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New Executive Order Would Terminate Race and Gender Affirmative Action Requirements for Federal Contractors

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On January 21, 2025, President Donald Trump issued an executive order ("Ending Illegal Discrimination and Restoring Merit-Based Opportunity") to eliminate race- and sex-based "affirmative action" requirements for federal agency contractors and subcontractors, and to ensure that contractor "diversity, equity and inclusion" (DEI) programs and policies do not violate civil rights law. The sweeping order, which applies more broadly than just to federal contracting, requires "all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."

The order also rescinds President Lyndon B. Johnson's Executive Order 11246 (equal employment opportunity) – the basis for the race- and sex-based affirmative action regulatory regime – and directs the Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor to "immediately cease: (A) Promoting 'diversity'; (B) Holding Federal contractors and subcontractors responsible for taking 'affirmative action'; and (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin."[1]

The executive order contains the following instructions and timeline for implementing these changes in federal contracting policy:

- The head of each agency must include in every contract or grant award:

    1. A "term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all Federal anti-discrimination laws is material to the government's payment decisions for purposes of" the civil False Claims Act (FCA).
    2. A "term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

        - Presumably, the Federal Acquisition Regulatory (FAR) Council will need to implement this requirement in regulation – though individual agencies might decide to adopt their own contract clauses in the meantime.
        - The certification requirement and the designation of the new nondiscrimination requirements as material to the government's decision to pay contractors unmistakably signal the Trump administration's intent to use contractor discrimination through "illegal DEI" programs (which is a term undefined in the executive order) as a predicate for civil FCA liability.

- For 90 days from the date of the executive order, contractors may continue complying with the equal opportunity and affirmative action "regulatory scheme in effect on January 20, 2025."

    1. The order does not state what contractors should or must do instead, after the 90-day period. The implication seems to be, however, that contractors should stop complying with the parts of the existing "regulatory scheme" that require race- and sex-based "affirmative action." The executive order does not address federal contractors' obligations to prepare affirmative action plans covering protected veterans and individuals with disabilities under the Vietnam Era Veterans' Readjustment

Assistance Act and Section 503 of the Rehabilitation Act. In fact, the order, by its terms, "does not apply to lawful Federal or private-sector employment and contracting preferences for veterans of the U.S. armed forces." Thus, contractors should plan to continue complying with affirmative action obligations relating to protected veterans and individuals with disabilities.

2. The same "regulatory scheme" includes an obligation to not discriminate in hiring based on, for example, race, sex or national origin. That obligation exists, too, under various federal, state and local laws. Accordingly, contractors should continue complying with those nondiscrimination obligations and, perhaps, with related reporting requirements.
3. Contractors that stop preparing race and gender affirmative action plans, however, will be taking at least some risk contractually, because the Equal Opportunity clause at FAR 52.222-26 remains for now in existing contracts, and some contracting officers might decide to continue enforcing those contract requirements, which include affirmative action plans for some contractors.

- The director of the Office of Management and Budget (OMB), with the assistance of the attorney general, must:

1. "Review and revise, as appropriate, all Government-wide processes, directives, and guidance."
2. "Excise references to DEI and DEIA principles, under whatever name they may appear, from Federal acquisition, contracting, grants, and financial assistance procedures to streamline those procedures, improve speed and efficiency, lower costs, and comply with civil rights laws."
3. "Terminate all 'diversity,' 'equity,' 'equitable decision-making,' 'equitable deployment of financial and technical assistance,' 'advancing equity,' and like mandates, requirements, programs, or activities, as appropriate."

More broadly, the executive order directs the attorney general – in consultation with the heads of agencies and in coordination with the director of the OMB – to submit a report to the assistant to the president for domestic policy, within 120 days, containing a "proposed strategic enforcement plan" to "encourage the private sector to end illegal discrimination and preferences, including DEI." As part of that plan, heads of agencies are to "identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit 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."

Also within 120 days, the attorney general and secretary of education will jointly issue guidance to all state and local educational agencies that receive federal funds and to all institutions of higher education that receive federal grants or participate in the Title IV student loan program regarding the measures and practices required to comply with the decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 US 181 (2023).

Notes

1. By directing OFCCP to stop "[a]llowing or encouraging … workforce balancing based on race, color, sex, sexual preference, religion, or national origin[,]" the order seems to suggest that OFCCP has been allowing or encouraging contractors to impose quotas in hiring for the purpose of ensuring a "workforce balance." That has not been OFCCP's policy. In fact, OFCCP has been explicit that quotas, preferences and set-asides in the employment context are prohibited.

notices.

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