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President Trump's "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" Executive Order Targets Federal Contractors, and the Private Sector

By Lindsay Buchanan Burke, Scott A. Freling, Evan D. Parness, Jennifer L. Plitsch, Carolyn Rashby, and Mike Wagner*

In this article, the authors examine an executive order issued by President Trump revoking a 60-year-old Civil Rights-era directive that prohibited federal contractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin, and that required federal contractors to take affirmative action to provide equal opportunity in employment.

On January 21, 2025, President Trump issued Executive Order 14173 (EO), "Ending Illegal Discrimination and Restoring Merit-Based Opportunity,"[1] which revokes Executive Order 11246, a 60-year-old Civil Rights-era directive that prohibited federal contractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin, and that required federal contractors to take affirmative action to provide equal opportunity in employment.

The EO seeks to "end[] illegal preferences and discrimination" and "promote individual initiative, excellence, and hard work" by ending the use of "dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA)" programs.

The EO does so by prescribing required contract provisions for federal contracts and by requiring specific reports from the heads of federal agencies, including identification of private entities for potential investigation, as described further below.

The provisions of the EO do not apply to federal or private sector employment and contracting preferences for veterans.

Federal contractors and grant recipients were given until April 21, 2025, to comply with the EO's revocation of affirmative action requirements. However,

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[1] https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

federal contractors, subcontractors, and grant recipients became subject to the new contract provision requirements imposed by the EO immediately.[2]

ELIMINATION OF FEDERAL CONTRACTOR AFFIRMATIVE ACTION REQUIREMENTS AND DEI REFERENCES

In addition to revoking Executive Order 11246, the EO requires the Office of Federal Contract Compliance Programs (OFCCP), which has been responsible for administering and enforcing Executive Order 11246 for many years, to "immediately cease" promoting diversity, enforcing affirmative action requirements, and allowing or encouraging federal contractors and subcontractors to engage in "workforce balancing" based on race, color, sex, sexual preference, religion, or national origin. The EO explicitly prohibits federal contractors or subcontractors from considering race, color, sex, sexual preference, religion, or national origin in employment, procurement, or contracting practices. Although OFCCP will no longer enforce affirmative action requirements, the EO delayed implementation of this prohibition for current federal contractors through April 21, 2025, so contractors had until this date to sunset any affirmative action programs, absent judicial intervention.[3]

The EO also directs the Director of the Office of Management and Budget (OMB) and the Attorney General to:

- Review and revise, as appropriate all government-wide processes, directives, and guidance;
- Remove references to DEI principles from federal acquisition, contracting, grants, and financial assistance procedures; and
- Terminate "all DEI-related mandates, requirements, programs, or activities," which the EO does not define.

NEW REQUIREMENTS FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS TO COMPLY WITH CIVIL RIGHTS LAWS

The EO obligates each federal agency to immediately include certain provisions in future federal contracts or grant awards, including requiring that the federal contractor or grant recipient (1) "agree" that its compliance with all

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[2] The EO also requires the Attorney General and Secretary of Education to issue guidance to state and local educational agencies and institutions of higher education that receive federal funding on how to comply with the U.S. Supreme Court's decision in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College.

[3] Note that OFCCP's authority to enforce requirements under Section 503 of the Rehabilitation Act of 1973, which considers disability status, and the Vietnam Era Veterans Readjustment Assistance Act of 1974, which focuses on veteran status, does not appear to be impacted by the EO.

applicable federal anti-discrimination laws is "material to the government's payment decisions" for purposes of the False Claims Act (FCA), and (2) certify that it does not operate "any programs promoting DEI" that violate federal anti-discrimination laws. Although the language of the EO is not entirely clear, the EO does not appear to apply retroactively, and suggests that it cannot—without additional agency action—modify any existing agreements with a federal agency.

In light of these new requirements and the potential for enforcement under the FCA, federal contractors and grant recipients should consider taking steps now to review their existing DEI programs for compliance with federal civil rights laws, including 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964.

EFFORTS TO TARGET PRIVATE SECTOR DEI PROGRAMS

The EO requires that within 120 days, the Attorney General, in consultation with relevant agencies and OMB, submit a report to the Assistant to the President for Domestic Policy 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." The report must include:

- Key "sectors of concern" within each agency's jurisdiction;
- "The most egregious and discriminatory DEI practitioners in each sector of concern";
- A plan to deter DEI programs (whether specifically denominated as DEI or otherwise) "that constitute illegal discrimination or preferences" in which each agency identifies "up to nine potential civil compliance investigations" of publicly traded corporations, large non-profit corporations or associations, foundations with assets of $500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over one billion dollars;
- Strategies to encourage the private sector to terminate "illegal DEI discrimination and preferences";
- Potential litigation that could be "appropriate for Federal lawsuits, intervention, or statements of interest"; and
- Potential regulatory action and guidance.

Importantly, the EO does not define "civil compliance investigation," nor does it provide the statutory basis for initiating such investigations. It is possible that the agencies responsible for enforcing relevant anti-discrimination laws—

such as OFCCP, the Department of Labor, the U.S. Equal Employment Opportunity Commission, and the Civil Rights Division of the Department of Justice—could initiate these "civil compliance investigations."

If the contemplated investigations are similar to other government civil enforcement investigations, the investigation will likely begin with a subpoena requesting documents relevant to its inquiry. However, the full range of enforcement actions is not clear based on the language in the EO, so it will be important for private sector entities to carefully monitor implementation and the first announced investigations.

CONSIDERATIONS FOR EMPLOYERS AND CONTRACTORS

Federal contractors and grant recipients should review their approach to human resources matters in the performance of federal contracts, subcontracts, and grants, including, in particular, affirmative action requirements such as flow down clauses in new subcontracts or awards, recordkeeping obligations, the implementation and maintenance of affirmative action plans, and making posters and notices available to employees.

Federal contractors should also anticipate that while the EO's newly required terms and certification requirements will appear in new contracts and grant awards, federal agencies could try to amend or modify existing contracts. Existing contracts presumably could be successfully modified only with the contractor's agreement, though it is possible we will see further federal guidance on this topic. Further, in light of possible FCA liability, federal contractors and grant recipients should consider conducting compliance assessments to ensure existing workplace programs comply with anti-discrimination laws.

Although the EO does not set new requirements for private companies that do not engage in federal contracting and grants, the EO's provisions implying potential compliance investigations of private entities' DEI programs suggests heightened scrutiny of all private sector DEI programs, regardless of industry.

Notably, demonstrating the lawfulness of DEI programs will likely be necessary in responding to these investigations. Thus, all private sector companies should consider working with legal counsel to assess existing DEI programs and policies to ensure compliance with federal laws.