

Trump 2.0 and Higher Education: Your Questions Answered

By Monica H. Khetarpal, Susan D. Friedfel, Danielle Bland & Laura A. Ahrens

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Transcript

INTRO

Since his inauguration, President Trump has issued dozens of executive orders affecting employers, including higher education institutions. These orders have quickly created multiple compliance hurdles.

On this episode of We get work® we address executive orders affecting higher education institutions and what proactive action employers can take right now.

Our hosts today are the co-leaders of our Higher Education and Collegiate Sports Group: Monica Khetarpal, principal in the Chicago office, and Susan Friedfel, principal in Jackson Lewis' White Plains office. They are joined by Danielle Bland and Laura Ahrens, associates, respectively, in the firm's Raleigh and Greenville offices.

Monica, Susan, Danielle and Laura, the question on everyone's mind today is: what do I need to know to ensure my higher education institution does not run afoul of President Trump's recent Executive Orders, and how does that impact my business?

CONTENT

Danielle Bland

Associate, Raleigh

My name is Dani Bland, and I am an associate in the Raleigh, North Carolina office. I am joined by my colleagues today to discuss the impact of the Trump Administration on higher education in his first few weeks in office. I'm joined by Susan Friedfel and Monica Khetarpal, who are the co-leaders of the firm's Education and Collegiate Sports group, and also Laura Ahrens, an associate

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Higher Education

joining us from the Greenville, South Carolina office.

The first topic we want to discuss is executive orders, which Trump has issued dozens of already. Monica, how do Trump's executive orders pertaining to DEI affect colleges and universities?

Monica H. Khetarpal
Principal, Chicago

This is a topic on a lot of people's minds. So, just a little reminder in the beginning: those executive orders don't actually change the law. They can only change how executive agencies like the EEOC, the Department of Education and the Department of Labor are going to enforce the law. So, they also, if you read them, don't actually direct higher education to do anything. Instead, they direct the administrative agencies to take action that is definitely going to implicate colleges and universities. That's different from the February 14th Dear Colleague letter that the Department of Education issued. We'll get to that later. I know a lot of schools have already been making changes and looking at their policies, programs and communications in advance.

The first big one is called 'Ending Illegal Discrimination and Restoring Merit-Based Opportunity' and here's what it requires. It says that the Attorney General is going to work with each of the agency heads. So again, that's all the major executive agencies. Each of them is supposed to submit a report within 120 days, so that brings us to about May 20th. You may have heard that there was a temporary restraining order (TRO) issued to block this one. It's not a complete block. So, I still want to go over what this one says and then we'll talk about the TRO. The report has to identify key sectors of concern, egregious and discriminatory practitioners and a plan to deter illegal DEI programs. However, it doesn't define what illegal DEI programs are. It also says that each agency has to identify up to nine civil compliance investigations. It specifically says that institutions of higher education with endowments over one billion dollars are in that bucket of nine per agency. So, that's going to be nine for the EEOC, nine for the Department of Education, etc.

If your endowment is less than one billion, you're still not off the hook. There are other strategies that they want the agencies to employ to encourage the private sector to end illegal DEI discrimination and preferences. It specifically says including appropriate potential litigation. So, we can expect lawsuits from the agencies as well. It also says that ending discriminatory DEI programs is going to be a new priority for the EEOC. So, expect anything related to these topics to be picked up more readily when you do have charges of discrimination, etc. We understand that the Department of Education is actually going to issue its guidance around March 1st. So, it's going to be coming out fast, and Jackson Lewis will have coverage of that when it comes out.

Importantly, the executive order requires contractors to certify that they don't operate any programs promoting DEI that violate applicable anti-discrimination laws. That's going to potentially have a lot of impact on breach of contract or False Claims Act actions, which could really raise the stakes.

Now, on February 21st, a temporary restraining order was entered that partially blocks enforcement action on this particular EO, but it doesn't block everything. So, a couple of things to really note. First, it doesn't apply to the President himself because he actually cannot be enjoined from certain actions. The TRO specifically refers to defendants other than the President, which is interesting. It says the administration cannot pause or freeze any awards, contracts or obligations for federal contractors who the administration claimed violated the EO. It also says they cannot require those certifications that I had mentioned, and they can't bring False Claims Act enforcement actions. That is a significant restriction because the threat of a False Claims action can be large. But of course, nothing stays the same for long and the temporary restraining order was appealed on February 24th. So, we'll just have to see where this leads.

In any case, all of the executive agencies can still investigate. So, everybody is not completely off the hook. It's really difficult to tell when we'll have additional clarity on this, but of course, we're monitoring everything, and we will keep everyone posted. So, that is a little summary of that first one.

Of course, that can't be all. Just to keep things interesting, there's that February 14th Dear Colleague letter from the Department of Education that I mentioned. Just a reminder, a Dear Colleague Letter isn't actually binding law. It is just communication from the Department on how they view things and how they plan to take that enforcement action. So, unlike the executive orders, it actually makes it harder to challenge something like this because there are standing issues.

Anyway, here is a summary of that Dear Colleague Letter. The focus is actually on Title VI which prohibits race, color and national origin discrimination. This is a departure from what the administration had previously been focusing on, which was gender and gender-identity, especially. That is not mentioned here. The letter mentions a whole slew of things across campuses including admissions, financial aid, scholarships, prizes, discipline, housing, graduation ceremonies, hiring, training, promotion, compensation and administrative support. Then it says, just to be sure that it caught everything, all other aspects of student academic and campus life and other institutional programming. So, it's really across everything on campus.

It mentions a few specific areas that are going to be a target. First, it talks about segregation by race. We think this is a reference to affinity-related spaces. So, houses or other gathering spaces that are based on a protected category. That is pretty common at a lot of colleges and universities. We have been looking into what is and is not lawful in those areas. The Letter also specifically targets DEI programs. It actually says, "they smuggle racial stereotypes and explicit race consciousness into everyday training, programming and discipline." It mentions a few things in particular that the Department of Education views as potential for taking actions based on protected categories. So, first, it starts with something broad. It says, "an educational institution treats a person of one race differently than it treats another person because of that person's race, the educational institution violates the law."

Then it talks about some more specific things like it prohibits considering race as a proxy through personal essays, writing samples or participation in extracurricular activities. It says that you cannot look at those things if they are being used as a proxy for race. It also says that it would be unlawful for an educational institution to eliminate standardized testing as a means to increase diversity. All of this is interesting because there is some tension here with the language of the 2023 Supreme Court decision in *Students for Fair Admissions v. Harvard*. The Letter says that there will be additional guidance from the Department of Education and that the DOE will actually take appropriate measures beginning no later than March 1st. There has already been some pushback to this Letter, which is not a surprise. Again, we're monitoring this situation, so tune back to Jackson Lewis' higher education podcasts, publications and webinars for more information, especially immediately after that March 1st guidance is issued.

Laura A. Ahrens
Associate, Greenville

Monica, based on what you mentioned about this executive order, what should colleges and universities be doing right now?

Khetarpal

It's a good question because you have the information, but then what do you do with it? We always like to offer some practical tips, too.

First, you really want to be taking stock. It's a three-fold approach here. The first one is to take stock of your mission and your risk tolerance. Where do you want to be? No one person should be making that decision. You have to think of all of your stakeholders. So, where are your board, your faculty, your students, your alumni and your donors? Where do they all want to be on these issues? Do they want to aggressively pursue DEI and take on some risk? Do they want to stay out of the limelight and pull back a little bit? How does that align with your institutional mission? First, you want to level set. Then you want to audit. You want to look at your communications, internal and external policies and procedures. Do they align with mission, risk and tolerance? Then, before you do anything, you want to socialize those changes that you might make and communicate them so that no one is surprised and your stakeholders, your faculty, your students, especially, understand why you're making any changes. Then, make those changes.

But with all of this, we really caution you to be careful of privilege. So, remember those emails or text messages that are flying; if there's an investigation or litigation, it's all coming out. So, it's best to do this under the cover of privilege.

With that, that's the end of that first executive order. There's so much to talk about.

Trump has also issued multiple executive orders about gender identity. What are those executive actions, and what do they mean, Susan?

Susan D. Friedfel

Principal, White Plains

Yes, the Trump administration has issued two significant executive orders relating to gender identity. The first that I'm going to talk about is called 'Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.' So, it's a mouthful.

But in essence, what it says is that it is "the policy of the United States to recognize two sexes, male and female." It rejects what the executive order calls gender ideology, which it defines as "replacing the biological category of sex with an ever-shifting concept of self-assessed gender identity, which includes the idea that there is a vast spectrum of genders that are disconnected from one's sex." These are direct quotes from the order. In essence, what it does is reject the idea that individuals are entitled to identify themselves based on their own gender identity as opposed to their biological sex. The executive order further requires agencies to remove all references to gender ideology. Federal agencies---all their statements, policies, forms and regulations. The boxes on government forms will no longer give you an option other than male or female. It further prohibits federal agencies from providing federal funding to "promote gender ideology."

So, this is where it's really going to impact colleges and universities. Because we don't know exactly what the agency guidance is going to be. Similar to the EO that Monica was discussing, there is a direction here for agencies to issue guidance within 120 days. So, we'll have more clarity once those are issued.

In addition, the executive order requires that all intimate spaces, which would be locker rooms, bathrooms and any other segregated space, be designated for males or females as defined by biological sex at birth as opposed to gender identity.

Bland

So, how does this compare to previous policies under previous administrations?

Friedfel

So, it's a direct reversal from the Biden administration. The Biden administration's Title IX regulations, which have since been vacated, explicitly talked about gender identity as a protected characteristic. Beyond that, the executive order even goes so far as to say that this administration is rejecting the previous administration's interpretation of the Supreme Court's decision in *Bostock v. Clayton County*, which held that Title VII's protections with respect to sex also protect individuals from discrimination and harassment based on their gender identity, does not apply to Title IX. So, basically, they're saying that we are not going to interpret Title IX in accordance with *Bostock v. Clayton County*, where we do not believe that Title IX creates protections based on gender identity, which is a huge shift. It is also a conflict because Title VII still applies to colleges and universities because they're employers.

Ahrens

Susan, is there any other way that these gender policies might affect the workplace?

Friedfel

The most significant way that they are going to impact is with respect to pronouns and sex-segregated spaces. So, it's clear that there's at least a suggestion in the executive order that the administration will take the position that individuals have a right not to recognize people's gender identity. They shouldn't be required to use preferred pronouns or share an intimate space with someone who does not have the same biological sex at birth. This is a challenging issue because, within your campus, you are likely going to have folks who are both strong proponents of rights based on gender identity and strong opponents of transgender rights. You can anticipate that there are going to be complaints and challenges from both ends of the spectrum on this issue.

Campuses need to anticipate that not only will you potentially get opposition to the notion of shared spaces based on gender identity, but you may also get requests for accommodation based on religion.

So, in addition to the executive order I was just discussing, there is a second executive order relating to gender called Keeping Men Out of Women's Sports. How is this new executive order going to impact colleges and universities, Laura?

Ahrens

This executive order specifically applies to Title IX, as you mentioned, which is important because most colleges and universities receive federal funding. They're required to comply with Title IX, which, as our clients know, is enforced by the Department of Education's Office for Civil Rights.

So, for some additional context, the purpose of this executive order is really to rescind all funds from educational programs that deprive women and girls of fair athletic opportunities. The administration views that as allowing for male competitive participation in women's sports. So, they've taken a direct stance on this. With that context in mind, the Secretary of the Department of Education has been directed to protect all-female athletic opportunities, which includes all-female locker rooms, as Susan mentioned. Also, to prioritize enforcement action against institutions if they are denying female students equal opportunities.

So, we've seen that before. That's always been the foundation of Title IX, ensuring equal opportunity for student-athletes, male and female. However, we'll see more Office for Civil Rights Enforcement actions in the coming years with this directive. Also, by early April, the Assistant to the President for Domestic Policy has been instructed to meet with representatives of major athletic organizations and their governing bodies, as well as state attorney generals, to establish best practices that align with this executive order. So, hopefully, we'll see some more guidance by April or May, if not earlier.

Friedfel

Interestingly enough, the NCAA didn't wait until April for those meetings and has already taken action to make clear that individuals can only participate in sports based on their biological sex at birth. Therefore, trans athletes will no longer be able to participate in NCAA sports based on their gender identity.

Ahrens

That's right. They've revised their transgender participation policy. So, as far as what to do now regarding athletics, we recommend considering whether you currently have transgender athletes. The NCAA stated that this was only 10 out of over 500,000 student-athletes. So, just consider whether you have policies on them, decide how you want to respond and if those policies comply with the executive order and the revised participation policy. Again, as Monica mentioned, we advise that these conversations and any communications surrounding them remain privileged.

Friedfel

Laura, are there any other updates in the Title IX space since Trump took office?

Ahrens

Yes, Susan, there has been another update. The Office for Civil Rights issued a Dear Colleague Letter on February 4th. They confirmed that they will be enforcing the 2020 Title IX Rule, which was released during Trump's first term in office. So, that version will be enforced instead of the 2024 Title IX Rule that was issued under Biden. We advise institutions to check and make sure that you are conducting Title IX investigations pursuant to the requirements of that 2020 Rule. Also, make sure any open investigations under Title IX that you have that were initiated under the 2024 Rule are consistent with the requirements of the 2020 Rule.

Friedfel

It's also important to note that to the extent that you've been relying on previous guidance from OCR, this administration has been pulling a lot of that guidance. The executive orders explicitly pulled significant portions of the guidance.

But in addition, we've noticed that things that were on the website a week ago aren't there anymore, like fact sheets and other things. So, it's important to keep track of where things stand now as opposed to where they were three weeks ago.

Ahrens

Good point, Susan. Dani, research funding is another area that has already been significantly impacted by the new administration. How did that come about?

Bland

So, in January, one of the first things this administration did was order executive departments and agencies to “temporarily pause all activities related to obligations or disbursement of federal financial assistance and other relevant agency activities that may be implicated by the executive orders, including but not limited to financial assistance for foreign aid, non-governmental organizations (NGOs), DEI, woke gender ideology and the Green New Deal.” These terms aren't exactly defined, which has definitely led to a lot of confusion in the space as to what programs constitute woke gender ideology, DEI or the Green New Deal? This has had a large impact on research institutions and labs across the country, especially

because of this vagueness. Many labs are not necessarily sure if their research fits into one of these categories where they're going to lose funding. So, the breadth of the order was also unclear. The questions that people have had are whether it has only paused financial assistance related to the executive orders that President Trump signed during his first week in office or if it paused all current federal financial assistance programs. That obviously has a huge difference in breadth. So, again, this led to confusion, but not just in the higher education space. This has led to confusion in all industries.

Friedfel

Were there any exceptions to the order, or does it freeze all federal funding?

Bland

Great question, Susan. The freeze did not apply to federal student loans or Pell grants. That was specifically excepted from the freeze.

Khetarpal

Is that order still in effect?

Bland

No, it's not Monica. This is important. On January 28th, the judge temporarily paused this freeze as applied to open awards or funds that had already been slated for disbursement. The judge's goal was to maintain the status quo and does not block the administration from freezing funding to new programs or require it to start funding that had already ended. However, after that judge's ruling, the White House rescinded the freeze entirely, but under the guise of wanting to prevent any additional confusion.

Clients should expect, and we have already seen, additional efforts to pause and/or reduce federal funding. They are not walking back their stance on this issue. They were just seeing that they were unsuccessful in causing confusion with that initial freeze.

Khetarpal

That sounds like there's a lot to still work through there. Has the administration taken efforts to reduce any federal funding in other ways since the freeze was entirely basically rescinded?

Bland

Yes, Monica. So, the National Institute of Health, the NIH, has taken action affecting research labs. They announced that they are capping funding for indirect costs for biomedical research. So, direct costs are things that are explicitly related to the research components themselves, but indirect costs can include things like maintaining buildings and equipment and paying for grants. So, the NIH announced it was going to cap these indirect costs by 15 % of grant money, which is far below what many institutions have historically been receiving. However, right after this announcement, the cap was struck down at least temporarily by a

court just a week later. So, the administration has taken clear efforts to pause and even reduce research funding. Institutions should be prepared for further efforts, maybe through other avenues to do this. But right now, this cap has been paused.

Ahrens

Dani, there is a lot of fear surrounding the topic of immigration across the country recently. How will the shift in immigration policy affect higher education?

Bland

There is a lot of fear about the effect of the Trump administration's immigration policies and enforcement on campus. Campus communities have international students, professors and other workers, as well as individuals with DACA status. So, there have been fears of widespread raids, but realistically, these are pretty unlikely to actually happen. It's also unlikely that DACA recipients will be specifically targeted.

Ahrens

Dani, if widespread raids are unlikely, what is likely?

Bland

The more likely priorities are suspected criminals or outspoken students on visas. So, for suspected criminals, we're expecting an increase in enforcement that targets anybody officials suspect to be engaging in criminal activity. That is what is most likely to bring enforcement to campus, but other people could then be swept up in a raid or enforcement activity that is occurring due to that suspected criminal activity.

As far as outspoken students on visas, that is something the administration has specifically spoken out against as a priority for enforcement. Specifically, they've stated that international students on visas who are vocally opposing the administrative action or the administration's policies could be targeted for immigration enforcement. So, those are the two areas to keep in mind.

Ahrens

Dani, what should universities know, and what actions can they take now?

Bland

Great question. So, institutions should definitely understand that there's a general feeling of anxiety among vulnerable community members. This may cause some students or maybe employees not to come to class or work. Institutions should definitely prioritize communicating with students in their broader campus communities and making sure to provide know your rights information to the community.

Institutions can also ensure that appropriate officials have procedures in place on what to do if immigration enforcement shows up on campus so that the university or college can be prepared. Finally, they can communicate information regarding

support services to students and employees who may be going through difficult times.

Bland

Susan, another issue in the higher education space is campus protests. What can institutions expect with respect to protest activities on campus?

Friedfel

As we've seen in the last year, there has been significant protest activity relating to the war in Gaza. Hopefully, that is coming to a close. However, we can continue to see significant protest activity on campus relating to a variety of these types of issues. There are a lot of people who feel very strongly about Trump's initiatives, whether in favor or against. We can expect that there are going to be campus protests as a result. Unfortunately, because people are so polarized, this could result in the same kind of heated conflict. So, universities need to be prepared for that. Hopefully, you have plans that you have developed over the course of the last year to address such circumstances, but definitely keep in mind that that's a significant possibility.

Ahrens

Susan, public and private institutions are subject to some differing laws, but there's also a lot of overlap. What campus protest issues affect both private and public schools?

Friedfel

Certainly, public schools have the First Amendment issues that they have to be wary of. In addition, both private and public schools have to be concerned about academic freedom. Any type of handbook provisions they might have protecting free speech or expression are all potential concerns.

In addition, it's important to recognize that academic freedom provides protection for faculty in their scholarship and in the classroom. Interestingly, the executive order that Monica talked about with respect to DEI specifically has a provision that clearly indicates it does not prohibit instructors at federally funded institutions from making statements and advocating against the policy set forth in the order in the course of their instruction. So, we certainly need to continue to be careful on the academic freedom issues.

With respect to the First Amendment, along with the protest preparations, it's important to understand that you can and should create time, place and manner restrictions to ensure as much safety and calm on campus as you can.

Bland

Laura, since Trump took office, there have been some changes to the National Labor Relations Board members and the EEOC commissioners. Why does this matter to colleges and universities?

Ahrens

Starting with the NLRB, Trump removed a Democratic NLRB member and the Board's General Counsel. This means that the Board now consists of only two members, and a three-member quorum is required to issue decisions. So, while this does mean that the Board is effectively inoperative and that they can't issue decisions until a third member is confirmed, the Board is going to continue operations as normal to the extent it can.

So, practically speaking, what this means for colleges and universities is that the Board will continue to process charges and conduct investigations. So, remain aware of any deadlines and charges that might be pending against your institution.

Now, turning to the EEOC, Trump has also removed two Democratic commissioners and the Commission's General Counsel. This means that the Commission, similar to the NLRB, consists of only two members, and a three-member quorum is required for the EEOC to make decisions. Similar to the operational issue with the NLRB, without a quorum, the EEOC can't vote on rulemaking, issue new policies or rescind guidance documents. With that said, the EEOC is otherwise continuing on business as usual. So again, remain aware of charges of discrimination that may be pending against your institution. Just as a reminder, those charges of discrimination have not been tolled while all of this change is going on. Also, the EEOC has published FAQs. So, we recommend taking a look at those or reaching out to a Jackson Lewis attorney to discuss if you have questions. As Susan mentioned, the acting chair of the EEOC, Andrea Lucas, has mentioned potentially rolling back the EEOC's enforcement guidance on harassment in the workplace. That's something to keep an eye on as well.

Khetarpal

Thanks everyone for joining us. That wraps up our quick coverage of all things Trump 2.0 as it applies to higher education. We've covered a lot of ground, but there's a lot more to say.

Jackson Lewis has a podcast series specifically for higher education that we are publishing. That'll come out at least monthly going forward.

We also have a webinar series that applies to all employers but also includes, in a couple of weeks, one episode specific to how to run an audit for higher education institutions. That's by invitation. Only reach out to your friendly Jackson Lewis attorney to register.

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