <https://bit.ly/3QA6ghx>
- Feb. 26, 2025 – Massachusetts Attorney General and Dep't of Higher Education release memo regarding DEI DCL - <http://bit.ly/3QCg4ry>
 - It correctly identifies federal civil rights laws, but then "misconstrues Supreme Court precedent, wrongly implies that it might be unlawful for schools to consider the impact of policies and practices on diversity, and creates a misimpression of the impact of diversity, equity, inclusion, and accessibility program."

OCR Investigations

- *ProPublica* reported that the Dep't of Ed. Issued an internal memo, lifting its investigations freeze.
 - Disability investigations can proceed; cases related to race and gender discrimination remain frozen.
- OCR issued a revised Case Processing Manual, effective Feb. 19, 2025.
 - Removed the prior CPM reference to investigations of "systemic issues" or "systemic allegations"
 - Removed gender-neutral terms

Upcoming Higher Ed Webinars

- Next Federal EO Update Webinar Placeholder: **3/14/2025**
- Free: Romanticizing of Stalking Behavior – 2/27/2025 - starts now!
- Free: Athletics Hot Topics – 3/13/2025
- Free: Employee Sexual Misconduct Cases – 3/27/2025
- Free: AI and Student Conduct on Campus – 4/10/2025
- Free: Sexual Misconduct Hearings – 4/24/2025
- Free: Title IX Litigation Update – 5/29/2025

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Kylie Stryffeler