LEGAL UPDATES

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White House Revokes E.O. 11246, Targets DEI Programs Alleged to Violate Anti-Discrimination Laws

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Executive Order (E.O.) 11246 was issued by President Lyndon Johnson in 1965 to combat discrimination in employment (following the then-recent passage of the Civil Rights Act of 1964) by requiring federal contractors and subcontractors to affirmatively ensure that employment practices are non-discriminatory against any person based on race, ethnicity, sex, national origin, or religion. On January 21, 2025, President Donald Trump issued an executive order entitled Ending Illegal Discrimination and Restoring Merit-Based Opportunity that sets forth the new administration's agenda and directives with respect to enforcement of federal anti-discrimination obligations.

E.O. 11246 is revoked

Section 3(b) of the new executive order expressly revokes the entirety of E.O. 11246. E.O. 11246 had served as the primary basis for equal employment opportunity obligations for federal contractors and subcontractors. In addition to revoking E.O. 11246, the new executive order immediately prohibits the Office of Federal Contract Compliance Programs (OFCCP) from (i) promoting diversity; (ii) holding federal contractors and subcontractors responsible for taking affirmative action; and (iii) allowing or encouraging federal contractors and subcontractors from workforce balancing based on race, color, sex, sexual preference, religion, or national origin. In short, the executive order completely removes affirmative action requirements derived from E.O. 11246 concerning race, color, sex, sexual preference, religion, or national origin and also prevents the OFCCP—the agency that has historically enforced E.O. 11246—from taking any action to enforce such requirements in the future.

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Federal contracting and grant power focused to prohibit DEI

The new executive order also harnesses federal procurement and grant power to strongly discourage private sector DEI programs. Section 3 requires executive branch agencies to insert into every federal grant or contract a new clause that requires federal contractors and grant recipients (1) to agree that their compliance with federal anti-discrimination laws is material to the government's payment decisions, and (2) to certify that they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws. As this executive order is structured, it is laying the legal groundwork for potentially prosecuting federal contractors and grant recipients under the False Claims Act and seeking triple damages, civil penalties, and potential debarment and other penalties for operating DEI programs that allegedly violate federal anti-discrimination laws.

What does this mean?

After 60 years of E.O. 11246, what now? The new executive order permits federal contractors to continue to comply with E.O. 11246 for 90 days, most likely until April 21, 2025. It is unclear when and how E.O. 11246 requirements will be phased out or removed from existing federal contracts. It is expected that FAR 52.222-26 and other FAR clauses implementing E.O. 11246 will be rescinded in the near future, preventing their insertion in new contracts. At this time, however, it is unclear as to how the new administration plans to handle the requirements for E.O. 11246 compliance written into existing federal contracts after the 90 day period expires.

Regardless of the revocation of E.O. 11246, federal contractors still have ongoing statutory affirmative action compliance requirements under the Vietnam Era Veterans' Readjustment Assistance Act (FAR 52.222-35; 41 C.F.R. Part 60-300) prohibiting discrimination against protected veterans and under Section 503 of the Rehabilitation Act (FAR 52.222-36; 41 C.F.R. Part 60-741) prohibiting discrimination against individuals with disabilities. Both of these statutory affirmative action requirements, and associated reporting requirements, currently remain unchanged and—for now—are enforced by OFCCP. Similarly, federal contractors have continuing obligations to comply with federal anti-discrimination laws currently enforced by the Equal Employment Opportunity Commission (EEOC), such as Title VII of the Civil Rights Act of 1964 and others.

Contractors with pending or scheduled OFCCP audits should consult with legal counsel to develop a strategy for responding to OFCCP in light of the recent executive order.

It is unclear at this time what the new federal contracting and grants clauses discouraging DEI programs will say or how they will be enforced. What is clear is that contractors and grant recipients should be proactive before they sign any new clauses and carefully review their DEI programs to determine whether and to what extent the new administration could argue that such DEI programs violate federal anti-discrimination laws. Given the potential False Claims Act implications from the

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new executive order, consultation with legal counsel and diligent review of DEI programs is encouraged.

Contractors and grant recipients should, to the extent possible, remain in compliance with any state or local government affirmative action contractual or statutory requirements that do not allegedly also violate federal anti-discrimination laws, as interpreted by the new administration. The new contracting and grant clauses only concern compliance with federal anti-discrimination laws and do not give contractors or grant recipients license to disregard generally applicable state and local government statutory or contractual requirements. Consultation with legal counsel is encouraged to the extent there is any perceived conflict between new federal priorities and existing state and local government legal requirements.

This is a rapidly evolving regulatory area in the opening days of the Trump administration. Husch Blackwell is closely following the situation and will issue additional legal updates on these topics and the impacts on existing contractor and grant recipient DEI programs as new guidance is issued by the administration and facts and situations warrant.

Contact us

If you have any questions about the revocation of E.O. 11246 and its implications, please contact Michael Schrier, Tracey O'Brien, or a member of the Labor & Employment or Government Contracts teams.

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