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The Trump Administration's Rescission of Executive Order 11246: Major Changes to Affirmative Action Requirements for Government Contractors and Grant Recipients

By [David Yang](#)

On January 21, 2025, President Trump issued a sweeping executive order titled "[Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#)," aimed at eliminating "illegal" Diversity, Equity, Inclusion (DEI) and Diversity, Equity, Inclusion, and Accessibility (DEIA) programs and practices by government contractors and grant recipients (the "DEI EO"). The DEI EO rescinds President Johnson's EO 11246, a nearly six-decade mainstay for affirmative action requirements in government contracting. The DEI EO also rescinds President Obama's EO 13672, which amended EO 11246. Together, the prior EOs had mandated, among other things, that government contractors and grant recipients implement affirmative action plans regarding race and gender.

Who: The DEI EO broadly targets unlawful DEI practices by government prime contractors, subcontractors, and grant recipients.

What: As it pertains to government contracting and grants, the DEI EO provides:

1. "Federal contractors and subcontractors shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws."

2. Contractors and grant recipients must in contract and grant clauses agree to comply “in all respects with all applicable Federal anti-discrimination laws” and agree that such compliance “is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code.”
3. Contractors and grant recipients must certify that they “do[] not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
4. The Office of Federal Contract Compliance Programs (OFCCP) under the U.S. Department of Labor is prohibited from “[p]romoting diversity,” “[h]olding Federal contractors and subcontractors responsible for taking ‘affirmative action;’” and “[a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”

When: The DEI EO provides that “[f]or 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.”

Initial Takeaways: The DEI EO leaves unanswered many questions which will need to be resolved – most notably, the definition of unlawful and illegal DEI practices. In this regard, the DEI EO directs the Office of Management and Budget (OMB) to remove DEI principles and references 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.” While the DEI EO does not define or provide meaningful guidance as to what unlawful DEI principles constitute, and which related practices are subject to this directive, it appears that the nondiscrimination, affirmative action, and reasonable accommodation requirements for veterans and disabled persons remain intact under the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, Section 503 of the Rehabilitation Act of 1973, and the Randolph-Sheppard Act, as do the protections under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

Moreover, additions or changes to the Federal Acquisition Regulation (FAR) – the main regulatory scheme for government contracting – must satisfy certain notice and comment requirements for rulemaking by the FAR Council before their issuance and implementation. It remains to be seen how these procedural requirements will impact the implementation of the DEI EO and/or how existing regulations and clauses regarding DEI under the FAR will be handled in light of the changes directed by the DEI EO. Finally, portions of the DEI EO may be challenged in litigation as exceeding the President’s authority to enact under the Procurement Act pursuant to arguments reminiscent of those used to challenge the COVID-era vaccine requirements and contractor minimum wages during the Biden Administration. In any event, we expect that the OMB, the U.S. General Services Administration, OFCCP and other partner agencies will be issuing guidance in the coming weeks and months to provide industry with the needed clarity on the implementation of the DEI EO.

For current purposes, contractors and grant recipients have 90 days from January 21, 2025, or by April 21, 2025, to transition their affirmative action programs to become compliant with the DEI EO, which at a minimum means that such programs should eliminate any practices that would be inconsistent with the DEI EO’s prohibition against “consider[ing] race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws.” Contractors and grant recipients should work with counsel to conduct a privileged review of their existing affirmative action plans to remove any potential areas of noncompliance while ensuring that they remain compliant with any applicable state law requirements.

Contractors and grant recipients should also watch for agency efforts to amend existing contracts and grant agreements to incorporate new anti-DEI clauses, along with related certification requirements, ensure that any such changes are made on a bilateral (as opposed to a unilateral) basis, and ensure that compliant programs are in place by April 21, 2025 due to the explicit threat of False Claims Act (FCA) liability raised by the DEI EO to enforce its mandates. The DEI EO signals an emphasis on investigations and enforcement and government contractors and grant recipients should be cognizant that such measures will rely on the qui tam or whistleblower avenues under the FCA, which could result in treble damages, contract termination, and administrative sanctions.

Lastly, contractors should be prepared for terminations of SBA set aside status contracts by contracting officers who may (incorrectly) believe that the DEI EO prohibits the use of such contracts. In such an event, contractors should seek reconsideration from the agency, request that the contract be amended to remove or change any areas of concern (instead of a termination), or otherwise address the termination in accordance with the rights and remedies available under the contract, including seeking appropriate settlement costs or challenging the propriety of the termination.

The rescission of EO 11246 amounts to a significant federal policy shift regarding affirmative action and DEI efforts, posing significant implications for government contractors and grant recipients as well as to the broader employment landscape. Nelson Mullins will continue to monitor these important developments.

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