

Understanding Equal Employment Opportunity, Affirmative Action and Diversity/Equity/Inclusion

Executive Summary

- The concepts of equal employment opportunity, affirmative action, and diversity/equity/inclusion are overlapping but are not the same, and employers should recognize the distinctions in these concepts.
- Employers continue to be subject to federal, state, and local equal employment opportunity laws and should ensure these laws are properly effectuated in the workplace.
- Diversity, equity, and inclusion programs are under scrutiny by the federal government and employers should consider whether and how to continue these programs.
- Employers should hire, promote, and retain the best qualified individuals.
- Employers should implement programs that will ensure that they recruit and select the best qualified individuals for all positions.

Understanding Equal Employment Opportunity, Affirmative Action and Diversity/Equity/Inclusion

With the ongoing scrutiny of diversity, equity, and inclusion (DEI) programs by the federal government, there is much confusion about what can and cannot be done to provide equal employment opportunity (EEO) in the workforce. [Executive Order 14173](#), entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” purports to reinvigorate federal EEO laws that affect both the federal government itself and private sector employers. The language surrounding the executive order can contribute to misunderstanding of what is and is not required of employers. This document is meant to help provide a better understanding of what is required of employers and what actions employers might take to build a high-performing workforce.

Equal Employment Opportunity

EEO laws are meant to prohibit discriminatory conduct by employers based on defined protected classifications. At the federal level, employers may not discriminate against applicants or employees based on race, ethnicity, sex, religion, national origin, disability, or age. These prohibitions grow out of [Title VII](#) of the Civil Rights Act of 1964, the Americans with Disabilities Act ([ADA](#)), and the Age Discrimination in Employment Act ([ADEA](#)). For race, ethnicity, sex, national origin, and religion, this prohibition applies to all variations on these characteristics. For example, an employer may not discriminate against a Hispanic female, just as an employer may not discriminate against a white male. In regard to sex, the Supreme Court has ruled that the term “sex” includes sexual orientation and gender identity. (See [Bostick v. Clayton County](#).)

State and local units of government may have EEO laws with different protected classifications than the federal government. For example, in Wisconsin, employers may not discriminate against applicants or employees based on marital status, arrest or conviction record, military service, or the use of lawful products. In Minnesota, protected classifications include status with regard to public assistance, familial status, and membership or activity in a local commission.

EEO laws are generally enforced through the filing of complaints by one or more individuals who believe there has been discrimination. Typically, this is no action taken by a governmental body until a complaint is filed. At the federal level, complaints are processed by the Equal Employment Opportunity Commission ([EEOC](#)). At the state and local level, complaints are processed by the state or local agency designated to manage these complaints. EEOC allows complaints under federal law to be heard by state agencies when there is a state agency with jurisdiction to hear the relevant complaint. On rare occasions, EEOC may initiate a “[commissioner charge](#),” where EEOC begins an action without a formal complaint having been filed. Commissioner charges are generally used only when there is a large class of potential victims of discrimination and an egregious violation of the law.

Remedies available for violations of EEO laws may be different depending on the relevant unit of government where a complaint was filed. Successful complainants typically will be allowed remedies that will put them in the situation where they would have been absent the discriminatory action. Successful complainants may be made job offers, provided with promotions, paid back pay for the period when they would have been employed, and so on. At the federal level, there may be compensatory and punitive damages awarded to successful complainants. These compensatory and punitive damages are limited in scope. Some state and local governments also provide compensatory or punitive damages in certain situations.

Affirmative Action

Employers that have contracts or subcontracts with the federal government may have equal opportunity obligations that go beyond those found in the EEO laws that affect other employers. Similarly, employers that have contracts or subcontracts with state or local units of government may have additional EEO obligations. These obligations are often referred to as “affirmative action” (“AA”) requirements.

Unlike traditional EEO laws, affirmative action laws require a proactive approach by employers. Employers covered by these laws may be required to make outreach efforts and to analyze workforce data, including data on current employees and on personnel activity. Affirmative action laws also require employers to hire, promote, and retain the best qualified individuals and to ensure applicants and employees are treated in a non-discriminatory manner in all facets of employment.

The federal affirmative action laws have traditionally been enforced by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs ([OFCCP](#)). OFCCP is responsible for ensuring compliance with several laws. One of the laws OFCCP formerly enforced was Executive Order 11246 ([EO 11246](#)). When it was originally adopted, EO 11246 prohibited discrimination based on race, ethnicity, religion, and national origin. EO 11246 was amended to include prohibitions against discrimination based on [sex](#), and, later, [sexual orientation and gender identity](#). EO 11246 required the preparation of a variety of statistical reports meant to identify possible imbalances in the workforce and possible discrimination in employment practices. This executive order did not require employers to hire, promotion, or retain less-qualified individuals, nor did it require employers to create preferences, establish quotas, or take other actions that might discriminate against any class of applicants or employees.

EO 11246 was revoked by Executive Order 14173. This means that the federal government no longer requires federal contractors and subcontractors to take affirmative action to protect applicants and employees from discrimination based on the classifications covered by EO 11246. Federal contractors and subcontractors are also no longer required to produce the statistical or narrative report required by EO 11246.

OFCCP also enforces a law that requires federal contractors and subcontractors to provide opportunities to [individuals with disabilities](#) as well as a law that required these employers to provide opportunities to certain classes of [veterans](#). These two laws prohibit discrimination against

the relevant groups and require outreach efforts to attract and retain members of these groups. The affirmative action laws regarding individuals with disabilities and veterans have not been affected by Executive Order 14173.

OFCCP enforced the laws under its jurisdiction through compliance reviews. Federal contractors and subcontractors were chosen for review under a neutral administrative procedure. Reviews examined statistical materials that employers were required to produce as well as various personnel records.

While OFCCP was allowed to recommend termination or suspension of federal contracts or subcontracts upon a finding of noncompliance, the agency rarely did so. The more significant sanction that the agency wielded was the ability to start discrimination actions on behalf of a class of applicants or employees after finding statistical or other evidence of possible discrimination. There have been settlements to end compliance reviews that required employers to pay millions of dollars in backpay to one or more classes of applicants or employees.

It is unlikely that OFCCP will survive the current restructuring that is occurring in the federal government. The budget agenda for federal fiscal year 2026 shows that the federal government expects OFCCP to cease operations as of October 2025. While EO 11246 has been revoked, the laws concerning individuals with disabilities and veterans will need to be enforced by some agency. The federal budget agenda suggests that the law regarding individuals with disabilities will be enforced by EEOC, while the law regarding protected veterans will be enforced by the Veterans Employment and Training Administration within the Department of Labor.

As is the case with EEO laws, there are also affirmative action laws that have been adopted by certain states and local governments. These affirmative action laws affect contractors (and occasionally subcontractors) with the relevant unit of government. The protected classifications covered by these laws vary from jurisdiction to jurisdiction, but most state and local affirmative action laws prohibit discrimination against applicants or employees on the basis of race, sex, and disability status. Some state and local affirmative action laws have extensive recordkeeping and reporting requirements; some require little more than the creation of an anti-discrimination policy. One commonality among these laws is that they are generally enforced through the suspension or termination of an employer's contracts with the relevant unit of government.

State and local affirmative action laws have not been affected by EO 14173. While state and local units of government may make some modifications to their affirmative action laws based on language in EO 14173, these units of government were not explicitly required to end affirmative action programs that protect applicants or employees from discrimination based on race, ethnicity, or sex.

Diversity, Equity, and Inclusion Programs

In the private sector, DEI programs have been adopted as a voluntary initiative to strengthen an employer's workplace and position in the marketplace. There is no legal mandate for DEI programs in the private sector, nor are there legal sanctions for failing to effectuate these programs.

DEI programs (or DEIA programs when the term "accessibility" is added to the acronym) are meant to accomplish one or more of the following objectives:

- Develop a broader presence in the marketplace
- Increase the scope of employee outreach in order to reach non-traditional candidates
- Create an environment in which a diversity of ideas might result in better decision-making about products and processes
- Influence customers on the employer's commitment to the communities and stakeholders it serves

An effective DEI program has some of the same objectives as EEO and affirmative action laws. For example, DEI programs should ensure that employers recruit, promote, and retain the best qualified individuals. As another example, DEI programs should ensure that employers make outreach efforts to find the best qualified individuals. However, the outcome of a DEI program is typically judged on whether it strengthens an employer's ability to meet its corporate objectives rather than showing compliance with a legal obligation.

Executive Order 14173 (EO 14173) suggests that DEI programs are inherently discriminatory. The executive order states that DEI programs undermine core American values of merit and hard work, and that these programs require the hiring of lesser qualified individuals who meet some demographic attribute. While most DEI programs do not have these characteristics, there have been a small number of highly publicized programs where private sector employers have established numerical targets for certain positions or populations without demonstrating a strong relationship between these targets and disparities in the employer's workforce. However, effective DEI programs are not based on numerical targets. They should be based on creating an environment where employees work together to achieve the employer's priorities.

Considerations Regarding DEI Terminology

While most DEI programs are not meant to discriminate against any class of individuals, a significant issue with some DEI programs may be the terminology associated with these programs. It would be useful to consider the terms "diversity, equity, and inclusion" in the following manner:

- "Diversity" should not focus on numerical targets associated with particular demographic characteristics such as race and sex. Instead, "diversity" should be associated with creativity and connectedness. The rationale for having a diverse workforce is to have a diversity of opinions and experiences that can bring greater creativity to work teams and to product development. A workforce with a broad cross-section of employees who have different life experiences should in theory be better positioned to consider new and

innovative ideas. Such a workforce should also provide a connection to others in the communities and in the stakeholder groups that the employer serves.

- “Equity” should again not focus on numerical targets, nor should it focus on creating artificial equality between unlike groups or individuals. Instead, “equity” should be associated with providing a work environment where the unique skills and talents of individuals are properly evaluated and recognized. The rationale for having a more equitable workforce is to provide incentives for employees to reach their greatest potential while ensuring that their contributions are appropriately valued. An equitable workforce recognizes the similarities and differences in the employee population and provides opportunities and rewards based on the contributions that employees make.
- “Inclusion” should not focus on providing opportunities based solely on demographic characteristics. Instead, “inclusion” should focus on creating an environment where employees believe they can and want to contribute to the employer’s success. Effective employees typically desire to understand the employer’s goals and objectives and to help achieve these goals and objectives. Programs to ensure employees are fully engaged can help to motivate employees towards these ends.

Actions to Take

In light of the continuing relevance of federal, state, and local EEO laws and the current scrutiny of DEI programs by the federal government, employers should take the following actions.

- Ensure that the employer knows what EEO laws apply in each of the employer’s locations.
- Prevent discrimination based on the protected classifications in applicable EEO laws.
- Create and distribute policies that make employees aware that discrimination is prohibited and that the employer should be notified if employees believe they were the subject of discrimination.
- For federal contractors and subcontractors, stop creating statistical and narrative reports which are no longer required because of the revocation of Executive Order 11246.
- For federal contractors and subcontractors, continue to implement the requirements of the federal affirmative action laws for individuals with disabilities and protected veterans.
- For state and local government contractors, continue to create statistical reports and to provide other information required by state and local affirmative action laws.
- Avoid the use of any DEI or related program that contains numerical quotas or other quantitative measures not strictly tied to applicable legal standards.
- Consider renaming programs and policies tied to DEI efforts to ensure that these programs and policies do not bring attention from the federal government.
- Continue making outreach efforts in order to ensure that the employer is seeking and selecting the best qualified individuals.

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