

TRUMP DISMANTLES KEY AFFIRMATIVE ACTION AND DEI STANDARDS FOR FEDERAL CONTRACTORS: TOP 3 TAKEAWAYS

Insights
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Many federal contractors and subcontractors have long been required to create affirmative action plans and have also promoted diversity, equity, and inclusion – practices that some see as necessary to create equal employment opportunities and others criticize as discriminatory. President Trump quickly delivered on his promise to unravel such programs late last night by revoking an executive order that mandated certain aspects of the affirmative action requirements, barring “illegal” DEI programs, and signing an executive order that promotes “colorblind equality” and merit-based opportunity. While there are still many unanswered questions about this new direction – and legal challenges are expected – here’s what federal contractors need to know now about this major shift in direction for the Office of Federal Contract Compliance Programs (OFCCP) and how it may impact your operations.

1. Longstanding Affirmative Action Requirements Revoked

Employers who are federal contractors had been required to engage in affirmative action since 1965 under Executive Order 11246, which covers women and minorities. In this context, “affirmative action” means that federal contractors had to analyze their workforce data to determine whether goals for women and/or minorities should be set and to engage in good faith efforts to ensure they were providing equal employment opportunities for all.

Contractors measured equal employment opportunity (EEO) levels by comparing their current workforce to the availability of women and minorities externally (using local

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and/or national data) and internally (based on employees eligible for promotion). Where goals were established, federal contractors were required to make good faith efforts to cast a wide net to diversify the applicant pool with the goal of providing the best opportunity for diversifying the workplace. It did not, however, require employers to replace their merit-based selection processes, participate in quotas, or "set aside" jobs for women and/or minorities.

President Trump's [January 21 executive order](#) revokes the 1965 order and replaces it with a directive for the OFCCP to immediately cease "holding federal contractors and subcontractors responsible for taking affirmative action."

Practical Pointer: It's important to remember that affirmative the employment context never allowed employers to make employment decisions based on protected characteristics, such as race and gender. So, that hasn't changed. Federal contractor employers in general, are prohibited from taking race (as well as gender, color, national origin, and other protected characteristics) into account when making decisions related to hiring, promotions, terminations, and other terms and conditions of employment.

However, the new executive order will clearly impact federal contractor and subcontractor practices and reporting requirements and will likely alleviate some administrative burdens. While the details are not yet known, the order allows contractors to continue to operate with the prior rules for 90 days, and we expect to learn more from the OFCCP in the coming days and months. So, stay tuned.

2. OFCCP Barred from Allowing or Encouraging DEI Programs

The order also puts existing DEI programs on the chopping block and delivers on President Trump's promise to "terminate DEI in the federal government." DEI programs in the public and private sector will be impacted by this order. Notably for federal contractors, it bars the OFCCP from promoting "diversity" or "allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin."

Moreover, federal agencies were instructed to require every contractor and grant recipient to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

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According to a White House fact sheet, the order “requires simple and unmistakable affirmation that contractors will not engage in illegal discrimination, including illegal DEI.”

The order also [impacts private employers](#) by directing federal officials to take “appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.”

Practical Pointer: Questions remain as to what constitutes “illegal” DEI, so you should watch for new developments from the OFCCP on regulatory changes. Work with your legal counsel to assist with revising policies and programs as needed and ensure that your objectives and employee education efforts are in compliance with the evolving rules.

As noted above, employers have been and are still prohibited from taking race, gender, and other protected characteristics into account when making employment decisions.

3. Veteran and Disability Affirmative Action Still Required

Notably, the new executive order does not end affirmative action requirements for covered federal contractors under two laws aimed at protecting veterans and individuals with disabilities: the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act. These programs are enforced by the OFCCP and require covered federal contractors to engage in affirmative action outreach efforts for protected veterans and individuals with disabilities, as well as creating affirmative action plans.

Practical Pointer: Federal contractors must stay the course as it relates to these obligations. Contractors should continue their outreach efforts and anti-harassment obligations for protected veterans and individuals with disabilities.

What Should Federal Contractors Do Now?

- **Keep Informed:** Over the next 90 days, we expect to receive more information from the OFCCP about how this new direction will impact federal contractors and subcontractors. Sign up to receive [Fisher Phillips' insights](#) to stay up to date on the latest developments.
- **Continue Other Compliance Efforts:** Federal contractors and subcontractors will continue to have obligations

related to federal and state laws, such as EEO-1 and VETS-4212 filings, and state pay data reporting requirements (including in California), as applicable. Continue to participate in these required compliance filings.

- **Track Legal Challenges:** We anticipate that civil rights groups will challenge the new executive order, but these lawsuits may take considerable time to resolve, so you'll want to understand your real-time compliance obligations and track any potential changes.
- **Work with Legal Counsel:** In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements, especially if you have a pending audit before the OFCCP.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our [Affirmative Action and Federal Contractor Compliance Practice Group](#).