

How Employers Will Be Impacted by President Trump's Executive Order Revoking Long-standing Affirmative Action Obligations of Federal Contractors

3 min read

Jan 29, 2025

By: Tom H. Luetkemeyer

On January 21, 2025, President Donald Trump signed an Executive Order titled “Ending Illegal Discrimination And Restoring Merit-Based Opportunity” (Order). The Order revoked several previous Executive Orders, including Executive Order 11246.

Executive Order 11246, which had been in effect since 1965, prohibited federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin and required the implementation of affirmative action plans for certain federal contractors.

Revocation of Executive Order 11246

In addition to revoking Executive Order 11246, the Order required that the Office of Federal Contract Compliance Program (“OFCCP”), the principal agency that had been responsible for enforcing Executive Order 11246, to immediately cease:

- Promoting “diversity” in violation of Title VII prohibitions on discrimination in the workplace;
- 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 national origin.

The Order did permit federal contractors to continue complying with the previous regulatory scheme for 90 days while they modified their internal policies to comply with the Order.

Contract or Grant Award

Additionally, the Order required that the head of each agency must include the following in every contract or grant award:

- (a) a term requiring the contractor or grant recipient to agree that its compliance with all applicable federal anti-discrimination laws is material to the government's payment decisions for purposes of the False Claims Act (FCA); and
- (b) a term requiring that the contractor or grant recipient certify that it does not operate any programs promoting diversity, equity, and inclusion (DEI) that violate any applicable federal anti-discrimination laws.

The underlying intent of the Order is clear that “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.”

Private Sector

The Order also encouraged the private sector to end illegal DEI discrimination and preference. The Order required that the heads of federal agencies, with the assistance of the Attorney General, submit a report containing recommendations for enforcing federal civil rights law and encouraging the private sector to end illegal discrimination and preference, including DEI initiatives that constitute unlawful discrimination or preferences under federal law. The report must identify:

- key sectors of concern within each agency’s jurisdiction;
- the most egregious and discriminatory DEI practitioners in each sector of concern;
- a plan of specific steps or measures to deter DEI programs or principles that constitute illegal discrimination or preferences;
- other strategies to encourage the private sector to end unlawful discrimination and preferences and comply with all federal civil rights laws;
- potentially appropriate federal lawsuits; and
- potential additional regulatory action.

Takeaways for Employers

The Order sets up a potentially problematic conflict situation between federal and state law. Many states have affirmative action requirements for state grants and contracts.

- The extent to which those state requirements would remain effective will need to be monitored in the coming years.

- Those state plans may also be vulnerable under the United States Supreme Court’s decision in *Harvard Admissions*, a case referenced in the President’s Order.

Employers also need to be aware that this Executive Order could be reversed by any subsequent, incoming administration with a different view towards affirmative action. **In the short term, however, employers need to do or be mindful of the following:**

- First, existing affirmative action plans must be reviewed to ensure compliance with the new Executive Order;
- Employer goals that promote under-utilization remediation over merit-based decision-making are potentially problematic;
- Employers must consult with counsel over appropriate compliance certification requirements for federal contracts and grants; and
- Ensure that any existing diversity, equity, and inclusion policies do not violate the requirements of the newly issued Executive Order.

Authors



Tom H. Luetkemeyer

Partner

📞 312-704-3056

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