

HOW THE WORLD OF AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT OPPORTUNITY HAS CHANGED (AND WHAT REMAINS)

UT-BATTELLE LABOR AND EMPLOYMENT TRAINING
AUGUST 14, 2025

BEFORE WE BEGIN:

OUR “ECOSYSTEM”



THREE ENTITIES, ONE MISSION:

**HELP OUR CLIENTS AND MEMBERS MANAGE
WORKPLACE COMPLIANCE REQUIREMENTS AND RISK**

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BRIEFING OBJECTIVES

- Discuss, explain, and begin formulating strategies for complying with the new compliance and risk framework established by EO 14173
 - Explain what the EO says. . . and what it doesn't say
 - Discuss how the EO is expected to impact employer nondiscrimination, affirmative action, and diversity, equity, and inclusion (DEI) programs
 - Review how employers are responding to EO 14173

**THE JANUARY 21, 2025
EXECUTIVE ORDER:
ENDING ILLEGAL DISCRIMINATION
AND RESTORING
MERIT-BASED OPPORTUNITY
(EO 14173)**



EO 14173 SEEKS TO END *ILLEGAL* DEI.

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 solemn duty to ensure that these laws are enforced for the benefit of all Americans.

SECTION 1: PURPOSE

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 Nation.

E.O. 14173

- Formally rescinded E.O. 11246, among many other orders
- Directed all federal agencies to enforce “longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities”
- Directed OFCCP to cease:
 - Holding contractors and subcontractors responsible for taking “affirmative action”
 - Promoting “diversity”
 - Allowing or encouraging contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin

**EO 14173 DOES NOT DISCOURAGE
EMPLOYERS FROM MONITORING
THEIR COMPLIANCE WITH
NONDISCRIMINATION LAWS.**

**IT ESTABLISHES A POWERFUL
"CARROT AND STICK" APPROACH
ENCOURAGING THEM TO DO IT.**



SECTION 3: TERMINATING ILLEGAL DISCRIMINATION

(b) The Federal contracting process shall be streamlined to enhance speed and efficiency, reduce costs, and require Federal contractors and subcontractors to comply with our civil-rights laws. Accordingly:

(iv) The head of each agency shall include in every contract or grant award:

(A) 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 [the False Claims Act]; and

(B) A term requiring such counterparty or recipient to **certify** that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

FALSE CLAIMS ACT ENFORCEMENT

- The FCA is enforced through civil actions brought by the government itself or through “qui tam” actions
 - Qui tam actions are filed by individuals on behalf of the government
 - Individuals are incentivized to file qui tam actions because they could receive a large percentage of the government’s awarded damages in a successful suit
- FCA claims require showing of a false certification made with:
 - *Knowledge* of the falsity; and
 - Intent to deceive
- The false claims act has three definitions of knowledge:
 - Has actual knowledge of the information;
 - Acts in *deliberate ignorance* of the truth or the falsity of the information;
 - Acts in reckless disregard of the truth or the falsity of the information

KNOWING A CLAIM IS FALSE

- The law seeks to hold accountable so-called “ostriches” who bury their heads in the sand and fail to make simple inquiries that would make them aware of false claims
 - “[I]ndividuals and contractors receiving public funds have *some duty* to make a *limited inquiry* so as to be *reasonably certain* they are entitled to the money they seek”
 - The “inquiry need only be reasonable and prudent under the circumstances”

UNDERSTANDING THE RISK LANDSCAPE

- It's critically important to understand that we're talking about three different but related concepts here
 - Nondiscrimination (or equal employment opportunity)
 - Race discrimination is just as unlawful under Title VII today as it was on January 21, 2025, and lawful efforts to monitor and prevent it remain just as prudent
 - Affirmative action
 - Traditional affirmative action is defined as the proactive steps employers take to reaffirm their commitment to nondiscrimination
 - Diversity, equity, and inclusion
 - Employer DEI policies and practices fall along a continuum, from “properly designed and implemented” to bold, aggressive, exclusive, and potentially illegal
 - DOJ released guidance re: illegal DEI on July 29, 2025

UNDERSTANDING THE RISK LANDSCAPE

- Companies, particularly federal contractors, must of course consider legal risk but also...
 - Risk of reputational harm
 - Risk of federal government investigations
 - Risk of federal government cancelling contracts

NEAR-TERM IMPACTS FOR FEDERAL CONTRACTORS



IMPACT TO FEDERAL CONTRACTORS

- Following the rescission of EO 11246 federal contractors are **no longer required** to:
 - Develop AAPs pursuant to 41 C.F.R. Parts 60-2 and 60-4
 - Notify applicants that they “will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin”
 - Insert the EO 11246 “flow down” clause into covered subcontractors and purchase orders
 - Post OFCCP’s “Pay Transparency Nondiscrimination Provision”
 - Retain the records required of OFCCP’s Internet Applicant Rule
 - Produce records to OFCCP on any of the above requirements

IMPACT TO FEDERAL CONTRACTORS

- Following the rescission of EO 11246 federal contractors are **still required** to:
 - Comply with state and local nondiscrimination and affirmative action obligations
 - Comply with state and local pay reporting requirements
 - File EEO-1 and IPEDS reports
 - File VETS-4212 reports (assuming jurisdiction thresholds are met)
 - Prepare Section 503 and VEVRAA affirmative action programs and comply with OFCCP's implementing regulations (again, assuming jurisdiction thresholds are met)

IMPACT TO FEDERAL CONTRACTORS

- Notable Section 503 and VEVRAA requirements include:
 - Collecting disability and veteran “data metrics”
 - Preparing a disability utilization analysis and veteran hiring benchmark
 - Listing vacancies with a LVER or the state employment service
 - Notifying each labor organization that the company is a federal contractor and is committed to take affirmative action
 - Inserting the 503 and VEVRAA “flow down” clauses into covered subcontractors and purchase orders
 - Soliciting disability and veteran self-identification information
 - Engaging in outreach and implementing good faith efforts

WHAT ARE FEDERAL CONTRACTORS DOING IN RESPONSE TO CHANGES?



WHAT EMPLOYERS ARE DOING IN RESPONSE

- Evaluating all DEI policies, programs, and practices to ensure they do not “violate any applicable Federal anti-discrimination laws”
- Terminating any policy, program, or practice that requires, encourages, incentivizes, or results in employment decisions based on or because of a federally protected characteristic, such as race or sex
- Removing quantitative diversity representation goals, whether “aspirational” or otherwise, based on race or sex

WHAT EMPLOYERS ARE DOING IN RESPONSE

- Given the continuing risks under Title VII and other non-discrimination laws, as well as significant new False Claims Act risks under EO 14173, federal contractors are developing “civil rights” compliance programs
 - These programs have both quantitative and qualitative components
 - Some will be adapted from existing programs, but architected in new ways that respond to the new compliance and risk landscape
 - No longer limited by the prescriptions in 60-1 and 60-2
 - Monitor compliance in three (familiar) areas: (1) workforce representation; (2) employment activity; and (3) employee compensation
 - Avoid use of the terms “affirmative action” and “goal”
 - Analyze data for both sexes and all race/ethnicity categories
 - Provide some confidence in the organization’s “compliance in all respects with all applicable Federal anti-discrimination laws”

COMMON QUESTIONS

- What does this mean for me? What can I do (or not) in recruitment and for current employees, etc.?
 - Targeted outreach?
 - Geographic or institutional targeting?
 - “Equal opportunity” tagline in job advertisements?
 - Diversity statements in job advertisements?
 - Self-ID?
 - Non-binary? LGBTQ+?
 - Diverse slate initiatives?
 - Voluntary hiring goals?
 - Employee Resource Groups?
 - Mentorships/Internships for specific groups?
 - Diversity trainings?

DISCUSSION AND Q&A

FOLLOW UP QUESTIONS?

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