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ALERT

# New Executive Order Rescinds EO 11246; Directs Changes to Nondiscrimination Landscape for Federal Contractors and Grantees

January 24, 2025

On January 21, 2025, President Trump issued an Executive Order (EO) titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." Consistent with the EO titled "Ending Radical and Wasteful Government DEI Programs and Preferencing" (summarized in a prior alert), the Order prescribes an end to "illegal" federal diversity, equity, inclusion, and accessibility (DEI and DEIA) policies, including EO 11246, the primary affirmative action and nondiscrimination obligation enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

**EO 11246 Revocation**

The Order revokes Executive Order 11246, Equal Employment Opportunity, which had been in place since 1965. EO 11246, as amended, required companies that do business with the Government not to "discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin," and also to take "affirmative action" towards ensuring employment without regard to those same characteristics.

The Order does provide "Federal contractors" 90 days to "continue to comply with the regulatory scheme in effect on January 20, 2025." Presumably the 90-day period was included to provide enough time for covered contractors to wind down their OFCCP compliance programs and revise any workplace policies and procedures effected

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by the new Order. However, the Order does not provide any guidance for contractors to determine which existing EO 11426 obligations the White House expects contractors might continue complying with during this period voluntarily. Nor does the Order indicate if the Order used "Federal contractors" generically so that this 90-day period applies to other entities subject to EO 11246 coverage, such as subcontractors, grantees, and federal depository institutions.

**New Contract and Grant Reps and Certs; False Claims Act Risk**

The Order directs agencies to "include in every contract or grant award" two provisions that present potential False Claims Act risk. One provision will require the contractor/grantee 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," which is a reference to the civil False Claims Act. The other provision will require a certification that the contractor/grantee does not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

These invocations of materiality and express certifications echo other efforts by relators and the Government to turn issues of contract compliance into the basis for FCA actions, most recently regarding cybersecurity. Those cases to date have focused on compliance with obligations incorporated into the contract, though, whereas here the Order purports to convert a broad, evolving, and not always nationally uniform body of federal law into a contract obligation material to payment.

**Directions to Agencies Relevant to Contractors and Grantees**

The Order directs OFCCP to immediately to stop promoting diversity and affirmative action, and cease "allowing or encouraging" contractors and subcontractors to engage in "workforce balancing" based on race, sex, color, religion, national origin, and "sexual preference."

The Order likewise directs federal agencies to identify private-sector entities for civil compliance investigations, and to adopt other strategies "to encourage the private sector to end illegal DEI

discrimination and preferences and comply with all Federal civil rights laws." A forthcoming alert will provide further analysis of this provision, as well as other potential impacts of the new Administration's DEI orders on the private sector.

Finally, the EO directs the Attorney General and the Secretary of Education to jointly issue guidance within 120 days of this order to all state, local, and higher educational agencies that receive federal funds or grants regarding the requirements and practices to comply with the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). Beyond the immediate application to student admissions, the Order's citation of this decision may signal the framework to be used by the Administration in future rulemaking, as well as the factors that the Administration might consider in assessing whether a DEI policy is "illegal" or otherwise not in compliance with federal nondiscrimination laws.

**Initial Agency Implementation**

While full implementation will likely take time (see our discussion of key takeaways below), agencies have already begun to implement the Order. For example, OFCCP on January 23 announced that it would "immediately" cease "promoting 'diversity,'" "[h]olding Federal contractors and subcontractors responsible for taking 'affirmative action,'" and allowing or encouraging contractors to engage in "workforce balancing based on race, color, sex, sexual preference, religion, or national origin." OFCCP also indicated that further guidance would follow "in the upcoming weeks." In the meantime, OFCCP advised contractors that they "may continue to comply with the regulatory scheme in effect on January 20, 2025" for the next 90 days. OFCCP further advised that it will continue to enforce the other two authorities in its ambit: Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), both of which would require legislation to change. (The Order had also stated expressly that veterans preferences and preferences under the Randolph-Sheppard Act will remain undisturbed.) Contractors and grantees should accordingly continue their practices for ensuring compliance with these laws.

In addition to OFCCP's initial guidance, the U.S. General Services Administration (GSA) issued a special notice on January 23 (see here) announcing its intent to "move expeditiously to issue directives, guidance, and rulemaking regarding the enforcement of terms, conditions, and requirements related to these [DEI-related] issues in government contracting." GSA also announced that, in the meantime, it is "suspend[ing] enforcement of contractual DEI terms in existing agreements," including any reporting or recordkeeping requirements, as a result of the EO. GSA also asked contractors to report any changes made to contracts since November 5, 2024 "to obscure the connection between the contract and [DEI] or similar ideologies." While GSA's notice indicates that the intent is to help contractors "alleviate these unnecessary, illegal, and divisive contractual provisions and regulatory overreach," at the same time it warns that "compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions" for purposes of the FCA.

**Takeaways for Federal Government Contractors and Grantees**

The Order's revocation of EO 11246, which has been in place for nearly 60 years, is a significant development that raises a number of important questions and concerns, as well as potential risks, for contractors and grantees as they assess what actions need to be taken to ensure compliance.

As an initial step, contractors and grantees should work with their counsel to catalog and review their existing OFCCP compliance programs and DEI policies over the next 90 days to determine what changes, if any, they might need to make to comply with the Order, federal nondiscrimination law as interpreted by courts, and relevant state and local laws.

Contractors and grantees should be on the lookout for further agency guidance in this quickly changing area. While the EO announces a number of significant changes – including new certification requirements that are fraught with FCA risk – implementing these changes will likely require further rulemaking and guidance. Similarly, implementing these changes will likely require changes to existing contracts, to remove or revise provisions and clauses that have applied EO 11246 obligations and insert the new clauses/certifications in the FAR, OMB's Uniform Rules for Federal Awards, and elsewhere. As noted above, both OFCCP and GSA have indicated their intent to issue further guidance in the coming days and weeks.

Finally, contractors and grantees should also watch for procedural and legal challenges to the implementation of the Order. At a minimum, implementation through FAR revisions will require notice and an opportunity to comment. The Order's required certification could face additional procedural hurdles under the FAR, which prohibits any new certifications unless the certification is required by statute (which is not the case here), or justified in writing by the FAR Council. And aspects of the EO and implementing rules, such as the broad certification requirement, could face legal challenges (similar to those raised in connection with COVID-era procurement rules and the contractor minimum wage), which challenged the President's authority to impose such requirements under the Procurement Act.

Wiley's Government Contracts and Employment practices have extensive experience helping clients navigate OFCCP compliance and have been engaged in evolving law and policy in this area with the Executive branch and Congress. We are continuing to monitor developments from the new Administration and are ready to assist our clients in navigating these changes.

To stay informed on all of the Executive Orders and announcements from the Trump Administration, please visit our dedicated resource center below.

Wiley's Trump Administration Resource Center