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Regulatory Compliance Update

The “Ending Illegal Discrimination” Executive Order: What Does It Mean for Employers?

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The landscape of federal employment priorities is being redefined. On January 21, 2025, President Trump issued an executive order (EO) titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” (the Ending Illegal Discrimination EO). The Ending Illegal Discrimination EO rescinds EO 11246—which had, for decades, served as the basis for federal contractors’ affirmative action programs. The Ending Illegal Discrimination EO further seeks to encourage the private sector to do away with diversity, equity and inclusion (DEI) programs and practices, though it does not specifically prohibit such programs. Though there is no direct **immediate** impact to employers, it is a seismic shift. Employers should evaluate their existing equal employment opportunity policies and procedures, and diversity-related programs, and consult with counsel to chart their course. We discuss below.

Key Elements of the Ending Illegal Discrimination EO

The executive order’s stated purpose is to protect Americans from discrimination based on race, color, religion, sex or national origin by ending the use of DEI policies and programs, not only within the federal government, but also among federal contractors and, eventually, private employers. There are four key elements of the executive order every employer should be aware of:

Rescission of EO 11246

First, the EO revokes Executive Order 11246, which has been in effect for nearly 60 years. EO 11246 required government agencies to include in every government contract a provision that the contractor agrees not to discriminate against, **and to take affirmative action** to prevent discrimination against, any employee or applicant because of certain protected characteristics. Pursuant to EO 11246, the secretary of labor implemented regulations defining the requirements of an EO affirmative action program for women and minorities.

Discouraging or even prohibiting certain diversity-related programs in the future

Second, the EO orders the Office of Federal Contract Compliance Programs (OFCCP) to “immediately cease: (A) [p]romoting ‘diversity’; (B) [h]olding Federal contractors and subcontractors responsible for taking ‘affirmative action’; and (C) [a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.” The executive order further orders that “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.”

Requiring federal contractors certify they do not operate programs promoting DEI in an unlawful manner

Third, the EO directs agency heads to include terms in future agreements with federal contractors requiring those companies certify that they do not “operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws”—though nothing in the order defines what it means to “promote DEI” or when such programs would violate applicable federal anti-discrimination laws in the administration’s view.

The executive order further requires future government contracts to include a term stipulating that compliance with all applicable federal anti-discrimination laws is “material” to government payment decisions for purposes of the False Claims Act, 31 U.S.C. 3729(b)(4). That combination of a certification requirement and stipulation as to materiality is significant because it suggests that the administration may intend to use the False Claims Act—which includes a treble damages provision—to target federal contractors who engage in DEI-related practices that the administration believes to be unlawful.

Discouraging DEI practices in the private sector

Fourth, the EO seeks to discourage (though not expressly prohibit) private sector employers from engaging in DEI practices. The order requires the attorney general, together with the heads of federal agencies, to submit a report containing recommendations for enforcing civil rights laws and taking other appropriate measures to encourage the private sector to end DEI programming and practices. This report will identify:

- key sectors of concern within each agency’s jurisdiction;
- the “most egregious” DEI practitioners in each sector of concern;
- a plan of specific steps or measures to deter DEI programming or principles—including by identifying up to nine potential civil compliance investigations;
- other strategies to encourage the private sector to end DEI policies and practices;
- potentially appropriate federal lawsuits or intervention; and
- potential regulatory action.

Impact to Employers and Next Steps

The executive order has no immediate direct effect on private sector employers. With the revocation of EO 11246, future government contracts will no longer require contractors to maintain affirmative action programs for women and minorities. (Note that the affirmative action programs required by the Vietnam Era Veterans’ Readjustment Assistance Act and the Rehabilitation Act of 1973 remain.) For the next 90 days, the executive order provides, contractors “**may**” continue their compliance with the existing regulatory scheme.

In the meantime, employers should:

1. **Review Policies, Procedures and Race/Sex Conscious Diversity-Related Programs for Compliance.**
2. **Reevaluate any Voluntary Affirmative Action Plans.**
3. **Train for Compliance, and Be Aware of Conflicting State Requirements.**

We are here to support and collaborate with employers as they navigate the potential impact posed by this executive order.

Join us for our upcoming webinar series: Employment Compliance at a Crossroads: Federal Shifts, State Conflicts and Employer Impacts.

Key Takeaways:

- Programs promoting DEI are likely to be viewed by this administration as unlawful.
- Federal contractors will no longer be required to adopt or maintain affirmative action plans.

- Employers should reevaluate their policies and procedures as necessary to adapt to this changing landscape.

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