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EO 11246 Rescinded: Major Shift for Federal Contractors



Today, the new administration issued [an Executive Order](#) (EO) related to the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP).

The action rescinded Executive Order 11246, upending the nondiscrimination and affirmative action requirements for federal contractors and subcontractors that have been in place since 1969.

Below are some key observations and takeaways.

- Affirmative action programs can continue for 90 days but OFCCP has been directed to immediately cease “holding Federal contractors and subcontractors responsible for taking ‘affirmative action.’”
- The EO allows for voluntary diversity, equity, and inclusion (DEI) programs that do not “violate Federal anti-discrimination laws.” However, compliance with antidiscrimination laws will need to be “certified” as part of any government contract. This certification may become part of the OFCCP portal certification process.
- The EO does not explicitly forbid using federal funds for DEI programs. This is a key part of the Dismantle DEI bill making its way through Congress that we expected to see in a EO. (See our insights on this legislation here: <https://perkinscoie.com/insights/update/dismantle-dei-act-one-potential-blueprint-forthcoming-attacks-dei>.) However, it is possible that it could come in a later EO.
- OFCCP’s powers over federal statutory requirements related to veterans (the Vietnam Era Veterans' Readjustment Assistance Act, or VEVRAA) and disabilities (Section 503 of the Rehabilitation Act) do not appear to be affected by this EO. (Although EO 11246 is an executive order, VEVRAA and Section 503 are acts of Congress that cannot be overturned by executive order.)
- The EO also includes provisions related to private sector employers. . The EO “encourages” private employers to end “illegal” DEI programs and preferences. Employers will need to take a look at their programs to ensure compliance.

- The new administration's EO includes language targeting large organizations for potential investigation, with a list of certain large organizations to be generated within 120 days. This is an important source of concern as it indicates the administration's intention to identify large companies and organizations with noncompliant DEI programs.

We anticipate more changes in the coming days, weeks, and months. At this point, we recommend caution and offer the following takeaways from the new administration's changes:

- Federal contractors should not immediately terminate their affirmative action efforts. Additional guidance may be forthcoming in the next 90 days, and litigation may change the landscape quickly. Moreover, Section 503 of the Rehabilitation Act and the VEVRAA affirmative action plan requirements remain.
- Federal contractors should anticipate that contracting officers may seek to modify contracts to include terms aimed at compliance with the executive order, including a contractor's confirmation that it is engaging in legal employment practices, e.g., DEI programs.
- We anticipate OFCCP will pause current audits until the agency provides additional guidance on compliance and enforcement authority.
- In addition to federal contractors, private employers should also conduct an evaluation of diversity programs to ensure that they comply with the law.

Authors

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