



## Executive Order Changes Requirements for Affirmative Action Plans and Other DEI Programs

JANUARY 23, 2025

On January 21, 2025, President Trump signed the “**Ending Illegal Discrimination And Restoring Merit-Based Opportunity**” Executive Order (the EO). This EO targets Diversity, Equity, and Inclusion (DEI) programs, upends 60 years of federal contractor affirmative action, and signals increased scrutiny of private company DEI programs by the federal government. In addition, the EO imposes potentially significant consequences for maintenance of “discriminatory” DEI programs.

The EO rescinds Executive Order 11246 issued by President Johnson in 1965 and related executive orders that established affirmative action requirements for federal contractors and subcontractors with respect to minorities and women. EO 11246 provided authority for the bulk of the Office of Federal Contract Compliance Programs (OFCCP) authority and affirmative action regulations. The EO provides that federal contractors and subcontractors may (not “must”) continue to comply with the prior affirmative action regulatory scheme for a period of 90 days following the executive order (*i.e.*, until April 21, 2025).

In addition, the EO also requires that:

- Federal contractors’ and subcontractors’ employment, procurement, and contracting practices not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws;
- For new federal contracts or grant awards, federal contractors and subcontractors:
  - Agree that their compliance with all applicable federal anti-discrimination laws is material to the government’s payment decisions for purposes of the False Claims Act (setting the stage for potential whistleblowers suits); and
  - Certify that they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws.
- The OFCCP cease promoting “diversity,” holding federal contractors and subcontractors responsible for taking “affirmative action,” or allowing or encouraging federal contractors or subcontractors to engage in “workforce balancing;” and
- Employment and procurement policies of federal contractors and subcontractors not consider protected class in a way that violates civil rights laws.

Given the new administration’s apparent suspicion that corporate DEI programs are generally discriminatory, these new federal contracting requirements may create False Claims Act exposure after April 21, 2025 for each subsequently submitted invoice for federal contractors who maintain DEI programs following the receipt of new federal contracts, but there is no clarity as to whether there will be any new standard for whether a DEI program is “discriminatory.”

The EO also instructs the Attorney General to issue a report by May 22, 2025 that identifies measures to deter DEI programs for private companies, including identifying specific sectors of concern (*i.e.*, industries with DEI practices), “the most egregious and discriminatory DEI practitioners,” and assessing whether potential litigation concerning private company DEI practices would be appropriate for federal lawsuits.

### KEY TAKEAWAYS:

1. Federal contractors and subcontractors will be subject to new language implementing the objectives of this EO in modifications to existing contracts and in new contracts.
2. Federal contractors and subcontractors will face new certification requirements and potentially significant exposure risks under the False Claims Act. Every submitted invoice after April 21, 2025 under a new government contract may expose federal contractors to liability if DEI programs and initiatives are maintained.
3. Enforcement of violations of existing Federal Acquisition Regulation (“FAR”) equal opportunity clauses such as FAR 52.222-26 (Equal Opportunity) and 52.222-36 (Equal Opportunity for Workers with Disabilities) will be lessened or halted.
4. Federal contractors and subcontractors should carefully examine DEI programs and initiatives within their organization to determine whether such programs create exposure under the EO.
5. All employers should carefully examine their DEI programs and initiatives in light of the enhanced governmental scrutiny signaled by the EO and the continued increases in private challenges to such programs and initiatives by activist groups and other litigants.

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