

PRESIDENTIAL EXECUTIVE ACTIONS: ETHICAL OBLIGATIONS FOR LAWYERS ADVISING IN AN EVOLVING LEGAL LANDSCAPE

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Since taking office, President Trump has taken a number of actions that include memoranda, proclamations, and executive orders. A current and complete list of presidential actions is available on the White House website (<https://www.whitehouse.gov/presidential-actions>). Orders cannot be easily overturned by Congress, but they can be blocked or challenged through legal action. Lawyers will undoubtedly be called upon to evaluate claims related to the president's actions or enforcement thereto and to assist clients who face legal issues as a result of the president's actions. This article will address common legal issues and ethical duties facing lawyers in our current legal climate through a series of hypotheticals.

A REFRESHER ON COMPETENCE

Providing competent legal representation related to uncharted legal issues requires a thoughtful and measured approach. Many lawyers are being bombarded with requests from clients and prospective clients requesting assistance with legal issues that have not previously been analyzed under these dynamic and changing circumstances. Lawyers are often presented with unique fact patterns that fit with an identified statutory scheme or theory of recovery. When presented with claims or issues related to the president's recent executive actions, lawyers can ensure competence by analyzing the facts and ensuring they understand how to appropriately frame the legal issue, including what tribunal is the appropriate jurisdiction and by identifying whether there is a remedy to redress the client's claim.

If a lawyer is presented with an emergency, and there is no practical way to refer the client or consult with another

lawyer, a lawyer may be able to provide limited assistance. (See cmt. 3, Rule 1.1, MRPC.) In an emergent situation, the lawyer should limit her advice to that which is reasonably necessary and should inform the client of her limitations. (Id.; see also Rule 1.4.) Lawyers should consider referring clients to those with specialized knowledge. For example, clients with immigration concerns should consult with immigration lawyers. Employment lawyers should also ensure they are competent in an area of an employee's claim, such as whether the client's issues implicate federal law that requires a different knowledge than private-sector claims.

USE RULE 1.6 EXCEPTIONS SPARINGLY

Rule 1.6, Minnesota Rules of Professional Conduct (MRPC) requires that a lawyer not knowingly reveal information relating to the representation of a client unless an exception applies. This ethical principle, along with the more narrowly applicable legal principle of privilege, are fundamental aspects of an attorney's obligations to a client. Lawyers must be mindful when considering to invoke an exception to Rule 1.6 and recall that exceptions are permissive, not mandatory.

Simply put, given the evolving legal landscape, exposure of your client's information now may have even greater consequences. Take, for example, an attorney-discipline proceeding that mandates attorney cooperation. Many attorneys fail to recognize the duty to protect confidential or privileged information in the context of attorney-discipline proceedings, particularly if the disciplinary authority is inquiring about a matter in which no client has complained. If the lawyer provides data to the dis-

ciplinary authority, and the disciplinary authority seeks public discipline, the entire disciplinary file is public, exposing vulnerable client information to anyone seeking to review it. Imagine if those clients were immigration clients or clients of another class that are now the subject of the president's actions?

Hypothetical: I am an immigration lawyer. What am I required to advise my clients of as new immigration executive orders are issued?

Immigration lawyers are subject-matter experts and will be expected to read and apply the president's executive orders relating to immigration. As such, you're obligated to maintain an understanding of new laws and executive orders as they are issued. After reviewing the potentially applicable executive orders, identify which of your clients are impacted. Contact your client(s) and inform them of your analysis—using an interpreter if necessary. Make sure your client(s) understands risks and benefits associated with various actions impacted by the order(s). Do not advise the client(s) to do anything that would violate the order(s). However, you can advise the client(s) of the consequences if they were to take such action. Review any other relief that may be available to your client(s). If you believe the order(s) will be challenged, discuss this with your client(s), but do not encourage action based on a challenge that has not yet occurred.

Hypothetical: I represent federal government contractors. How do I effectively represent my clients?

This hypothetical is purposely written broadly. Law firms representing government contractors and/or federal grant recipients must ensure competence by reviewing the Executive actions that eliminate federal contractors' affirmative-action requirements. Any pending Office of Federal Contract Compliance Programs (OFCCP) cases, audits, complaints, or other enforcement actions or investigations were to be closed by January 31, 2025. Guidance should also be provided to clients about the modifications to existing grants and pending requests for proposals that are expected to include

(1) a new certification attesting that the contractor “does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws;” and (2) remove most affirmative action requirements.

When advising on federal pay equity, law firms should note that while President Trump revoked the Biden administration’s Executive order aimed to eliminate discriminatory pay practices for the federal workforce and federal contractors, more than 20 states maintain pay equity rules. Lawyers will need to provide a detailed analysis to clients in this regard. Similarly, lawyers may see an increase in workforce reduction questions. When advising clients about work force reduction, advise clients about existing law and potential risks associated with work force reduction.

Hypothetical: I represent private employers. Do I have any obligations to advise them of potential impacts of the presidential actions?

Firms who represent private employers should advise employers that immigration workplace inspections will resume mandating that employers confirm their employees are legally authorized to work in the United States. If conducting an I-9 audit, ICE may carry out an onsite inspection, which will begin with a Notice of Inspection (NOI), notifying the employer they must provide the I-9 forms for their workers within three days. However, ICE may deliver the NOI without warning. Employers should be advised to conduct an I-9 audit and address non-compliant employees.

Employers should also immediately be advised on developing policies and protocol for ICE raids. ICE does have the ability to enter a common public space, but will need the employer’s permission or other authority to access a

business’s private area. It is imperative that employers develop and implement policies and protocol for staff who handle public business areas.

Lawyers should also stay abreast of the federal government’s efforts to regulate private sector DEI programs. The newly appointed commissioner of the EEOC has made clear that private sector DEI programs will be targeted. The Executive Order “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” itself orders “all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”

Also included within the Order is, “A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated “DEI” or otherwise) that constitute illegal discrimination or preferences. In this plan, each agency must identify up to nine potential civil compliance investigations of publicly traded corporations, large nonprofit corporations or associations, foundations with assets of 500 million dollars or more, state and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars.”

Federal litigation and regulatory strategies are also requested to encourage compliance.

Hypothetical: My law firm represents employees in employment matters. How do I ensure I ethically represent a federal employee impacted by Executive Order(s)?

Federal employees are being impacted in a number of ways by President Trump’s Executive Orders and presidential actions. This includes employees who have been fired, reassigned or designated to be laid off. Additionally, over 2 million federal workers were

offered a buyout that also included mandates to return to the office full time. Hiring freezes have been implemented for most positions.

Lawyers and firms advising federal employees should be familiar with federal sector labor and employment law. Undoubtedly, there may be an influx of federal employees who require or need assistance. To ensure competence, it is necessary that lawyers seeking to advise these clients are familiar with the concepts of federal employment law, civil service protections, and are prepared to discuss all risks and benefits with their clients, including impacts to federal benefits, civil service protections, and pension implications should employees seek legal assistance in evaluating buyout offers. Terminated employees will also need to understand the remedies available to them along with timelines associated with pursuit of a remedy.

CONCLUSION

Lawyers should expect that clients will continue to be impacted by presidential actions at a higher rate than previously experienced. To ensure competence and to comply with ongoing ethical obligations, lawyers will need to review presidential actions with frequency and should also review any related legal action impacting implementation. Communication with clients should include strategies for compliance, consequences of non-compliance, and the likelihood of success if intending to challenge an executive branch action.

Disclaimer: This article is not intended to be relied upon as legal advice. There is no attorney-client relationship between Bassford Remele P.A. and any reader of this article.

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