

# Managing Risk in the Everchanging World of the Trump Administration's Executive Orders

ACC NCR's First 100 Days of the New Administration Conference

## **Speakers:**

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- Denise Giraudo, Partner and Labor & Employment Leader, Sheppard Mullin
- Ryan Roberts, Partner and Government Contracts Leader, Sheppard Mullin

May 7, 2025



## **Presenters**







Nayna M. Diehl

Denise Giraudo
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# Friendly Reminder

This presentation is provided for information purposes only and does not constitute legal advice and is not intended to form an attorney client relationship. As you are aware, things are changing quickly. This presentation does not reflect an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand in this very fluid environment.



# Agenda





PRESIDENTIAL ACTIONS

# ENDING RADICAL AND WASTEFUL GOVERNMENT DEI PROGRAMS AND PREFERENCING

January 20, 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 and Policy. The Biden Administration forced illegal and immoral discrimination programs, going by the name "diversity, equity, and inclusion" (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military. This was a concerted effort stemming from President Biden's first day in office, when he issued Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."

Pursuant to Executive Order 13985 and follow-on orders, nearly every Federal agency and entity submitted "Equity Action Plans" to detail the ways that they have furthered DEIs infiltration of the Federal Covernment. The public release of these plans demonstrated immense public waste and shameful discrimination. That ends today. Americans deserve a government committed to serving every person with equal dignity and respect, and to expending precious taxpayer resources only on making America great.



PRESIDENTIAL ACTIONS

# ENDING ILLEGAL DISCRIMINATION AND RESTORING MERITBASED 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 solem 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 hatter.



By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7301 of title 5, United States Code, it is hereby ordered

Section 1. Purpose. Across the country, ideologues who deny the biological reality of sex have increasingly used legisl and other socially occreive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women's domestic abuse shelters to women's workplace showers. This is wrong. Efforts to eradicate the biological reality for sex fundamentally attack women by depriving them of their dignity, safety, and well-being. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system. Basing Federal policy on tuth is critical to scientific inquiry, public safety, morale, and trust in overroment itself.

This unhealthy road is paved by an ongoing and purposeful attack against the ordinary and longstanding use and understanding of biological and scientific terms, replacing the immutable biological reality of sex with an internal, fluid, and subjective sense of self unmoored from biological facts. Invalidating the true and biological category of "woman" improperly transforms laws and policies designed to protect sex-based opportunities into laws and policies that undermine them, replacing longstanding, cherished legal rights and values with an identify-based, inchantes cookie loncept.

Accordingly, my Administration will defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male.

Sec. 2. Policy and Definitions. It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sexprotective laws to promote this reality, and the following definitions shall gover all Executive interpretation of and application of Federal law and administration policy:



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The Administrator

Contractor Notice re Implementation of Executive Order

#### MEMORANDUM

All GSA Contractors

Acting Administrator

January 22, 2025

Policy Statement Regarding Intent to Suspend Enforcement of Contractual DEI Terms in Existing Agreements

Consistent with President Trump's priorities and agenda, Executive Order, Ending Radical and Wasteful Government DEI Programs and Preferencing (January 20, 2025); Executive Order, Initial Rescissions of Harmful Executive Orders and Actions (January 20, 2025); and Executive Order, Ending Illegal Discrimination And Restoring Merit-Based Opportunity (January 21, 2025), to the maximum extent permitted by law, the General Services Administration (GSA) intends to take immediate action to begin forbearing enforcement of all contract clauses, provisions, terms, and conditions, related to "diversity, equity, and inclusion" (DEI). These programs divided Americans by race, wasted taxpayer dollars, and resulted in discrimination. As set forth by President Trump, forbearing enforcement will provide immeasurable benefits to the American

This forbearance may include, but is not limited to, any clauses that mandate diversity-related obligations, any reporting or record keeping requirements specifically related to the same and to requirements imposed on contractors on a firm-wide basis, in each case not otherwise

We are aware of efforts by some in government and private industry to disguise these programs by using coded or imprecise language. If you are aware of a change in your contract since November 5, 2024, to obscure the connection between the contract and DEIA or similar ideologies, please report all facts and circumstances to GSAtruth@gsa.gov within 10 days. Our goal is to help alleviate you of these unnecessary, illegal, and divisive contractual provisions and regulatory overreach. As a reminder, compliance in all respects with all applicable Federal

> U.S. General Services Administration Washington, DC 20405



### Ending Illegal Discrimination and Restoring Merit-Based Opportunity

On January 21, 2025, the White House and President Donald Trump issued an Executive Order: "Ending Illegal Discrimination and Restoring Merit-Based Opportunity", which revoked Executive Order 11246. 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.

The Office of Federal Contract Compliance Programs shall immediately cease:

- · Promoting "diversity".
- Holding Federal contractors and subcontractors responsible for taking "affirmative action"; and
- Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or

It is important to note that requirements under Section 503 of the Rehabilitation Act, 29 U.S.C. 793, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. 4212, both enforced by OFCCP, are statutory and remain in effect.

Additional information regarding OFCCP's current activities will be forthcoming in the

If you have any questions, please contact the OFCCP Customer Service Helpdesk at 1-800-397-6251 or 711 for TTY-Based Telecommunications Relay Service.



### UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

#### MEMORANDUM

TO: Heads and Acting Heads of Departments and Agencies

FROM: Charles Ezell, Acting Director, U.S. Office of Personnel Management

DATE: January 21, 2025

RE: Initial Guidance Regarding DEIA Executive Orders

Pursuant to its authority under 5 U.S.C. § 1103(a)(1) and (a)(5), the U.S. Office of Personnel Management ("OPM") is providing the following initial guidance to agencies regarding the President's executive orders titled Ending Radical and Wasteful Government DEI Programs and Preferencing and Initial Rescissions of Harmful Executive Orders and Actions, which repeals Executive Order 14035, Diversity, Equity, Inclusion and Accessibility in the Federal Workforce.

Steps to Close Agency DEIA Offices: In light of the above Executive Orders, each should take prompt actions regarding the offices and agency sub-units focusing exclusively on DEIA initiatives and programs (the "DEIA offices"). Specifically, agency heads should take the

#### 1. No later than 5:00 pm EST on Wednesday, January 22, 2025

- a. Send an agency-wide notice to employees informing them of the closure and asking employees if they know of any efforts to disguise these programs by using coded or imprecise language a template agency-wide notice is attached as Appendix 1.
- b. Send a notification to all employees of DEIA offices that they are being placed on paid administrative leave effective immediately as the agency takes steps to close/end all DEIA initiatives, offices and programs. A template employee letter is attached as Appendix 2.
- c. Take down all outward facing media (websites, social media accounts, etc.) of DEIA offices.

1 The authority for placing these employees on paid administrative leave is set forth in the OPM memorandum entitled "Guidance on Probationary Periods, Administrative Leave and Details" issued January 20, 2025.

Empowering Excellence in Government through Great People

National Aeronautics and Space Administration

Mary W. Jackson NASA Headquarters Washington, DC 20546-0001



MEMORANDUM FOR NASA CONTRACTOR AND GRANTEE COMMUNITY

SUBJECT: Initial Guidance Regarding Diversity, Equity, Inclusion, Accessibility (DEIA) Executive Orders

On January 20, 2025, the President of the United States of America signed an Executive Order (E.O.) titled, "Initial Rescissions of Harmful Executive Orders and Actions", which repeals Executive Order 14035, Diversity, Equity, Inclusion and Accessibility in the Federal Workforce". The U.S. Office of Personnel Management (OPM) issued a memorandum, dated January 21 2025 titled "Initial Guidance Regarding DEIA Executive Orders" to federal

To implement the E.O. requirements, OPM directed federal agencies to take immediate action to identify and terminate DEIA initiatives and programs and remove final or pending documents, directives, orders, materials, and equity plans issued in response to the nowrepealed Executive Order 14035, Diversity, Equity, Inclusion and Accessibility (DEIA) in the Federal Workforce (June 25, 2021). To date, the following directions are provided:

Contracts and Grants. NASA Contractors and Grantees immediately shall cease and desist all DEIA activities required of their contracts or grants. In accordance with FAR 52.242-15, Stop Work clause, a stop work order may have been issued to stop all or any part of the DEIA related activity. Additionally, FAR 52.249, Terminations clause modifications may also be issued to implement this change. This work may include but is not limited to: DEIA plan requirement, training, reporting, considerations for staffing, or any other direct or indirect contract or grant activity. All Contractors and Grantees shall notify their Contracting Officer or Grant Officer if they identify requirements within their contracts or grants that are in violation this guidance.

Guidance. Consistent with the DEIA E.O. and the Regulatory Freeze Pending Review E.O. additional guidance will be issued to further implement the executive order requirements, such as updating and removing DEIA related policy guidance in the NASA FAR Supplement, Grant and Cooperative Agreement Manual, Grant and Cooperative Agreement Procedures, and the Grant and Cooperative Agreement Terms and Conditions.

Websites, social media, accounts, etc. NASA Office of Procurement has removed external and internal facing contract and grant websites that include DEIA related policies and documents, and these website were taken offline as of 5pm January 22, per OPM guidance.



# **EO 14173 Primary Goals**



Rid the Federal workforce of all personnel whose job focuses on enhancing DEI programs within the Federal Government



Rid the Federal Government of all activities and programs promoting/supporting DEI



Compel Federal contractors and grantees to end any/all DEI efforts



Pressure organizations (companies, universities, associations, etc.) to end their internal DEI efforts, whether or not they are Federal contractors or grantees

## Critical Dates



## Yesterday

Contractors and subcontractors must begin to evaluate their employment, procurement, and contracting practices do not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws



## 22 March 2025

## Agencies must take steps to:

- •Terminate DEI-related positions, programs, and actions
- Name names (i.e., provide OMB a list of federal entities and employees involved in DEI)
- •Assess the cost of "DEI hires" and DEI programs
- Recommend specific actions to align programs, contracts, and grants with the EOs



## 21 May 2025

Agencies must make specific recommendations to OMB for pressuring private sector organizations to abandon DEI programs

Contractors and subcontractors must be ready to certify the absence of "illegal DEI" when requested by a federal customer

And also be ready to certify to the forthcoming FAR Clause when inserted into your contract

**Today** 

Contractors and subcontractors must cease all 11246 compliance activities

21 April 2025



# The Path From EO To Implementation

Government Pronouncements



Agency Memoranda



- FAR Deviations
- Formal Contract Modifications



- FAR Changes
  - Interim Rule



• Final Rule



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

Date: January 24, 2025

- 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.
- 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.

## GSA Class Deviation CD-2025-04

- Deviation to "to stop the enforcement of FAR policies related to the now revoked Executive Order 11246"
- Removes multiple FAR clauses, certs, and reps
- Instructs COs on how to contractually implement changes

Documign Envirope ID: ED53D995-936A-4970-6E44-02411F550965



GSA Office of Governmentwide Policy
Class Deviation CD-2025-04

MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

FROM

JEFFREY A. KOSES ME L. LOWS SENIOR PROCUREMENT EXECUTIVE OFFICE OF ACQUISITION POLICY (MV

SUBJECT: FAR Class Deviation for Revoked Executive Order 11246, Equal Employment Opportunity

 Purpose. This memorandum approves a class deviation to Federal Acquisition Regulation (FAR) subpart 22.8, Equal Employment Opportunity and associated provisions and clauses to stop the enforcement of FAR policies related to the now revoked Executive Order 11246, Equal Employment Opportunity. Executive Order Executive Order (E.O.) 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, revoked E.O. 11246.

#### 2. Background.

- On January 21, 2025, President Trump issued <u>Executive Order (E.O.) 14173</u>, <u>Ending Illegal Discrimination and Restoring Merit-Based Opportunity</u> which revoked E.O. 11246, <u>Equal Employment Opportunity</u>.
- On January 24, 2025, the Department of Labor Issued <u>Order 03-2025</u> announcing that it would cease enforcement activity under the rescinded E.O. 11246. In addition, the Office of Federal Contract Compliance Programs (OFCCP) published a <u>Bulletin</u> announcing that for 90 days from the date of the E.O., Federal contractors *may* continue to comply with the regulatory scheme in effect on January 20, 2025, while also announcing it would cease:
  - Promoting "diversity"
  - Holding Federal contractors and subcontractors responsible for taking "affirmative action"; and
  - Allowing or encouraging Federal contractors and subcontractors to engage in worldorce balancing based on race, color, sex, sexual preference, religion, or national origin.

# **Contract Clause Target Scorecard**



- FAR 52.222-9 (Apprentices and Trainees)
- FAR 52.222-21, Prohibition of Segregated Facilities
- FAR 52.222-22, Previous Contracts and Compliance Reports
- FAR 52.222-23 (Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction)
- FAR 52.222-24 (Pre-award On-site Equal Opportunity Compliance Evaluation)
- FAR 52.222-25 (Affirmative Action Compliance)
- FAR 52.222-26 (Equal Opportunity)
- FAR 52.222-27 (Affirmative Action Compliance Requirements for Construction)
- FAR 52.222-29 (Notification of Visa Denial)

# Internal and External Messaging

- Some companies will have to modify their programs – some significantly
- Messaging will be key
  - Companies want to ensure all employees feel safe, supported, and heard
  - Companies want to communicate a clear intent to comply with the law

"We are aware of efforts by some in government and private industry to disguise these programs by using coded or imprecise language." –GSA Memorandum

# EO 11246 vs. Statutory Obligations

Withdrawal of EO 11246 eliminates certain requirements

But does not eliminate statutory requirements

# **EO 14173 Forthcoming Contract Clauses**



- "A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal antidiscrimination laws."
- "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."

## In The Meantime . . .



U.S. Consulate General, Dubai. Date: February 12, 2025

Dear Prospective Quoter.

Subject: Request for Quotations number 19TC1225Q0003 for CGR Landscaping Works.

Enclosed is a Request for Quotations (RFQ) 19TC1228Q0003 for CGR Landscaping Services at Consulate General Residence Umm Suneim 2. Dubai-UAE.

All contractors must certify that they do not operate any programs promoting DEI that violate any applicable antidiscrimination laws and agree that such certification is material for purposes of the government's payment decision and therefore subject to the False Claims Act. See 31 U.S.C. 3729(b)(4).

company submitting a technically is the right to hold discussions per hour holding discussions, although are is a need to do so.

M (local time) on Thursday 20<sup>th</sup> heir representatives by 03:00 PM

DISCRIMINATION LAW	
	The Contractor or prospective offeror certifies that -

CERTIFICATION REGARDING COMPLIANCE WITH APPLICABLE FEDERAL ANTI-

Is in compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 31 USC 3729(b)(4) (False Claims Act);

does not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws.

Attendance is limited to only two persons per company

Quotations are due by 03:00 PM (local time) on Thursday 6th March 2025. No quotations will be accepted after this time. Proposals must be in English and incomplete proposals will not be accepted.

Your questation must be submitted electronically to <u>DubniGSOProcurement@state gov</u>. It is important to make sure the submission is made in specific size and format; in MS-Word 2007/2010 or MS-Excel 2007/2010 or Adobe Acrobat (pdf) file format. The file size must not exceed SIMB. If the file size whould exceed the 30MB, the submission must be made in separate files and attached to separate emails with less than 30MB each. Hard copies of quotations and links to quotations are not acceptable and shall not be considered for the evaluation process.

In order for a quotation to be considered, you must also complete and submit the following:

- 1. SF-1449
- 2. Section I, Pricing
- Section 5 Representations and Certifications
   Additional information as required in Section 3
- 5. Proof of SAM Registration
- 6. NDAA \$89 compliance certification

Offerors shall be registered in the SAM (System for Award Management) database at <a href="https://www.sam.gov/price">https://www.sam.gov/price</a> to submission may deem the offeror's proposal to be considered non-registered at time of proposal submission may deem the offeror's proposal to be considered non-responsible and no further consideration will be given. Therefore, offerors are highly encouraged to register immediately if they are interested in submitting a response to this requirement.

- 1

## Government's Enforcement Tools

- New certification
- New reporting hotline
  - GSAtruth@gsa.gov
- False Claims Act
  - DOJ
  - Whistleblower
- Direction to agencies to identify
  - Specific companies to investigate
  - Key sectors of concern and particular "egregious" violators
  - Actions to align, among other things, programs, contracts, and grants with the EO



## Federal Civil False Claims Act

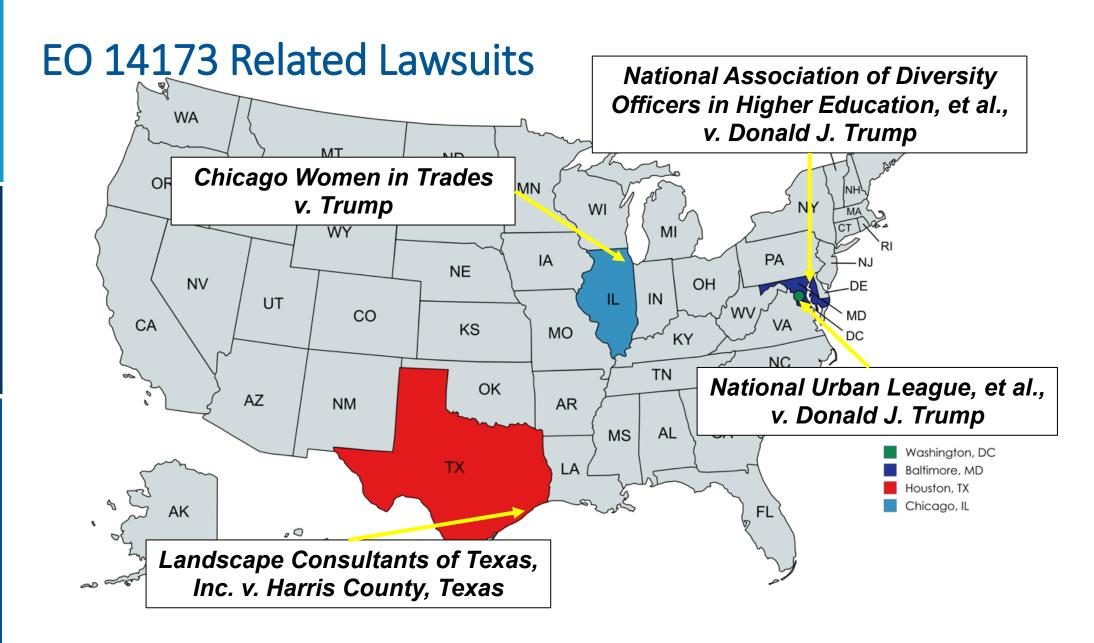


Contract, order, invoice

Either new false certification or implied false certification re compliance generally EO calls for new certification to concede materiality

The breadth of the Government awareness campaign will make it harder to prove no scienter Government
may be able to
pursue a
penalties-based
FCA case
without actual
damages

# Litigation Update



# Litigation Update: D. Md. Injunction

## Constitutional Challenges

- 1<sup>st</sup> Amendment
- 5<sup>th</sup> Amendment
- Preliminary Injunction Issued February 21, 2025
  - Prohibiting the Federal Government from requiring DEI certifications;
  - Prohibiting the Federal Government from bringing any enforcement action stemming from the EOs; and
  - Prohibiting the Federal Government from impeding in any way any awards, contracts or obligations in connection with "equity-related" grants or contracts as required under EO 14151.

"Indeed, the Certification Provision was likely designed to induce, and certainly has been shown to have the effect of inducing, federal contractors and grantees to apply an overinclusive definition of illegal DEI to avoid risking liability. This is exactly what [Supreme Court precedent] prohibits—the government leveraging its funding to restrict federal contractors and grantees from otherwise exercising their First Amendment rights outside the scope of the federal funding."

"'Vague laws invite arbitrary power.' Sessions, 584 U.S. at 175 (Gorsuch, J., concurring). And Plaintiffs here have shown substantial evidence of the risks of such arbitrariness here. By threatening the 'private sector' with enforcement actions, [EO 14173], based on those vague, undefined standards, the Enforcement Threat Provision is facially unconstitutional under the due process clause of the Fifth Amendment."

# Litigation Update: 4th Circuit Decision

## On March 14, a three-judge panel ruled on the appeal. Key quotes:

- <u>Chief Judge Diaz</u>: "despite the vitriol now being heaped on DEI, people of good faith who work to promote diversity, equity, and inclusion deserve praise, not opprobrium . . . From boardrooms to courtrooms to operating rooms to classrooms, previously marginalized Americans are thriving in spaces long closed to them. And we are the better for it."
- <u>Judge Harris</u>: "What the Orders say on their face and how they are enforced are two different things. Agency enforcement actions that go beyond the Orders' narrow scope may well raise serious First Amendment and Due Process concerns, for the reasons cogently explained by the district court."
- <u>Judge Rushing</u>: "Any individual judge's view on whether certain Executive action is good policy is not only irrelevant to fulfilling our duty to adjudicate cases and controversies according to the law, it is an impermissible consideration. A judge's opinion that DEI programs 'deserve praise, not opprobrium' should play absolutely no part in deciding this case."

Despite what these quotes might lead you to believe, all three judges voted to stay the preliminary injunction pending a decision on the merits...

# Post-4<sup>th</sup> Circuit Decision Landscape

All provisions of the two DEIfocused EOs are back in play, including the Certification, Termination, and Enforcement provisions of EO 14173. The Government can move forward with its plans, for now at least, to incorporate the new certification provision into government contracts and grants.

The Government can move forward with its plans to incorporate the new "materiality" acknowledgement in government contracts and grants.

The Government can move forward with its plans to investigate and bring enforcement actions against contractors and grantees (and any other organization, for that matter) believed to be engaging in "illegal DEI."

## A Tale of Two Courts

## Chicago Women in Trades v. Trump (N.D. III.)

- Decision issued March 27, 2025
- Held EO 14173 constituted a "coercive threat" to suppress disfavored speech otherwise protected under the First Amendment.
- "[contractors/grantees] must either take steps now to revise their programmatic activity so that none of it 'promote[s] DEI' (whatever that is deemed to mean), decline to make a certification and thus lose their [contracts/grants], or risk making a certification that will be deemed false and thus subject the grantee to liability under the False Claims Act."
- Limited Scope Preliminary Injunction

## National Urban League v. Trump (D.D.C.)

- Decision issued May 2, 2025
- Found Plaintiffs lacked standing on 4 of 8 claims
- Held Plaintiffs unlikely to succeed on the merits of the remaining 4 claims
  - "Presidential directives to subordinates that inflict no concrete harm on private parties—or at least not on these parties do not present a justiciable case or controversy."
  - "The government need not subsidize the exercise of constitutional rights to avoid infringing them."
  - "The Constitution does not provide a right to violate federal antidiscrimination law."

# Life After EO 11246

## March 19, 2025 EEOC Guidance

- **Disparate Treatment**. Discrimination against applicants or employees on the basis of sex or race, including "hiring, firing, promotion, demotion, compensation, fringe benefits, exclusion from training, exclusion from mentoring or sponsorship programs, exclusion from fellowships, [and] selection for interviews (including placement on candidate slates)."
- **Harassment**. Situations when an employee is subjected to "unwelcome remarks or conduct based on race, sex, or other protected characteristics." The EEOC notice provides that "depending on the facts, DEI training may give rise to a colorable hostile work environment claim."
- **Limiting, Segregating, and Classifying**. Limiting membership in workplace ERGs to certain specified groups, or "separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings"
- Retaliation. Retaliation against an individual because he/she has objected to or opposed DEI activities.
   "Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII."

## How Should I Think About My Employee Resource Groups?

- OPM guidance to Government officials provides some insight
  - OPM seems okay with affinity group events that allow "employees to come together, engage in mentorship programs, and otherwise gather for social and cultural events"
  - But OPM cautions that discretion must be exercised to ensure such events do not cross the line into "illegal DEI"
  - Agencies must make sure activities are consistent with the goal of "creating a federal workplace focused on individual merit"
  - "Agencies must ensure that attendance at such events is not restricted (explicitly or functionally) by any protected characteristics, and that attendees are not segregated by any protected characteristics during the events"

# Can I Still Host Recognition Events?

- Recognition events should not be deemed "illegal DEI" if implemented in a non-discriminatory manner
- DOD/DIA approach
- Presidential Proclamation
  - "February 2025 as National Black History Month"
  - "Public officials, educators, librarians, and all the people of the United States [should] observe this month with appropriate programs, ceremonies, and activities"
- DOJ February 5th Directive
  - "This memorandum is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. It does not prohibit educational, cultural, or historical observances-such as Black History Month, International Holocaust Remembrance Day, or similar events-that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination"

RELEASE
IMMEDIATE RELEASE
IMMEDIATE RELEASE
IMMEDIATE RELEASE
Identity Months Dead at DoD

Jan. 31, 2025 | f × •

Guidance from the Secretary of Defense: "Identity Months Dead at DoD"

Our unity and purpose are instrumental to meeting the Department's warfighting mission. Efforts to divide the force – to put one group ahead of another – erode camaraderie and threaten mission execution.

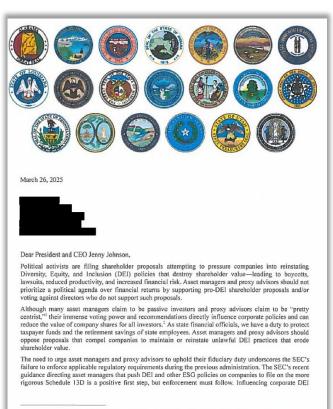
Going forward, DoD Components and Military Departments will not use official resources, to include man-hours, to host celebrations or events related to cultural awareness months, including National African American/Black History Month, Women's History Month, Asian American and Pacific Islander Heritage Month, Pride Month, National Hispanic Heritage Month, National Disability Employment Awareness Month, and National American Indian Heritage Month. Service members and civilians remain permitted to attend these events in an unofficial capacity outside of duty hours.

This guidance is effectively immediately.

## Enforcement After EO 11246...

- The OFCCP is still getting its "sea legs" but, to date, we have not seen any enforcement activity related to Affirmative Action Plans (AAPs)
- Moving forward, the OFCCP's enforcement will only focus on disabled employees and veterans
- AAPs related to disabled employees and veterans are required and don't forget the job posting requirements!
- The recission of EO 11246 does not eliminate all EEO requirements there's still Title VII, ADA, ADEA, Section 1981....

## One State, Two State, Red State, Blue State



<sup>&</sup>lt;sup>1</sup> See https://www.enbc.com/video/2024/03/11/theres-less-investor-support-for-esg-proposals-this-year-says-iss-lorraine-kelly.html.



### The Commonwealth of Massachusetts The State of Illinois Offices of the Attorney General



etts Mass.Gov/AGO neral IllinoisAttorneyGeneral.Gov Kwame Raoul Illinois Attorney General

February 13, 2025

## <u>Multi-State Guidance Concerning</u> Diversity, Equity, Inclusion, and Accessibility Employment Initiatives

The Attorneys General of Massachusetts, Illinois, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and Vermont are issuing this Guidance to help businesses, nonprofits, and other organizations operating in our respective states understand the continued viability and important role of diversity, equity, inclusion, and accessibility efforts (sometimes referred to as "DEI" or "DEIA" initiatives) in creating and maintaining legally compliant and thriving workplaces.

Our Offices have heard concerns from many in the private sector about the continued viability of diversity, equity, inclusion, and accessibility policies and programming following an Executive Order that purports to target "illegal DEI and DEIA policies" across a wide range of organizations. I Importantly, diversity, equity, inclusion, and accessibility best practices are not illegal, and the federal government does not have the legal authority to issue an executive order that prohibits otherwise lawful activities in the private sector or mandates the wholesale removal of these policies and practices within private organizations, including those that receive federal contracts and grants. The Executive Order states what is already the law—that discrimination is illegal—but then conflates unlawful preferences in hiring and promotion with sound and lawful best practices for promoting diversity, equity, inclusion, and accessibility in the workforce. This conflation is inaccurate and misleading. Policies and practices that promote diversity, equity, inclusion, and accessibility are not the same as preferences in individual hiring and promotion decisions that have been found to be unlawful. The Executive Order cannot and does not prohibit these otherwise lawful practices and policies. As such, this Guidance aims to clarify the state of the law for businesses, nonprofits, and other organizations operating in our states.

Employment policies incorporating diversity, equity, inclusion, and accessibility best practices are not only compliant with state and federal civil rights laws, but they also help to reduce litigation risk by affirmatively protecting against discriminatory conduct that violates the law. Effective policies and practices foster the development of inclusive and respectful workplaces where all employees are supported and encouraged to do their best work. When companies have such policies, employees are less likely to be subjected to unlawful discrimination, and companies are less likely to be held liable for such discriminatory conduct. This is in addition to the benefits of well-designed diversity, equity, inclusion, and accessibility practices in improving business performance —making companies that prioritize a culture of



Although it is a step in the right direction that certain asset managers and proxy advisors have announced that they are eliminating their board diversity policies, it is not clear that in each case those changes have been incorporated into benchmark policies. This proxy season will demonstrate what the actual policy of each asset manager and proxy advisor is as votes (and votine recommendations) take polace.

See "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/

# **State Affirmative Action Programs**

- Catch-22
  - Federal law prohibits affirmative action programs
  - Some state laws requires affirmative action programs
- Reporting of statistics remains legal
  - In fact, Federal EEO-1 Reports require reporting diversity data
- Narratives detailing affirmative actions to employ and advance women and minorities, more problematic
- Where does this leave us?
  - The lesser of the evils probably is to continue submitting required state/local reports
  - It's a far thornier question if the state requires hiring preferences
  - In that case, contractors would comply with the state rule at great federal risk
  - Where possible, consider caveating state/local submissions

## Statement of Former Equal Employment Opportunity Commission (EEOC) Officials on Employer Diversity, Equity, and Inclusion Efforts

April 3, 2025

Dear Legal Communit

On March 19, 2025, EEOC Acting Chair Andrea Lucas issued a document entitled "What You Should Know About DEI-Related Discrimination at Work" ("Acting Chair's document").

The Acting Chair's document seems designed to convey the message that initiatives to advance diversity, equity, and inclusion ("DEI"), which the document does not define, are fraught with legal peril. This document ignores important aspects of applicable law, as well as the reality that proactive efforts are still needed in America's workplaces to provide equal opportunity for all employees and applicants. To the extent the Acting Chair's document chills such efforts, we believe it does a grave disservice to employers, their employees, and America's economy.

Under well-established legal principles discussed below, employers lawfully may – and indeed should – take proactive steps to identify barriers that have limited the opportunities of applicants and employees based on any protected characteristic. Properly constructed, such efforts are <u>not</u> discriminatory. To the contrary, they can help prevent and address the discrimination that continues to deny equal employment opportunities to qualified workers and applicants and prevents employers from utilizing the full talent of our communities.

#### An Employer's "Interest in Diversity

Many employers recognize the importance of having a diverse and inclusive workforce. Research is clear that such workforces can increase the economic bottom line for companies and can enhance productivity and innovation across the board for all organizations.<sup>2</sup> In addition, it is well-established law that employers may express their interest in providing equal opportunity by having a policy that embraces diversity and by working to address barriers.<sup>3</sup>

<sup>1</sup> This document was issued by the Acting Chair without a Commission vote and thus represents her views. We therefore describe this document as the Acting Chair's Document.

<sup>2</sup> Examples include Katherine W. Phillips. How Diversity Makes Us Smarter, Scientific American (2014)(summaring research on positive aspects of diversity on innovation, decision-making and productivity). McKriesey, Diversity Matters Exam Marc (2023) (global data shows that companies with the largest representation of women and the highest level of ethnic diversity in executive leadership were nearly 40% more likely to financially outperform companed with the companies with the lowest levels of diversity – and that this gap has grown over time).

<sup>3</sup> Peterson v. Hewlett-Ration V. Hewlett-Ration V. See F. 36 599 (9th Cir. 2004) (goal of diversity policy to reduce sexual view of the Vertice View of the Vertice View of the Vertice View of Vertice Vi

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## So, so many questions...

From: Jonathan Aronie

Sent: Sunday, February 16, 2025 9:58 PM

Jonathan Aronie

Jonathan Aronie From

Sunday, February 9, 2025 10:38 PM

Roberts

Sent-

Ionathan Aronie

Sunday February 2 2025 9:41 PM

Sent:

Sunday, January 26, 2025 11:23 PM To: Jonathan Aronie

Ryan Roberts; Denise Giraudo Subject: DEI Executive Order Update 1.0

[BCC GovCon Clients and Friends]

Welcome back everyone. It's been a minute since our TikTok updates, and even longer since our EO 14042 updates (which one client generously described as "the only thing I'm going to miss about COVID"). The current slate of Executive Orders, and their likely significant impact on most every government contractor, however, suggests now probably is a good time to get the band back together.

Unless you have been living under a rock, you probably noticed a steady stream of news stories, law firm blogs, and agency announcements discussing the President's recent Executive Orders and their potential impact on federal contractors. Some of these "alerts" are more dire-sounding than others, but most have a common threads: The new order of things will have real, significant, and immediate impacts. We agree. So fasten your seatbelts, everyone; in the words of the immortal Bette Davis, it's going to be a bumpy ride. (Yes, we know the actual quote is "bumpy night," but that doesn't work as well here.)

-Ionathan and Ryan

P.S. If you want to skip the context and jump right to Action Items, simply scroll down to the "So what do I need to do and when do I need to do it?" section below.

#### WHAT DO I NEED TO KNOW ABOUT THE PRESIDENT'S DEI EOs?

President Trump issued 43 Executive Orders within hours of becoming President. It is not our goal here to review them all. For the moment, we are going to focus on two Executive Orders — "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" — and their related pronouncements. We'll take on a few others that impact federal contracts — like the one suspending all foreign aid contracts and the one signaling a likely change to the Trade Agreements Act - soon enough. For now, though, let's start with Diversity, Equity, and Inclusion.

At their core, the DEI-related Executive Orders seek to do four things:

- Rid the Federal workforce of all personnel whose job focuses on enhancing DEI programs within the Federal Government.
- Rid the Federal Government of all activities and programs promoting, supporting, or even mentioning
- Force Federal contractors and grantees to end any/all internal DEI efforts, and
- Pressure organizations (companies, universities, associations, etc.) to end their internal DEI efforts. whether or not they are Federal contractors or grantees.

"When can I read more about the DEI-related Executive Sunday's Update 1.0, and with apologies for interrupting ate 2.0. As you will see, we've compiled a few additional ls, emails, and trainings over the past week. As always, the laily (if not hourly), this is not legal advice, etc., etc.).

ces, directives, and emails you have been receiving from od sense of what is going on in industry and to share

ial numbers in the Federal Register. Typically, EOs are you may see these references more moving forward:

ral Hiring Process and Restoring Merit to Government

mination and Restoring Merit-Based Opportunity

discuss anything further or better understand how these

#### ups Banned by the EOs?

ent Procurement on Thursday. Several participants asked us ce groups fall under the DEI ban. We answered that they overnment viewed it differently. Well, we now have our in the issue. (Further evidence that the landscape is

nemorandum (because, among other reasons, the only xpect more sightings if it truly were a DOD-wide position). ty with unnamed DOD sources.

to the DIA, the agency "will pause all activities and events tive immediately and until further notice. Additionally,

reryone. Before we jump into the substance (and there is quite gratulations to all those Philly fans out there. While Ryan was his beloved Giants were out of contention long ago), Jonathan, ege basketball and probably couldn't tell you even which the Eagles on their dominating performance.

. As always, we've organized our observations in a Q&A d skip what you don't. Also, as always, remember, these are t legal advice. Finally, please continue to call/email us with

#### e Government's view of what constitutes "illegal DEI"?

Director, Charles Ezell, issued "further guidance ending DEI morandum does not resolve all open questions, it does provide e EOs at least as they apply to Government agencies. This it may apply the EOs to its contractors. You can access the

s, in OPM's view at least, likely constitute "illegal DEI":

raining or other professional development, internships, discipline, and separation, based on protected characteristics nal origin, age, disability, genetic information, or pregnancy,

nposition of hiring panels, as well as for the composition of "diverse slate" policies)."

advance recruitment, hiring, preferential benefits ng or other career development opportunities), or employee ed characteristics."

Ryan Roberts

pe you're enjoying the holiday weekend. In re going a bit off-script for this focusing only on the DEI EOs, we've enings of interest to federal contractors esident Trump's recent Executive Orders. ated tweets (or is it X's now?). We he DEI updates, though, so we'll start

#### ertification efforts by federal agencies?

DEI "confirmations" being sent to contractors by the CDC shortly re seeing more agencies taking a similar, if not more aggressive. xample, issued a solicitation for landscaping services on February vas this: "All contractors must certify that they do not operate any plicable antidiscrimination laws and agree that such certification is yment decision and therefore subject to the False Claims Act. . . st of other State Department contracts and modifications for all sy to find online, by the way, simply search Google for "DEI" and f state," or something along those lines.)

wing certification:

#### H APPLICABLE FEDERAL ANTI-

nti-discrimination laws is material to the government'

rsity, Equity, and Inclusion that violate any applicable

## SheppardMullin

## Path Forward Recommendations

Review and catalog your various DEI and DEI-related programs and initiatives.

Carefully evaluate existing DEI programs DEI-related affiliations, sponsorships, speaking engagements, and marketing materials.

Review policies, Code of Conduct, CSR/ESG reports, hiring materials, website, etc.

Review and catalog contracts and grants that incorporate DEI performance requirements.

Prepare for the elimination of EO 11246-based
Affirmative Action obligations.

Retain programs focused on non-discrimination.

Keep a close eye on your inbox for CO/GO notices regarding modifications to your contracts and grants.

Once your federal agreements are modified, be sure to modify YOUR subcontracts.

## Path Forward Recommendations

Catalog and re-assess your diversity-based partner/vendor alliance initiatives.

Ensure your internal affinity groups are not afforded opportunities unavailable to non-members.

If you are involved in pending audits or investigations relating to EO 11246 or DEI matters, consider reaching out to the investigating agency to confirm they will be terminating their efforts.

If you have a contract that could be suspended or terminated, take immediate steps to record and track all costs incurred relating to the stop work, suspension, or termination.

Ensure your internal hotline reporting and investigation plans are up to date.

Be careful not to over-correct in a manner that creates collateral risks.

# GovCon Potpourri

## Elsewhere in the Procurement Sphere...

FAR 2.0 Rewrite **GSA** Consolidation Preference for Commercial Products/Services **DoD Modernization Tariffs Consulting Contracts Grant Terminations** High Ed. Enforcement

## Thank You!







Nayna M. Diehl

Denise Giraudo
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