



# Federal EO Update for Higher Education

## February 12, 2025



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- 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.

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- 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.

# Agenda

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- What is an Executive Order, and what can it do?
- Title IX
- DEI
- ICE

## Themes:

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

# EOs – What They Are/Aren't

- U.S. Constitution
  - Article II, Section 1 - "The executive power shall be vested in a President of the United States of America."
  - Article II, Section 3 - "He shall take care that the Laws be faithfully executed"
- Executive orders can:
  - Explain how the President expects the executive agencies to interpret a federal law
  - Give indication of what the President thinks is important – e.g. asking for legislation, directing agencies on guidance to issue or reports to gather
  - Indicate federal enforcement priorities
- Executive orders cannot:
  - Make a new federal law, or invalidate a current federal law
  - Override the U.S. Constitution

# Title IX Sexual Harassment

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- February 4, 2025 DCL
  - Supersedes Jan. 31 Guidance
- OCR will enforce the 2020 Title IX Regulations – NOT the 2024 regs
  - Definition of SH
  - Procedural protections
  - "... no portion of the 2024 Title IX Rule is now in effect in any jurisdiction."

# Impact on Pending Title IX SH Investigations

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- Cases initiated under the 2024 regs "should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule and the preexisting regulations at 34 C.F.R. 106 et seq."
- Things to think about:
  - Which cases need to go to a **hearing** now?
  - Remember the 2020 definition of **retaliation** when considering process
  - Do you need a signed **Formal Complaint**?
  - Do your **Notices of Investigation** require additional detail?
  - **Informal Resolution** – remember the limitation imposed by the 2020 regs
  - **Appeals for supportive measures** – Keep?
  - Remember to post your **training materials** if you stopped

# Title IX Sexual Harassment To Do's

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- Work with legal counsel to address pending cases
  - Consider issuing interim guidance or talking points to assist with party meetings
- Evaluate your Title IX Policy – can you go back to your 2020 Policy?
  - What didn't work under your 2020 Policy?
  - Consider P&P provisions – not explicitly struck down by the TN decision or DCL
- Communicate with your campus/stakeholders



# Gender Identity

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- "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," Jan. 20, 2025
  - Declares that gender identity is not on the basis of sex
  - Lawsuits pending on this EO already

# Gender Identity Questions to Consider

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- How are you fulfilling your requirements under *Bostock* with regard to Title VII to protect employees from discrimination/harassment on the basis of gender identity?
- If discrimination/harassment on the basis of gender identity is no longer protected by Title IX, will you modify other policies to provide those protections?
- How do your state laws on bathroom use, locker room use, athletic participation (see next slides), etc. affect what you can choose to protect and prohibit?

# Participation in Athletics

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- Executive Order "[Keeping Men Out of Women's Sports](#)," Feb. 5, 2025
  - Consistent with EO 14168 ("Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," Jan. 20, 2025)
- Secretary of Education will:
  - Protect all-female athletic opportunities and all-female locker rooms by prioritizing Title IX enforcement actions against those that do not comply
  - Bring regulations and policy guidance into line with the Congress' existing demand for "equal athletic opportunity for members of both sexes;" and
  - Resolve pending litigation consistent with this policy.

# We Are Already Seeing...

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- NCAA changed its transgender athlete policy on Feb. 6, 2025
- ED announced three investigations - two universities, and one high school athletics association
- ED OGC sent letter to NCAA and NFHS "urging them to restore to female athletes the records, titles, awards, and recognitions misappropriated by biological males competing in female categories."
- The EO will likely be addressed in multiple court cases that are already pending regarding transgender women athletic participation
- ED rescinded the fact sheet on how Title IX applies to NIL.

# Next Steps

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- To Do's:
  - Evaluate your policies that address transgender participation in athletics
  - Work with GC to identify state law conflicts with Women's Sports EO

# A Quick DEI Primer

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- DEI = Diversity, Equity, and Inclusion
- Title VI, Title VII, Title IX, ADA, ADEA, PWFA, etc. all set forth rules on prohibited discriminatory conduct including, but not limited to:
  - Employment decisions because of a protected trait
    - Bona Fide Occupational Qualifications
    - Affirmative Action requirements for federal contractors (which are also affected by EOs)
  - Access to services, benefits, or programs because of a protected trait
- Reminder: Making folks feel welcome on campus is not a violation of federal law

# Jan 20 EOs on DEI

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- January 20, 2025 - "Ending Radical and Wasteful Government DEI Programs and Preferencing"
  - Targeted to ending Equity Action plans and all DEI + Accessibility programs at the federal level
  - Terminates all DEI requirements for federal contractors
- January 20, 2025 - "Initial Rescissions of Harmful Executive Orders and Actions"
  - If you've been complying with a past EO relating to DEI, it was probably withdrawn by this EO

# Jan 21 - "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (slide 1 of 2)

- Pending:

- Within 120 days, Dept. of Ed. and Attorney General shall issue joint guidance regarding measures and practices required to comply with *Students for Fair Admissions*
- Within 120 days, Attorney General and Director of OMB shall submit a report containing recommendations for enforcing Federal civil rights laws and "taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI"

- Administration's reported goals:

- All executive departments and agencies must "terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."
- Orders all federal agencies to enforce "long-standing, civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities"



# Jan 21 - "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (slide 2 of 2)

- What EO says, in pertinent part:
  - Section 3a rescinds several existing "DEI" EOs that were specific to the federal government.
  - Section 3b
    - Revokes the 1965 EO on Equal Employment Opportunity
    - New federal grants and contracts will require recipients to certify they are not operating DEI programs that violate federal law
    - OFCCP must immediately cease "promoting diversity," holding contractors and subcontractors responsible for affirmative action requirements, permitting/encouraging workforce balancing
    - Federal contracts and grants must include a provision requiring that the recipient certify that it "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws"
  - Section 4 - "Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences"
    - Wants to encourage individual initiative, excellence, and hard work in the private sector
    - Attorney General/OMB to provide a report in 120 days to explain what illegal things are happening and how to enforce the law and encourage these values
  - This does not prevent IHEs from exercising First Amendment speech rights

# U.S. Attorney General Memo – Feb. 5, 2025

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- By March 1, 2025, report to be prepared making recommendations "for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including policies related to DEI and DEIA."
  - Asks for proposals for "criminal investigations and for up to nine potential civil compliance investigations" where institutions are engaging in illegal discrimination or preferences

# What's Next for DEI

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- Expect more guidance and more reports
  - There may not be any time between the issuance of guidance and the opening of enforcement investigations
- Increased focus on religious inclusion
  - February 6, 2025 – Eradicating Anti-Christian Bias
  - February 7, 2025 – Establishment of the White House Faith Office
- Grant assurances and contract provisions will be changing – make sure you know what you are signing and can comply
- Consider an attorney-client privileged analysis to determine what programs may be at risk
- Think about what you can tell your community proactively to ensure they continue to feel comfortable to the extent possible

# Immigration EOs – Overview

Overview: Many EOs directly address immigration or are immigration adjacent – **focusing here on those that directly address (in blue below)**

*Front bookend: Colleges and Universities should have pre-ready taskforces and point-people with a plan (we'll talk about that plan later). I am not an immigration attorney and I am not providing you immigration advice.*

- Jan 20 - "Protecting the Meaning and Value of American Citizenship"
- Jan 20 - "Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats"
- Jan 29 - "Additional Measures to Combat Anti-Semitism"

# Immigration EOs – Overview of Additional Immigration-Adjacent EOs

Additional EOs that should be on your radar that are more immigration-adjacent for our purposes, but expect more agency and department guidance (or additional EOs) - additionally, there two naming terrorist groups not listed here

- Jan 20 - "Securing Our Borders" - terminates parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans
- Jan 20 - "Protecting the American People Against Invasion"
- Jan 20 - "Guaranteeing the States Protection Against Invasion"
- Jan 29 - "Progress on the Situation at Our Northern Border"
- Jan 29 - "Expanding Migrant Operations Center at Naval Station Guantanamo Bay to Full Capacity"
- Feb 1 - "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border"
- Feb 1 - "Imposing Duties to Address the Situation at Our Southern Border"
- Feb 3 - "Progress on the Situation at Our Southern Border"

# Jan 20 - "Protecting the Meaning and Value of American Citizenship" (aka "Birthright Executive Order")

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- Blocked - Currently the subject of several federal injunctions out of Maryland, Washington State, and New Hampshire
- Background – The Fourteenth Amendment to the Constitution provides birthright citizenship – meaning, U.S. citizenship to any person born in the U.S., regardless of status of that person's parents – lots of case law on this
- Administration's reported goal – children of illegal immigrants born in the U.S. are not subject to the laws of the jurisdiction and not U.S. Citizens
- Reality of EO – any person born to parents who are in the country, even legally, but temporarily, will no longer automatically become U.S. citizens, includes those people born to parents here on high-skill work visa and student visas AND children of legal immigrants who were not born in the U.S. but whose parents became U.S. Citizens while they were still children (parents legally immigrated with child)
- What to expect – more legal battles

# Jan 20 - "Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats"

- Pending- Ordered the Secretary of State, in coordination with the Attorney General, Secretary of Homeland Security, and Director of National Intelligence to issue regulations, policies and procedures within 30 days (next week) that, in pertinent part:
- Administration's reported goal – protect U.S. Citizen's First Amendment Rights (target supporters of Hamas - see next EO)
- What EO says, in pertinent part – recommend actions against foreign nationals who have "undermined or seek to undermine the fundamental constitutional rights of the American people, including, but not limited to, our Citizens' rights to freedom of speech and the free exercise of religion protected by the First Amendment, who preach or call for sectarian violence, the overthrow or replacement of the culture on which our constitutional Republic stands, or provide aid, advocacy, or support for foreign terrorists
- What to expect – said policies and procedures, more court battles, scrutiny of college and university campuses' handling protests with a focus on foreign-national students

# Jan 29 - "Additional Measures to Combat Anti-Semitism"

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- Pending- Ordered the head of each executive department or agency to inventory how campuses handled protests in the wake of October 7, 2023:
- Background – In his first term's administration, the President issued an EO 13899 "Combating Anti-Semitism." In the interim the Biden Administration issued guidance to combat antisemitism and anti-Islamic harassment and threats, focusing on enforcement under Title VI.
- Administration's reported goal – Address discrimination and attacks on Jewish students on college and university campuses
- What EO says, in pertinent part – the federal government's failure to protect Jewish students was "astounding," and, in requested reports on how to combat this, provide guidance for institutions "so they may monitor for and report activities by alien students and staff relevant to those grounds and for ensuring that such reports about aliens lead, as appropriate and consistent with applicable law, to investigations and, if warranted, actions to remove such aliens."
- What to expect – said policies and procedures, more court battles, scrutiny of college and university campuses' handling of Title VI matters during campus protests (retroactively?) with a focus on foreign-national students



# If ICE (under Department of Homeland Security) Shows Up

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- Verify their identity.
- Connect with identified campus representative.
- Read their paperwork and ask questions. Who is making a legal demand of your institution, and on what basis? Document the answers. Contact legal counsel with questions regarding your specific state laws.
- FERPA protects student information, unless the student consents (e.g. through a student visa program). Can also release:
  - Pursuant to a valid subpoena/court order – but you must notify the student and give them time to quash the subpoena, unless the subpoena prohibits you from doing so
  - Health and safety emergency – must be an imminent and articulable threat to safety

# Prepare a Response Plan

*Colleges and Universities should have pre-ready taskforces and point-people with a plan.*

- Identify a team of response and contact people for if agents show up on campus [legal, senior leadership, communications, student affairs, etc.]
- Make sure that team includes legal support (include immigration experience).
- Consider counseling/emotional support for individuals impacted by any intervention.
- To the extent possible, without violating privacy considerations, prepare communication packages and prepare for community responses.
- Review your MOUs with law enforcement
- Practice using tabletop/hypothetical scenario

# Upcoming Higher Ed Webinars

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- Free: Essential Insights to Guide Your *House* Settlement Decision – 2/14/2025
- Free: Creating Neuroinclusive Grievance Procedures – 2/19/2025
- Free: Romanticizing of Stalking Behavior – 2/27/2025
- Free: Athletics Hot Topics – 3/13/2025
- Higher Education Title IX Regulations Training Series – Throughout February

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