

Goodbye Affirmative Action Plan? President Trump Revokes Long-Standing Federal Contractor and Grantee Practices and Targets Private Sector DEI Initiatives with New Enforcement Initiative

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by Alex Hontos, Chris DeLong, and Eric Weisenburger

On January 21, the President issued an Executive Order with significant impact for Federal contractors and grantees. The EO upsets settled rules related to affirmative action plans and Department of Labor enforcement procedures. The EO also injects significant ambiguity into compliance. Styled as “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” the new EO creates significant risk to ongoing operations for Federal contractors and grantees and may require significant new steps for compliance.

In summary, the EO:

1. purports to “terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements”;
2. revokes several executive orders that govern Federal employment and practices;
3. revokes Executive Order 11246, the 1965 Executive Order that is the foundation of contractor and grantee preference and affirmative action requirements;
4. directs the Office of Federal Contract Compliance Programs to “immediately cease,” among other things, holding contractors and subcontractors accountable for taking “affirmative action” and from allowing “Federal contractors and subcontractors from engag[ing] in workforce balancing based on race, color, sex, sexual preference, religion or national origin”;
5. directs federal contractors and subcontractors to “not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws”; and
6. directs agencies to include in contracts and grants the requirement that the contractor or recipient “certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

The EO significantly upsets the current affirmative action regime that applies to Federal

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contractors and grantees—and may require significant changes, i.e., revisions to organizational policies to conform to the new order. Though the EO does not outright ban Federal contractors and grantees from having a DEI program, it is worded in such a way to leave those organizations who do retain DEI initiatives at risk that the Federal government deems such an initiative to be in violation of Federal anti-discrimination laws. Given the uncertain and evolving state of Federal anti-discrimination laws, the EO's certification requirements, in particular, may be difficult for Federal contractors and grantees with existing affirmative action programs/plans and other government-mandated requirements, such as small business subcontracting plans and other anti-discrimination principles. The EO also contemplates an ongoing enforcement effort to police its terms, directing the Attorney General to within 120 days of the order, formulate objectives and targets for Federal enforcement, including litigation. The Administration has also strongly hinted that the False Claims Act be brought to bear against federal contractors and grantees that violate the new EO, and given the False Claims Act's qui tam provisions, organizations may face a double-pronged enforcement threat: direct action by the United States and qui tam lawsuits by private "whistleblowers."

The EO is likely to be tested in litigation. It may conflict with existing statutory regimes—regimes that cannot be overridden by executive fiat. Its breadth and ambiguity are also readily apparent. The EO also provides a 90-day grace period, where Federal contractors and grantees may "continue to comply with the regulatory scheme in effect on January 20, 2025." But given the significant change to settled rules and policies, Federal contractors and grantees should make contingency plans and examine existing practices.