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DEI and Affirmative Action Programs Blitzed, While Executive Order 11246 Is Revoked

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In one of his first acts as President in his second term in office, Donald Trump signed an executive order on January 21, 2025, entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" ("Order").

Claiming that "critical and influential institutions of American society … 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)," the Order directs all executive departments and agencies of the federal government to terminate "all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements." Departments and agencies are also directed to enforce the country's long-standing civil rights laws and to combat "illegal" private-sector DEI preferences, mandates, policies, programs, and activities. As part of the reset, President Trump revoked Executive Order 11246 ("EO 11246"), which contractually required covered federal government contractors and subcontractors (collectively, "contractors") to meet certain affirmative action obligations.

Termination of "Illegal" Discrimination in the Federal Government

As part of the Order, President Trump revoked a number of prior executive orders that addressed diversity and equal opportunity in employment.[1] In addition, the Order requires the head of each federal agency to include in every contract or grant award (i) a term requiring all contractual counterparty or grant recipients to agree that their compliance in all respects with all applicable

federal anti-discrimination laws is “material” to the government’s payment decisions, and (ii) a term requiring the counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws. This is a highly significant representation to be required of all contractors and grantees.

The Trump administration has repeatedly emphasized a disdain for DEI programs. President Trump signed a second executive order entitled “Ending Radical and Wasteful Government DEI Programs and Preferencing,” which requires the Director of the Office of Management and Budget (OMB), assisted by the Attorney General (AG) and the Director of the Office of Personnel Management, to coordinate the termination of all discriminatory programs, including illegal DEI and DEIA mandates, policies, programs, preferences, and activities in the federal government. This order directs the OMB Director to review and revise, as appropriate, all existing federal employment practices, union contracts, and training policies or programs to comply with this order. The order also requires that federal employment practices, including federal employee performance reviews, will reward individual initiative, skills, performance, and hard work and will not under any circumstances consider DEI or DEIA factors, goals, policies, mandates, or requirements. Further, the order mandates agency, department, and commission heads, within 60 days, to terminate all DEI and DEIA offices and positions; all “equity action plans”; all “equity” actions, initiatives, or programs; all “equity-related” grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees.

Private Sector Encouraged to End Illegal DEI Discrimination and Preferences

President Trump’s Order aimed at ending illegal discrimination also targets the private sector’s DEI programs by encouraging the private sector to “end illegal discrimination and preferences.” According to the Order, illegal DEI and DEIA policies violate federal civil rights laws, undermining national unity and threatening the safety of Americans “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.”

To that end, the Order directs the heads of all agencies “to advance in the private sector the policy of individual initiative, excellence, and hard work.” In addition, the Order directs the AG to consult with agency heads to propose a strategic enforcement plan that identifies (i) “sectors of concern” within each agency’s jurisdiction, (ii) the “most egregious and discriminatory DEI practitioners in each sector of concern,” and (iii) specific measures to “deter DEI programs or principles (whether specifically denominated “DEI” or otherwise) that constitute illegal discrimination or preferences.” The Order specifically requires that the AG’s report include recommendations from every federal agency that identify up to nine potential civil compliance investigations of publicly traded corporations, large nonprofit corporations or associations, foundations with assets of $500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over $1 billion. It also seeks recommendations for other strategies to encourage the private sector to “end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws,” including litigation that would be “potentially appropriate for Federal lawsuits, intervention, or statements of interest” and potential regulatory action and sub-regulatory guidance.

Revocation of Executive Order 11246

The Order revoked EO 11246, citing a need to ensure that the federal contracting process is “streamlined” to enhance speed and efficiency and reduce costs, and still require contractors to comply with civil rights laws.

Signed into law by President Lyndon B. Johnson on September 24, 1965, nearly 60 years ago, and a year after the passage of the Civil Rights Act of 1964, EO 11246 was intended to complement Title VII and require contractors to take positive steps to ensure that all individuals had an equal opportunity in employment, without regard to race, color, religion, sex, and national origin (the specific characteristics of sexual orientation and gender identity were added by President Barack Obama on July 21, 2014). To accomplish this, EO 11246 required contractors to create affirmative action programs (AAPs) that would serve as a management tool with the central premise that, absent discrimination, over time, a contractor's workforce would reflect the gender, racial, and ethnic profile of the labor pools from which the contractor recruited and selected its employees.

Federal law, under Title VII, continues to require that all qualified candidates have equal opportunities for employment. However, by revoking EO 11246, the Trump administration has eliminated contractors' affirmative action obligations. Contractors have until April 21, 2025 (90 days from the Order's date of issuance) to wind down their AAPs. In addition, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which enforced EO 11246, must immediately cease promoting "diversity," holding contractors responsible for taking "affirmative action," and permitting contractors to engage in "workforce balancing based on race, color, sex, sexual preference, religion, or national origin."

While a Fact Sheet addressing the Order "directs all [federal] departments and agencies to take strong action to end private sector illegal DEI discrimination, including civil compliance investigations," it remains to be seen how the OFCCP will operate moving forward. This includes its enforcement of the affirmative action provisions of the Rehabilitation Act of 1973 (the "Rehabilitation Act") and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), neither of which are addressed in the Order and, as a result, presumptively remain in effect.

What Employers Should Do Now

- Private-sector employers should expect the Trump administration's efforts to eliminate DEI programs to fuel legal challenges to DEI efforts, including via "reverse discrimination" lawsuits.
- Private-sector employers should promptly review any DEI/DEIA plans, programs, and policies, as well as their AAPs, to determine whether they contain any aspects that could be deemed unlawful under Title VII or any other federal, state, or local civil rights law, and consider whether to take any action to modify such plans, programs, or policies, including the names of such plans, programs, or policies, in consultation with employment counsel.
- Employers that include affirmative action and/or DEI/DEIA goals as a rating factor in employees' (and particularly managers' or supervisors') performance or salary reviews should consider removing any such factors.
- Contractors should take steps to ensure that they are able to wind down their EO 11246-required AAPs and seek direction from counsel as we await clarification about the OFCCP's authority, how the Rehabilitation Act and VEVRAA AAPs will be monitored and enforced, the status of pending compliance reviews, and how reporting obligations will be addressed. This could include EEO-1 reports, which are required pursuant to Title VII but are shared with and used by the OFCCP.
- Employers that are state and municipal contractors should keep in mind that they may have some remaining obligations around affirmative action under their government contracts.
- Although affirmative action as we knew it pursuant to EO 11246 may no longer exist, Title VII remains the law of the land and all employment decisions should continue to be made without consideration of race, color, religion, sex, or national origin, as well as other factors protected

by federal, state, and local law. Employers should continue to ensure that management and staff are providing equal opportunity in employment and are being trained accordingly.
- Employers should be advised that nothing in President Trump's executive orders bars employers from taking race- and gender-neutral steps in connection with recruiting, such as casting a broad applicant net considering applicants' varied experiences, perspectives, and viewpoints, or offering scholarships or work/study programs based on financial need, so long as any such strategies and programs do not promote preferences to applicants based on factors such as race or sex.

There is clearly more to come, including the possible elimination of the OFCCP. Stay tuned—we will update you as further developments unfold and outstanding questions are addressed.

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Staff Attorney Elizabeth A. Ledkovsky contributed to the preparation of this Insight.

ENDNOTE

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

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