

Summary of and Guidance for Executive Order 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity.

Introduction

On January 21, 2025, President Trump signed a new Executive Order (EO) 14173 titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.” This Executive Order impacts the federal government and its agencies, federal government contractors and subcontractors (“contractors”), and private sector employers. Among its major actions were to:

- eliminate Diversity, Equity and inclusion (DEI) programs in the federal government,
- revoke Executive Order 11246, which is the basis for the Women and Minorities Affirmative Action Program obligations for federal government contractors,
- require compilation by federal agencies of employers of lists with “illegal” DEI practices in the private sector in preparation for possible litigation, and
- impose additional requirements, including requiring Federal government contractors to certify they do not operate any DEI programs that violate Federal anti-discrimination laws.

A copy of the Executive Order is included as Appendix A.

In order to assist federal government contractors in understanding this Executive Order and determining what steps to take in following this EO, Ellen Shong & Associates, LLC has prepared this memorandum to provide:

- a summary of the Executive Order,
- an overview of the impact of the Executive Order on federal contractors regarding which affirmative action (AA) obligations are no longer required, which AA obligations remain in effect, and whether there will be compliance reviews (audits) to enforce AA federal obligations,
- suggested actions to be taken now and in the near term, and
- what issues are unresolved, what questions exist now, and where future guidance from regulatory agencies may be forthcoming.

Ellen Shong & Associates, LLC will be available to answer questions and discuss particular sections with clients after they have an opportunity to review this memorandum.

This memo is intended to inform clients and other parties in order to assist them with understanding and evaluating Executive Order 14173 and the impact of this Executive Order on Federal affirmative action compliance obligations. This memo is not to be considered as legal advice and it is recommended that you consult your attorney to receive any legal advice.

I. Summary of Executive Order 14173

We have separated out the major parts of the Executive Order and specifically highlighted in grey those provisions that impact private sector employers.

Purpose of Executive Order

The premise for this EO is that DEI and other related programs implemented by the federal government and its agencies, as well as by private employers including federal government contractors, are violating non-discrimination laws and regulations.

Section 1 of the Executive Order makes this clear. It reads in part as follows:

- *“[C]ritical and influential institutions of American society, including the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education have adopted and actively use 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) that can violate the civil-rights laws of this Nation.”*
- *“The Federal Government is charged with enforcing our civil-rights laws. The purpose of this order is to ensure that it does so by ending illegal preferences and discrimination.”*

Policy of Executive Order

Section 2 of the Executive Order states the EO’s policy.

- *It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order 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. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.*

The stated policy is intended to eliminate “illegal” DEI preferences and programs.

Actions Directed at the Federal Government

Sections 3 of the Executive Order, “Terminating Illegal Discrimination in the Federal Government,” includes parts impacting the Federal government and its agencies under subsections 3(a) and 3(c):

- (a) *The following executive actions are hereby revoked:*
 - (i) *Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental*

- Justice in Minority Populations and Low-Income Populations);*
- (ii) Executive Order 13583 of August 18, 2011 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);*
- (iii) Executive Order 13672 of July 21, 2014 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity); and*
- (iv) The Presidential Memorandum of October 5, 2016 (Promoting Diversity and Inclusion in the National Security Workforce)...*
- (c) The Director of the Office of Management and Budget (OMB), with the assistance of the Attorney General as requested, shall:*
- (i) Review and revise, as appropriate, all Government-wide processes, directives, and guidance;*
- (ii) 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; and*
- (iii) 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.*

The above subsections direct the Federal government and its agencies to reverse DEI programs and efforts required through earlier Executive Orders, and to review all current programs in this area to eliminate these programs as well as any references to the programs.

Actions Directed at Federal Government Contractors and Subcontractors

Section 3(b) of the Executive Order, which is directed at Federal government contractors, reads as follows:

(b) The Federal contracting process shall be streamlined to enhance speed and efficiency, reduce costs, and require Federal contractors and subcontractors to comply with our civil-rights laws. Accordingly:

(i) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), is hereby revoked. For 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.

(ii) The Office of Federal Contract Compliance Programs within the Department of Labor shall 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.

(iii) In accordance with Executive Order 13279 of December 12, 2002 (Equal Protection of the Laws for Faith-Based and Community Organizations), the employment, procurement, and contracting practices of 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.

(iv) The head of each agency shall include in every contract or grant award:

(A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) 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.

The revocation of EO 13672 in the section entitled "Actions Directed at the Federal Government" also impacts Federal government contractors with respect to the inclusion of "sexual orientation" and "gender identify" as protected group designations. (This will be covered later in this memo.)

Key parts of this subsection impacting Federal government contractors and subcontractors are:

- revocation of Executive Order 11246, which is the basis for requiring Affirmation Action Programs ("AAPs") associated with race, ethnicity, gender, and certain other classifications,
- instructions to the Office of Federal Contract Compliance (OFCCP) to cease requiring contractors to promote a number of activities, including providing "affirmative action" for women and minorities, and,
- the imposition of new contractual requirements on federal government contractors, including the certification that the contractor has no illegal DEI programs

The federal contractor compliance obligations regarding race, ethnicity, and sex were created by Executive Order 11246 issued President Johnson approximately 60 years ago.¹ While Executive Order 11246 had been in place for 60 years, it could be revoked by another President through a subsequent Executive Order, which is what happened when President Trump issued Executive Order 14173.

¹ Executive Order 11246 did not initially include sex as a protected classification. Sex was added to the EO 11246 in 1967 via Executive Order 11375.

While the primary focus of the recent EO is to eliminate DEI programs and perceived preferences, employers should remember that under EO 11246 and its regulations, there were never any racial or gender preferences or quotas. These were expressly forbidden under EO 11246. However, because EO 11246 focused on and used the term “affirmative action,” there were misperceptions about Federal contractor obligations. Given that “affirmative action” has been perceived to require set-asides and/or preferences, it is not surprising how DEI, “affirmative action” and EO 11246 principles were not distinguished from each other and were combined into EO 14173.

Actions Directed at All Private Employers and at Institutions of Higher Education

The EO’s Sections 4 and 5 are addressed to all private employers and to institutions of higher education:

Sec. 4. Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences.

- (a) The heads of all [Federal] agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order.*
- (b) To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall 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 shall contain a proposed strategic enforcement plan identifying:*
 - (i) Key sectors of concern within each agency’s jurisdiction;*
 - (ii) The most egregious and discriminatory DEI practitioners in each sector of concern;*
 - (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated “DEI” or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall 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;*
 - (iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws;*
 - (v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and*
 - (vi) Potential regulatory action and sub-regulatory guidance.*

Sec. 5. Other Actions. Within 120 days of this order, the Attorney General and the Secretary of Education shall jointly issue guidance to all State and local educational agencies that receive Federal funds, as well as all institutions of higher education that receive Federal grants or participate in the Federal student loan assistance program under Title IV of the Higher Education Act, 20 U.S.C. 1070 et seq., regarding the measures and practices required to comply with Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

In the above action items, note that Federal government contractors and subcontractors and institutions of higher education are subject to possible inclusion as employers that are considered to be “the most egregious and discriminatory DEI practitioners” and thus subject to potential “civil compliance investigations.”

II. Overview of Impact of Executive Order on Federal Contractors and Subcontractors

What Federal Affirmative Action Program Obligations Have Been Ended?

With the revocation of Executive Order 11246, as of January 21, 2025, federal government contractors and subcontractors are no longer required to prepare Federal Affirmative Action Programs that cover the classes protected under Executive Order 11246. Contractors therefore no longer need to undertake the following:

- Preparation of written AAP narratives associated with Executive Order 11246
- Preparation of numerical and statistical reports, including the Workforce Analysis (or Organizational Display), Job Group Analysis, Availability Analysis and Comparison of Incumbency v. Availability required in the regulations under EO 11246
- establishment of placement goals for Women or Minorities
- good faith efforts and outreach to meet any established goals
- monitoring of personnel activity, including evaluations regarding applicants, hires, internal movements, terminations, and compensation
- monitoring of prior year placement goals for Women and Minorities

NOTE: Per EO 14173, Federal contractors and subcontractors are allowed to continue under the regulatory structure in place as of January 20, 2025, for 90 days. This effectively allows for preparation (or completion) of EO 11246 AAPs until April 21, 2025. Contractors should carefully consider whether to prepare or complete AAPs and consult with legal counsel about how to move forward.

Contractors were also required under EO 11246 to solicit from applicants their race, ethnicity and gender in order to be able to monitor hiring and other personnel activity. However, this is no longer explicitly required through any Federal regulations. This information may be important for use in defending EEOC charges, determining non-discrimination, and for some other purposes. Therefore, contractors may still want to solicit this information but should discuss this action with legal counsel.

Federal contractors and first-tier subcontractors that have 100 or more employees must continue to solicit race, ethnicity and gender information from new hires in order to comply reporting obligations associated with the EEO-1 report. These employers may also be required to solicit race, ethnicity, and gender information from employees because of other federal, state, or local mandates.

What Federal Affirmative Action Program Obligations Continue to be Required?

Federal government contractors and subcontractors are required to continue preparing Affirmative Action Programs for Protected Veterans and for Individuals with Disabilities. These compliance obligations were created by Congress under the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and under Section 503 of the Rehabilitation Act. Therefore, they cannot be revoked by Executive Order. Congress could certainly take action to remove these obligations, though that does not appear to currently be on the agenda of the administration or Congress.

Obligations under VEVRAA and Section 503 include:

- Preparation of written AAP narratives for protected veterans (PVs) and individuals with disabilities (IWDs)
- Establishment of a Protected Veterans annual hiring benchmark
- Establishment of a utilization goal of 7% for Individuals with disabilities²
- Assessment of progress towards meeting the 7% utilization goal
- Providing an invitation to self-identify PV and IWD status for applicants at both the pre-offer and post-offer stage of a selection process
- Providing an invitation to all employees to self-identify IWD status every five years and notifying employees of the opportunity to self-identify at least once within this five year interval
- Ensuring that OFCCP's mandated self-identifications form is used any time there is a collection of information on disability status
- Preparing PV and IWD applicant and hire statistical summaries
- Creating an annual assessment of outreach
- Preparing an annual audit and reporting review
- Reviewing personnel processes for their impact on PVs and IWDs
- Sending a notification to subcontractors and suppliers
- Reviewing physical and mental qualifications in job descriptions
- Listing of job vacancies with state employment services
- Ensuring there is outreach for PV and IWD

² Note that the federal regulations require most federal contractors and subcontractors to have a utilization goal for each affirmative action job group. Job groups were created under the EO 11246 AAP, and thus it is no longer clear what employers must use as grouping for measurement purposes.

- Creating an EEO policy statement and posting this statement where it can be seen by applicants and employees
- Making a reasonable accommodation notice available to applicants and employees
- Including an equal opportunity clause with specific language in contracts and purchase orders
- Filing VETS-4212 report annually
- Complying with documentation and data retention requirements (which may involve up to three years of data retention)

Employee, applicant and other HR data will be needed and required for complying with the PV and IWD obligations, such as measurement of the IWD utilization goal and the preparation of statistical reports on applicants and hires. The fact that there are no data collection requirements under Executive Order 11246 does not relieve employers from data collection under VEVRAA and Section 503.

It is interesting that Section 7 of EO 14173 includes a reference to veterans and blind individuals:

Sec. 7. Scope. (a) This order does not apply to lawful Federal or private-sector employment and contracting preferences for veterans of the U.S. armed forces or persons protected by the Randolph-Sheppard Act, 20 U.S.C. 107 et seq.

However, it should be noted that the veterans definition above differs from the four categories of veterans specifically defined in VEVRAA as covered protected veterans. Likewise, the reference to the Randolph-Sheppard Act, which is a federal law that gives blind people priority in operating vending facilities on federal property, is a more limited and different definition of disabled individuals than the definition found in the regulations under Section 503. The inclusion of Section 7 could be interpreted as an attempt to indicate that Executive Order 14173 was not intended to impact VEVRAA and Section 503, even though an EO could not revoke those laws.

See later discussion on the possible future of OFCCP, which could lead to contractors preparing separate written AAPs for Protected Veterans and Individuals with Disabilities. Currently, it is quite common for the two AAPs to be combined into a single narrative document.

What is the Impact of EO 14173 on Current Compliance Reviews (audits) and on Corporate Scheduling Announcement Lists (CSALs)?

The Office of Federal Contract Compliance Programs (OFCCP) at the U.S. Department of Labor is responsible for contractor compliance with regard to the EO 11246, VEVRAA , and Section 503. Each year, the OFCCP has routinely scheduled Federal contractors and subcontractors for compliance reviews (as known as audits) to determine whether they are in compliance with their obligations under these three laws.

In order to make employers aware of pending compliance reviews, OFCCP has been issuing Corporate Scheduling Announcement Lists (CSALs). A CSAL does not open a compliance review; instead, it makes an employer aware that the agency will eventually be conducting some type of review of one or more of an employer's establishments or functional units. The latest CSAL which was released in late 2024 included

2,000 contractor establishments and functions to be reviewed by the OFCCP. There were also other earlier CSALs that contained establishments and functions where OFCCP had not yet completed compliance reviews.

With the revocation of EO 11246, OFCCP cannot enforce the regulations associated with the EO and therefore does not have the authority to conduct compliance reviews regarding EO 11246. However, the agency currently has legal authority to oversee compliance with VEVRAA and Section 503.

On January 24, 2025, the acting Secretary of the U.S. Department of Labor issued a cease and desist order to the OFCCP directing the agency to close the EO 11246 portion of any ongoing review or investigation (**see Appendix B**). The order also directed the OFCCP to place on hold, pending further guidance, the portion of any compliance review or investigation related to VEVRAA and Section 503. Letters notifying Federal contractors and subcontractors with open compliance reviews were sent January 31, 2025.

With the January 24 memo, all OFCCP compliance reviews are on hold. Contractors on OFCCP's CSAL from November 2024 should not be receiving letters initiating any compliance reviews.

OFCCP will not be able to open a new compliance review under VEVRAA or Section 503 since the current letter used to open a review includes requests for both EO 11246 documents and Section 503 and VEVRAA documents. Until OFCCP goes through the process to issue a proposed new letter, receive comments from the public, and receive approval from the Office of Management and Budget (OMB) for a revised letter, the agency will not be able to initiate new compliance reviews.

III. Suggested Actions to be Taken Now and in the Near Term

As noted above, with the revocation of EO 11246, an affirmative action plan under this Executive Order no longer needs to be created or maintained. There are other areas where contractors will need to revise policies, documents, and other items that were part of the revoked compliance obligations. It is recommended that changes, if applicable, be made prior to April 21, 2025, which is the end of the 90 day period provided for in the Executive Order 14173.

Policy Statements: Contractors have created EEO (or EEO/AA) policy statements (usually signed, dated and posted) to comply with obligations under the EO 11246, Protected Veterans, and Individuals with Disabilities regulations. It is recommended that contractors review their EEO policy statements to:

- Remove "affirmative action" phrases that are related to women and minorities or are general in nature (see next item)
- Consider qualifying any references to "affirmative action" to make them clearly applicable to Protected Veterans and individuals with Disabilities
- Carefully review and consider removing or renaming any phrases that refer to diversity, equity, inclusion or related concepts
- Review references to "sexual orientation" and "gender identity" among protected groups

Sexual orientation and gender identity are no longer explicitly protected classifications for Federal contractors after the revocation of EO 13672. However, certain protections for these two groups exist under Title VII because of the US Supreme Court's decision in *Bostock v. Clayton County*.

Taglines: Contractors are required to have an Equal Opportunity Employer (EOE) tagline on their career websites, within job postings, and in other locations where job vacancies are displayed. This EOE tagline can be either very short or longer as found in these examples:

- "EOE. Veterans/Disabled"
- "EOE/Veterans/Disabled"
- "EOE/Protected Veterans/Disabled"
- "Company xyz is an equal opportunity employer. Veterans/Disabled."
- "Company xyz is an equal opportunity employer. We do not discriminate on the basis of race, national origin, sex, religion, age, protected veteran status, disability or any other basis protected by federal, state or local laws."

Contractors should review EOE statements being used and consider making these modifications:

- Remove use of any phrases such as "affirmative action" since it avoids confusion on what affirmative action is taking place (since affirmative action is required for protected veterans and individuals with disabilities but not is not required for women and minorities). Employers may want to reference non-discrimination only in these EOE taglines and not include the words "affirmative action."
- As with the EEO policy statement, consider removing references to "sexual orientation" and "gender identity" among any listed protected groups.

Contracts and Purchase Orders: Contractors have been required to include in purchase orders and subcontracts an equal opportunity clause as specified in the federal affirmative action regulations. These requirements were driven by all three affirmative action laws, but now that EO 11246 has been revoked, there are some changes that will need to be made. Model wording for an EO clause is shown below and has been marked to indicate the modification to be made to remove the reference to EO 11246:

*During the performance of this contract or purchase order, the contractor/vendor agrees to comply with all Federal, state and local laws respecting discrimination in employment and non-segregation of facilities including, but not limited to, requirements set out at ~~41 CFR §60-1.4~~, 41 CFR §61-300.10, 29 CFR Part 471 Appendix A to Subpart A, 41 CFR §60-300.5 and 41 CFR §60-741.5, which specific clauses are herein incorporated by reference into all covered contracts and subcontracts as required by Federal law. **This contractor and subcontractor shall abide by the requirements of 41 CFR §60-300.5(a) and §60-741.5(a). These regulations prohibit discrimination against qualified individuals on the basis of protected veteran status or disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and individuals with disabilities.***

Wording in Policies and Other Employer Materials: Review the use of “affirmative action”, “diversity” and other DEI related wording found in policies, company websites, social media, publications, employee handbook, etc. and consider removing or recharacterizing or renaming. Especially be careful of the publication of aspirational goals for selected groups such as “the company’s goal is to have at least 20% xxxxx in its workforce by 2030”. The use of aspirational goals is an area where contractors should definitely involve legal counsel.

DEI and Related Programs: Review DEI programs, affinity groups, internship programs, networking groups, employee resources groups, training programs, supplier diversity programs, etc. that have in the past been focused on or where membership was limited to under-represented or other protected groups. Among other considerations:

- Employers should consider pausing all DEI and related programs in order to allow for a thorough review.
- DEI programs are not inherently illegal, so properly constructed, employers may be able to use DEI programs. However, it is possible these programs will still be challenged by third party plaintiffs or the Federal government.
- Be careful of differences between stated policies and actual practices. This is another area that contractors should definitely involve counsel.

Obligations Regarding Protected Veterans and Individuals with Disabilities: As described in earlier sections of this document, contractors are required to prepare and update AAPs for Protected Veterans and Individuals with Disabilities. Contractors should be sure to continue meeting the related compliance obligations under the PV and IWD regulations. Major requirements have been listed earlier. These include documentation and record retention requirements under the PV and IWD regulations.

Contractors may want to consider having separate affirmative action plans for PVs and IWDs. The reporting requirements for these two groups are slightly different. More importantly, PVs and IWDs will now be the only focus groups during OFCCP compliance groups. Separate AAP would help to ensure that issues with one group do not impact the other group.

Federal Reports: Continue filing the EEO-1 reports annually as overseen by the EEOC. Note that in the EO 11246 implementing regulations, there was a requirement for contractors with at least 50 employees to file the EEO-1. While this no longer is a requirement, most contractors will still need to file the EEO-1, since there is a 100 employee threshold imposed by the EEOC for EEO-1 reporting for covered employers.

Communication to Employees: Consider communicating to employees a high level summary of the impact of the EO 14173, including the revocation of EO 11246, stating that an EO 11246 AAP is no longer maintained, but per contract requirements affirmative action programs for PV and IWD are still maintained.

Self-Identification for Applicants: It is worth repeating that contractors should review their practices regarding the self-identification of applicants for race, ethnicity and sex, since that is no longer required under federal law. However, as noted previously, there may be some future need and/or utility to

collecting this information to assist with any DEI certification process or to demonstrate non-discrimination or non-illegal DEI program activity. Some additional considerations:

- Many self-identification website forms in the application process will refer to the reason for collecting this information being a requirement by the Federal government. These statements will need to be reviewed and modified.
- If a state requires submission by a state contractor of applicant data by race/ethnicity and sex, an employer would need to continue to collect this demographic information from its applicants. For example, Minnesota and New Jersey are two states where state contractors are required to collect and report on the race/ethnicity and sex of applicants.

Know Your Rights Poster: It is expected that EEOC will eventually issue a new Know Your Rights poster without EO 11246 references and requirements. When the revised poster is issued, be sure to update paper posters in the workplace and electronic versions on career websites and company intranets.

IV. What Are Some Unresolved Issues and Questions?

As with any new Executive Order or law, there are many questions and unresolved issues that are being asked about Executive Order 14173. It is certain there will be additional questions and issues in the future as the Federal government and contractors work through the EO requirements.

Here are some of the questions and issues that are being raised now.

- What is the definition of an “establishment” for the Protected Veterans and Individual with Disabilities AAPs, given that much of the guidance for AAP establishment was in the regulations under EO 11246?
 - o Do AAPs have to still be prepared for each establishment with 50 or more employees?
 - o What about establishments with fewer than 50 employees?
- What about the 41 CFR 60-2.1(d) requirements that govern how employees reporting to managers in a different location are treated for AAP inclusion and exclusion? For now, contractors may be able to continue defining AAP establishments similar to how done for the EO 11246 AAPs or move to AAPs based strictly on where employees are located (or in the absence of this information, where their manager is included, similar to the EEO-1 instructions.)
- How are job groups defined for the Individuals with Disabilities utilization analysis, since the definition is found in the EO 11246 regulations at 41 CFR 60-2 or 60-4. In 60-2, “job group” is defined as jobs having similar “content, wage rates, and opportunities”. Is this the definition to continue using?
- How will the Federal government require a contractor to agree that *“its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code”* and when will this happen?
 - o Will this be through a contract modification? Will it be through the government’s System for Award Management (SAM)?

- Contractors are reminded that when they agree to this term, it is a critical risk area under the False Claims Act and opens up contractors to whistleblower claims from third parties that can be potentially very costly.
- How will the Federal government require a contractor to certify *“that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws”*
 - This and the previous requirement could lead to an increased numbers of lawsuits by White and/or male employees under this EO.
- How does one determine if DEI programs violate anti-discrimination laws?
- What is the definition of illegal DEI?
 - Will there be guidance and regulations for contractors and employers to rely on?
 - Are there going to be standards in this area?
 - There already have been lawsuits filed in February 2025 challenging the EO and some of its aspects, including the vagueness and lack of definition of “illegal DEI” terminology. Employers may remember Executive Order 13673, entitled Fair Pay and Safe Workplaces, which was issued by the Obama administration and was known as the blacklisting rule. This rule had reporting requirements for EEO and other workplace violations. This rule was litigated in part due to its vagueness, the rule was put on hold, and the rule never went into effect due to Congressional action. EO 14173 may similarly be considered to be too vague to allow for enforcement.
- Should contractors make use of data and conduct analyses of data such as employee and applicant data to demonstrate that they are not discriminating and/or that their DEI programs are not discriminatory?
 - Stated another way, should contractors be performing an analysis of applicants versus selections (hires, etc.) to be able to proactively verify there are no potentially discriminatory results?
 - Should contractors perform analyses of compensation to verify that there are no significant pay disparities? If contractors perform these analyses, what happens if they do not take corrective action promptly?
 - If analyses ARE prepared, be sure to consult with legal counsel and conduct these under attorney-client privilege.
- How are conflicts between state level EEO/AA requirements, such as Minnesota’s AAP regulations that require affirmative action for women and minorities, and federal requirements found in this EO resolved for employers?

With regard to the OFCCP, these are questions being raised:

- What is the future role of the OFCCP? Will it continue to exist or will its regulatory oversight role be transferred to other US Department of Labor agencies?
- What happens to the existing compliance reviews that are on hold, which are now limited to the Protected Veterans and Individuals with Disabilities portions of the review?

- Will the annual AAP certification required by the OFCCP in the spring continue in the future? This would only require certification of the Protected Veterans and Individuals with Disabilities AAP obligations.
 - Would the OFCCP add any of the other certifications and agreements set out in the new Executive Order?
- Could the OFCCP be given responsibility for policing illegal DEI programs and other non-compliance in this EO?

Again, as a final reminder, be sure to involve inhouse counsel and outside employment/labor counsel in reviews and considerations of how to proceed with regard to compliance with this Executive Order, especially with regard to the DEI portions. For many of these areas, especially review of policies and practices, contractors should conduct these under attorney-client privilege.

Appendix A - Executive Order 14173

[Menu](#)[Search](#)

PRESIDENTIAL ACTIONS

ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT- BASED OPPORTUNITY

January 21, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. Longstanding Federal civil-rights laws protect individual Americans from discrimination based on race, color, religion, sex, or national origin. These civil-rights protections serve as a bedrock supporting equality

of opportunity for all Americans. As President, I have a solemn duty to ensure that these laws are enforced for the benefit of all Americans.

Yet today, roughly 60 years after the passage of the Civil Rights Act of 1964, critical and influential institutions of American society, including the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education have adopted and actively use 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) that can violate the civil-rights laws of this Nation.

Illegal DEI and DEIA policies not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system. Hardworking Americans who deserve a shot at the American Dream should not be stigmatized, demeaned, or shut out of opportunities because of their race or sex.

These illegal DEI and DEIA policies also threaten the safety of American men, women, and children across the Nation by diminishing the importance of individual merit, aptitude, hard work, and determination when selecting people for jobs and services in key sectors of American society, including all levels of government, and the medical, aviation, and law-enforcement communities. Yet in case after tragic case, the American people have witnessed first-hand the disastrous consequences of illegal, pernicious discrimination that has prioritized how people were born instead of what they were capable of doing.

The Federal Government is charged with enforcing our civil-rights laws. The purpose of this order is to ensure that it does so by ending illegal preferences and discrimination.

Sec. 2. Policy. It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order 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. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.

Sec. 3. Terminating Illegal Discrimination in the Federal Government. (a) The following executive actions are hereby revoked:

- (i) Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);
- (ii) Executive Order 13583 of August 18, 2011 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);
- (iii) Executive Order 13672 of July 21, 2014 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity); and
- (iv) The Presidential Memorandum of October 5, 2016 (Promoting Diversity and Inclusion in the National Security Workforce).

(b) The Federal contracting process shall be streamlined to enhance speed and efficiency, reduce costs, and require Federal contractors and subcontractors to comply with our civil-rights laws. Accordingly:

(i) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), is hereby revoked. For 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.

(ii) The Office of Federal Contract Compliance Programs within the Department of Labor shall 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.

(iii) In accordance with Executive Order 13279 of December 12, 2002 (Equal Protection of the Laws for Faith-Based and Community Organizations), the employment, procurement, and contracting practices of 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.

(iv) The head of each agency shall include in every contract or grant award:

(A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) 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.

(c) The Director of the Office of Management and Budget (OMB), with the assistance of the Attorney General as requested, shall:

(i) Review and revise, as appropriate, all Government-wide processes, directives, and guidance;

(ii) 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; and

(iii) 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.

Sec. 4. Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences. (a) The heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order.

(b) To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall 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 shall contain a proposed strategic enforcement plan identifying:

- (i) Key sectors of concern within each agency’s jurisdiction;
- (ii) The most egregious and discriminatory DEI practitioners in each sector of concern;
- (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated “DEI” or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall 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;

- (iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws;
- (v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and
- (vi) Potential regulatory action and sub-regulatory guidance.

Sec. 5. Other Actions. Within 120 days of this order, the Attorney General and the Secretary of Education shall jointly issue guidance to all State and local educational agencies that receive Federal funds, as well as all institutions of higher education that receive Federal grants or participate in the Federal student loan assistance program under Title IV of the Higher Education Act, 20 U.S.C. 1070 et seq., regarding the measures and practices required to comply with *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

Sec. 6. Severability. If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

Sec. 7. Scope. (a) This order does not apply to lawful Federal or private-sector employment and contracting preferences for veterans of the U.S. armed forces or persons protected by the Randolph-Sheppard Act, 20 U.S.C. 107 et seq.

(b) This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-

protected speech.

(c) This order does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 21, 2025.

News

Administration

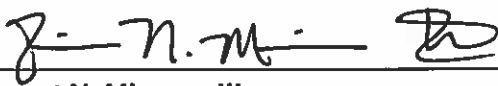
Issues

Appendix B - US Department of Labor cease and desist order to OFCCP

**Secretary's Order 03-2025 - To Cease and Desist All Investigative and Enforcement Activity
Under Rescinded Executive Order 11246.**

Date: January 24, 2025

1. **Purpose.** To immediately cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246, *Equal Employment Opportunity* (September 24, 1965), and the regulations promulgated under it. DOL no longer has any authority under the rescinded Executive Order 11246. This order applies to all DOL employees, including OFCCP, OALJ, and ARB.
2. **Authorities.** This Order is issued pursuant to the President's Executive Order, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (January 21, 2025), which repeals Executive Order 11246 and its subsequent amendments.
3. **Orders.**
 - a. Cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246 and the regulations promulgated under it. This includes all pending cases, conciliation agreements, investigations, complaints, and any other enforcement-related or investigative activity.
 - b. Notify all regulated parties with impacted open reviews or investigations by January 31, 2025, that the EO 11246 component of the review or investigation has been closed and the Section 503 and VEVRAA components of the review or investigation are being held in abeyance pending further guidance.
4. **Privacy.** This Order is subject to applicable laws, regulations, and procedures, including the Privacy Act. This Order does not apply where prohibited by law.
5. **Effective Date.** This order is effective immediately.



Vincent N. Micone, III
Acting Secretary of Labor

Jan 24, 2025
Date