



From “DEI” to Merit-Based Mandates:

Legal Insights and Strategies on the Recent
Executive Orders

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Seyfarth Shaw LLP

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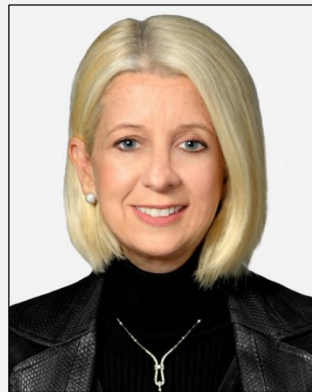
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Agenda

- 1 | Summary of Key Executive Orders on “Diversity, Equity and Inclusion”
- 2 | EO 11246 Revoked: Immediate and Near-Term Impact on Federal Contractors
- 3 | Compliant and Targeted DEI Practices
- 4 | Strategic Responses and Next Steps



1. Executive Orders on DEI



Four Key Executive Orders Address DEI issues

1 “Day 1” Executive Order: “Initial Recissions of Harmful Executive Orders and Actions”.

- Revokes multiple Biden Administration Orders
- Stated Purpose:

“The injection of “diversity, equity, and inclusion” (DEI) into our institutions has corrupted them by replacing hard work, merit, and equality with a divisive and dangerous preferential hierarchy”
- Examples of revoked DEI-related Orders include:
 - EO 13985 (1/20/2021) (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).
 - EO 4035 (6/25/2021) (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce).
 - EO 14069 (3/15/2022) (Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency).



Executive Actions

2 “Day 1” Executive Order: “Ending Radical And Wasteful Government DEI Programs And Preferencing”

- Directs federal agencies to terminate their internal DEI, DEIA, and “environmental justice” offices and positions, all “equity action plans”, “equity” actions, initiatives, or programs, “equity-related” grants or contracts, and all DEI or DEIA performance requirements for federal employees, contractors, or grantees.
- Requires identification of federal contractors who provided DEI training to federal agencies, and all grantees who received federal funding for DEI or environmental justice programs since January 20, 2021.
- Mandates monthly oversight meetings with the White House, to monitor costs and identify areas needing additional Presidential or legislative action to advance "equal dignity and respect."



Executive Actions

3 “Day 1” Executive Order on “Gender Ideology Extremism”

- Directs all federal agencies to define "sex" only as a binary biological classification determined at conception, explicitly rejecting "gender identity" in federal law and policy interpretations.
- Requires sex-segregated spaces (like restrooms) to be based on biological sex rather than gender identity in federal facilities, while directing the Attorney General to issue guidance about "single-sex spaces" in workplaces more broadly.
- Requires Federal systems and identification documents (including passports) to recognize “male” and “female” designations based on sex assigned at birth.
- NOTE: On January 27, 2025, another Executive Order was issued regarding transgender individuals in military service.



Executive Actions

4 January 21, 2025 Order (“Ending Illegal Discrimination And Restoring Merit-Based Opportunity”)

- Requires various actions by federal agencies to eliminate DEI practices
 - Revokes older Executive Orders touching on DEI issues
 - Orders a review of government-wide programs
 - Requires elimination of references to DEI and DEIA principles from acquisition, contracting, grants, and financial assistance procedures;
 - Orders the termination of all federal “diversity,” “equity,” “equitable decision-making,” “equitable deployment of financial and technical assistance,” “advancing equity,” and similar mandates
- Revokes EO 11246, ending affirmative action obligations for federal contractors, and directs all federal agencies to take action against “DEI discrimination” throughout private industry.
- ***Our discussion today will focus on these provisions.***



2. EO 11246 Revoked: Immediate and Near-Term Impact on Federal Contractors

Main Provisions of the “Illegal Discrimination” Executive Order

Section 3(a)	Section 3(b)	Section 3(c)	Section 4
<p>Revokes:</p> <ul style="list-style-type: none">• EO 12898 (1994) (environmental justice)• EO 13583 (2011) (Federal workforce diversity initiative)• EO 13672 (2014) LGBT workplace protections• Presidential Memo (2016) (National security diversity goals)	<ul style="list-style-type: none">• Addresses federal contracting• Eliminates EO 11246• Addresses immediate actions to be taken by OFCCP• Requires contractor certification• False Claim Act implications	<ul style="list-style-type: none">• Directs OMB to review and revise government-wide processes, directives, and guidance• Remove references to DEI and DEIA principles from the federal acquisition, financial assistance, contracting and grant making processes• Terminate all DEI mandates, programs, and requirements	<ul style="list-style-type: none">• Encourages private sector to end “Illegal” DEI• Directs the Attorney General to create a report that includes a strategic plan targeting sectors and entities engaged in illegal DEI discrimination or preferences and investigations

Effects of Revoking EO 11246



EO 11246 Revoked: Immediate and Near-Term Impact on Federal Contractors

- Purpose Statement:
 - Federal civil rights protections support equality of opportunity for all.
 - “Illegal DEI and DEIA policies violate federal civil-rights laws.”
- Eliminates federal contractor affirmative action requirements that have shaped employment practices for nearly 60 years
- Contractors permitted (but not required) to maintain existing compliance framework through April 21, 2025, providing limited window for program adjustments

Effects of Revoking EO 11246



OFCCP's Transformed Role

- Prohibited from
 - promoting “diversity”
 - holding federal contractors responsible for taking “affirmative action”
 - allowing or encouraging workforce demographic balancing based on certain characteristics
- Must Cease:
 - “all investigative and enforcement activity” conducted under EO 11246
 - Work on pending cases, conciliation agreements, investigations, complaints, and “any other enforcement-related or investigative activity”
- Section 503 and VEVRAA components being held in abeyance pending further guidance.

What Should Federal Contractors Do Now?

- Remove references to EO11246 in existing policy documents, forms and notices
 - Update postings (e.g., “Know Your Rights” once updated by EEOC, Pay Transparency Non-Discrimination)
 - Evaluate revisions to EEO taglines
 - Evaluate revisions to subcontractor flow-down language and letters to vendors, unions and suppliers
 - Evaluate references to “affirmative action”
 - Evaluate implications of state affirmative action obligations
 - Talk with legal counsel about future contemplated analytics
-

Executive Order

Imposes New Certification Requirements on Federal Contractors and Grantees



- Order requires that all federal contracts and grants contain the following provisions:
 - (1) “[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.” EO §3(a)(iv)
 - (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.”
- Consider: What will be your basis for these certifications?
 - Identify relevant programs
 - evaluate relevant programs
 - consider legal advice related to compliance

Why Does the New Certification Matter?



False Claims Act Implications

- In addition to the possibility of government exposure, the certification required by the Order intentionally increases exposure under the False Claims Act (FCA)
 - Order requires agencies to include in every contract and grant award a term specifying that compliance with “all applicable Federal anti-discrimination laws” is material to payment decisions under **31 U.S.C. § 3729(b)(4)**
- Thus, a contractor’s “false” certifications about its DEI programs or anti-discrimination compliance can provide a basis for FCA liability, with treble damages
- The FCA allows **private whistleblowers** to bring suits on behalf of the government and receive a percentage of any recovery
- The FCA does not require actual damages to be proved

Private Sector Implications:

“Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences”



- Directs federal agencies to immediately take “all appropriate action” to advance the policy of “individual initiative, excellence, and hard work” in the private sector.
- Directs the Attorney General, along with agency heads and the Director of OMB, to provide 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.
- Within 120 days, the Attorney General must create a "strategic enforcement plan" that:
 - Identifies sectors of concern within each agency’s jurisdiction,
 - Identifies the "most egregious" DEI practitioners in each sector of concern,
 - Outlines specific deterrence steps for DEI programs deemed discriminatory, and
 - Includes potential litigation strategies and regulatory actions.
 - Each federal agency must identify up to 9 potential investigation targets, focusing on large employers (publicly traded corporations, nonprofits with \$500M+ assets, state/local bar and medical associations, universities with \$1B+ endowments).



4. Compliant and Targeted DEI Practices



EEOC Acting Chair
Andrea Lucas

Newly Named EEOC Acting Chair Andrea Lucas's Statements on Employer DEI Initiatives

“Far too often, diversity ‘goals’ lead to discrimination. As I’ve warned repeatedly while serving as an @USEEOC Commissioner, diversity-motivated discrimination is still unlawful discrimination. It’s long past time for employers to ditch DEI & return to EEO & merit.”

-- Andrea Lucas, on X (formerly Twitter), January 6, 2025

Consistent with the President’s Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination....”

– Andrea Lucas, January 21, 2025 EEOC Press Release

Hours later, the three Democratic Commissioners issued a joint statement on X:



**STATEMENT OF EEOC COMMISSIONERS
CHARLOTTE A. BURROWS, JOCELYN SAMUELS, AND KALPANA KOTAGAL
ON TRUMP ADMINISTRATION DAY-ONE EXECUTIVE ORDERS**

“For 60 years, the EEOC has advanced our nation’s historically bipartisan commitment to equal opportunity in America’s workplaces. This commitment seeks to ensure that everyone can contribute to our economy, strengthen their communities, support their families, and enjoy safety and dignity at work. But yesterday’s slate of civil rights related Executive Orders and recessions undermines those goals and ignores the day-to-day reality of discrimination for many working people in this country. No one should face discrimination or be denied opportunity simply because of who they are, how they worship, or whom they love.

Complying with workplace civil rights laws requires employers to make proactive efforts to address barriers to equal opportunity. Common sense practices, such as monitoring hiring and promotions decisions, skills-based hiring, standardized interview practices, and robust recruitment, remain lawful and important ways to promote the goals of our nation’s laws and founding principles. These and other diversity, equity, inclusion and accessibility practices seek to include all workers according to their talents and abilities. Significantly, these practices exclude none – they simply give all workers a fair shot to succeed. Barring adoption of these practices can only result in legal risk to employers and lost opportunities for vulnerable communities.”



(1/2)



**EEOC Acting Chair
Andrea Lucas
On Specific Policies
and Practices**

- 1 | Audit all job descriptions to remove unnecessary job requirements;
- 2 | Audit job descriptions, job ads, and interview questions for race and gender references;
- 3 | Standardize interview questions for similar positions and remove “cultural fit” or other subjective interview questions;
- 4 | Standardize promotion and internal hiring policies. Consider including a requirement to post all internal job openings and to require opt-out methods for in-line promotions instead of opt-in methods;
- 5 | Ensure mentor and fellowship program opportunities are open to all;

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On Specific Policies
and Practices**

- 6 | Standardize leadership development trainings and offer them to all employees;
- 7 | Consider focusing mentorship, fellowship, and other DEI programs on “first-generation” employees in a given field (versus restricted to minority group members);
- 8 | Individualized training based on skills, performance and qualifications;
- 9 | Privileged audits to identify areas with existing discrimination or harassment issues/complaints; and
- 10 | Widen the pool of job applicants through expanding the colleges and geographic areas that are sources, including advertising jobs in a wider variety of formats and locations.

Potential Targeted Practices



America First Legal’s Complaints Provide a Window into Potentially Targeted Practices

- America First Legal was founded by Stephen Miller, who is now President Trump’s Deputy Chief of Staff for Policy.
- AFL has submitted EEOC “complaint” letters, inviting the EEOC to initiate an investigation into employer DEI-related conduct
- AFL’s complaints provide insights as to potential challenges to DEI-related programs

Identified Programs

Aspirational Goals

- “Increasing representation of Black and Latinx associates...”
- “Increase the racial diversity of our leadership team ... in support of our current goal of 30% representation
- We are “targeting” X% of leadership roles to be “filled by people of color, while also achieving gender parity”

Diverse Slates

- We ... strive to present a “diverse slate of candidates”
- “[G]oal of having diverse candidate slates for at least 90% of [leadership positions.]
- “manipulates” “interview panels and candidate slates” to promote diversity

Supplier Diversity

- “Increasing representation of Black and Latinx” suppliers
 - Increase “spending with minority-owned businesses”
 - Prioritizing “diverse suppliers”
-

Identified Programs

Development Programs

- “formal mentorship” and “leadership development” for “historically underrepresented groups”
- business training for “diverse ... talent”
- “accelerated development program” for “racially diverse management talent”

Internships & Fellowships

- Limiting fellowship programs to only “Black or African American” graduates
- “diverse” “internship program”
- program limited to “Black, Hispanic, Native American and/or LGBTQ+” students

Employee Resource Groups

- Majority of employee groups were focused on race, color, national origin or sex, but no group exists for “white heterosexual males”
- “inclusive community” does not include white, straight men networks



Strategic Responses and Next Steps



Strategic Responses and Next Steps

- Executive leadership engagement and strategic initiatives
- Identify all relevant policy and practices for deeper review
- Evaluate each policy individually
 - Intent, language and impact
 - Evaluate how each policy works in practice
- Evaluate potential enhancements or changes

- Consider your communication strategies for all stakeholders
 - ESG statements
 - Public Websites
 - Employees-facing
 - Customers/clients/vendors
 - Regulators



Closing Thoughts



Additional Resources

- **Legal Updates**

- [Trump Executive Order Eliminates Federal Contractor Affirmative Action Requirements and Creates New DEI Enforcement Framework](#) (January 22, 2025)
- [President Trump's Agenda Starts By Eliminating Internal Federal DEI Programs](#) (January 21, 2025)
- [President Trump's Executive Order Eradicates 'Gender Ideology' from Federal Government and Seeks to Dismantle Federal Transgender Protections](#) (January 21, 2025)



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