

March 20, 2025

## **FAQs for Recipients of Federal Funding Regarding Required Certifications**

In January, the federal government issued two executive orders regarding diversity, equity and inclusion (“DEI”) programs.<sup>1</sup> The executive orders apply only to the federal government’s own actions and do not change the law. They do not define DEI, and they are vague about which types of DEI programming the government will view as unlawful. However, the executive orders do signal increased federal government scrutiny of DEI programming by federal funding recipients and even private companies.

Over the past month, many nonprofits that receive federal funding have been told that, in order to continue receiving federal funds, they must certify that they comply with the executive orders or with federal anti-discrimination laws. This legal alert explains the current state of litigation around the certification requirements and lays out some practical steps a nonprofit can take to reduce organizational risk around signing such a certification.

### **1. Can a federal agency require us to make an anti-DEI certification in order to receive federal funding?**

There is ongoing litigation about whether federal agencies can require nonprofits to make anti-DEI certifications as a condition of receiving federal funding.<sup>2</sup> From February 21 to March 14, 2025, there was a national court order in effect barring the federal government from requiring anti-DEI certifications. That court order was lifted on March 14, so as of this writing the government can require such certifications.<sup>3</sup> There will likely be further developments in this case and in other lawsuits.

### **2. What should we do if a federal agency requires us to make an anti-DEI certification in order to receive federal funding?**

In an ideal world, all nonprofits would consult with an attorney before responding to a request to certify anything to a funder. However, we recognize that this may not always be possible, either because there is a short deadline to sign a certification or because the organization cannot afford or find knowledgeable counsel. Whether or not you are able to find counsel, these are important steps to take:

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<sup>1</sup> See E.O. 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, <https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity> and E.O. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, <https://public-inspection.federalregister.gov/2025-01953.pdf>.

<sup>2</sup> See Nat’l Ass’n of Diversity Officers in Higher Education v. Trump, 1:25-cv-00333-ABA (D. Md.). Information about the case can be found at <https://democracyforward.org/>.

<sup>3</sup> NADOHE v. Trump (4th Cir. Mar. 14, 2025), available at <https://www.jacksonlewis.com/sites/default/files/2025-03/4thCir-NatlAssocDivOfficersHigherEd-v-Trump-stay-3-14-25.pdf>.

- **Speak to the grant or contract manager at the federal agency to find out if they can give you any additional information.** Are there guidance documents that they expect your organization to follow? What is the deadline for responding?
- **Read the request for certification carefully.**

Different federal agencies are requiring different certifications.

- Some require the nonprofit to affirm compliance with some or all federal antidiscrimination laws. Those laws have not changed, and they do not make all DEI work unlawful. If your programs complied with federal law before the Presidential inauguration, and if those programs have not changed, then they still comply with federal law today.
- Other certification requirements demand that the nonprofit affirm compliance with specific executive orders. However, The Trump administration has told a federal appeals court that the two executive orders regarding DEI only apply to conduct that violates existing antidiscrimination laws.<sup>4</sup>

You can read the executive orders and find more information about them in the National Council of Nonprofits' Chart of Executive Orders Affecting Nonprofits, which is available at <https://www.councilofnonprofits.org/files/media/documents/2025/chart-executive-orders.pdf>

- **Ensure your organization complies with applicable antidiscrimination laws, including those regarding employment and program services, and document such compliance.**

If you have access to legal counsel, this review should be done by them. If you do not have legal counsel, document your efforts to learn about the laws, executive orders, and anything else referenced in the certification. Then, document how you reviewed your organization's policies and practices and confirmed that they are compliant. Attached to this legal alert is a sample form you can use for this purpose.

Here are some resources you can use to understand what different federal antidiscrimination laws require:

- The New York Attorney General and 15 other state attorneys general have issued a Multi-State Guidance Concerning Diversity Equity Inclusion and Accessibility Employment Initiatives: <https://www.mass.gov/doc/multi-state-guidance-concerning-diversity-equity-inclusion-and-accessibility-employment-initiatives/download>

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<sup>4</sup> See Jackson Lewis, DEI Injunction Falls (March 14, 2025), <https://www.jacksonlewis.com/insights/dei-injunction-falls-now-4th-circuit-allows-trump-administration-agencies-enforce-eos>. Moreover, the Fourth Circuit's decision to stay enforcement of the preliminary injunction in the NADOHE litigation appears to rely on that representation. *Id.* (citing NADOHE v. Trump (4<sup>th</sup> Cir. March 14, 2025), ops. of JJ. Harris & Diaz, concurring).

- Public Counsel has issued a legal alert for California nonprofits, but most of it applies to New York nonprofits too: <https://publiccounsel.org/wp-content/uploads/2025/03/DEI-EOs-FAQ-3-4-2025.pdf>
- The U.S. Department of Justice has gathered guidance on Title VI of the Civil Rights Act of 1964 here: <https://www.justice.gov/crt/fcs/TitleVI>
- Organizations receiving funding from the U.S. Education Department (“DOE”) may also need to comply with Title IX of the Educational Amendments of 1972. DOE laid out its current understanding of Title IX and other civil rights laws in a “Dear Colleague” letter on February 14, 2025, available at: <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf> and a set of FAQs on March 1, 2025, which is available at: <https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf>. Note that these documents interpret civil rights laws as allowing far fewer DEI initiatives than other knowledgeable legal observers do. A pending lawsuit challenges this “Dear Colleague” letter.<sup>5</sup>
- On March 11, 2025, New York Lawyers for the Public Interest, Lawyers Alliance, Human Services Council, Nonprofit New York, and Simpson Thacher presented a workshop, “DEI Insights and Practical Guidance for Nonprofits Following Recent Executive Orders.” The [recording](#) and [presentation slides](#) are available for review.

Remember to also ask your federal funding agency whether it has issued any relevant guidance.

### **3. If we sign a certification will we be subject to False Claims Act liability?**

A recipient of federal funding can be subject to liability under the federal False Claims Act if the recipient makes a materially false statement to induce the federal government to provide the funding. A False Claims Act violation can lead to high financial penalties.

To reduce the risk of False Claims Act liability, only sign a certification if you have a reasonable belief that it is true. The False Claims Act can impose liability on funding recipients who know that their statement is false, or who deliberately ignore or recklessly disregard evidence of the falsity of their statement. You can use some of the resources above to understand your organization’s antidiscrimination obligations under federal law.

In addition, you should review your website and social media accounts to make sure that you are describing your employment practices and program services accurately. It is particularly important to make sure that you are not implying that the organization discriminates on the basis of race, ethnicity, national origin, gender, or other protected category in employment decisions or in the way you deliver program services.

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<sup>5</sup> See NEA-ACLU Lawsuit Challenges Trump’s Anti-DEI “Dear Colleague” Letter (Mar. 7, 2025), <https://www.nea.org/nea-today/all-news-articles/nea-aclu-lawsuit-challenges-trumps-anti-dei-dear-colleague-letter>.

## **Additional Resources**

**This alert is meant to provide general information only, not legal advice. For legal assistance for your nonprofit organization,** please contact NYLPI via a [Confidential Intake Form](#) or the Lawyers Alliance Legal Resource Call Hotline at [ResourceCall@lawyersalliance.org](mailto:ResourceCall@lawyersalliance.org). For information about our organizations, visit [www.nylpi.org](http://www.nylpi.org) and [www.lawyersalliance.org](http://www.lawyersalliance.org).

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Funder Certification Worksheet

1. The Certification says: \_\_\_\_\_

2. This is what we did to learn about what the certification requires:

We read: \_\_\_\_\_

We watched: \_\_\_\_\_

We spoke to: \_\_\_\_\_ who told us: \_\_\_\_\_

3. We learned that our organization **must do** the following things: \_\_\_\_\_

4. We learned that our organization **must not** do the following things: \_\_\_\_\_

5. This is what we did to confirm that our organization is in compliance with these requirements:

We reviewed these organizational policies and protocols: \_\_\_\_\_

We spoke to: \_\_\_\_\_ who told us: \_\_\_\_\_

Other:

6. Here is what we did to try to get legal counsel before signing the Certification:

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