Updates
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Eight Questions Employers and Federal Contractors Are Asking Regarding the Administration's DEI Order

As part of its promise to target diversity, equity, and inclusion (DEI) programs and practices in workplaces, educational settings, and elsewhere, the new administration issued a January 21, 2025, Executive Order entitled "Ending Illegal Discrimination and Restoring Merit-based Opportunity" (the EO).

The new EO first takes aim at DEI programs by rescinding the long-standing Executive Order 11246, which includes the nondiscrimination and affirmative action obligations for federal contractors. The second arrow in its quiver targets private employers by encouraging them to cease "illegal" DEI programs and promising to wield the ample resources of the federal government to seek out and identify employers with such "illegal" programs.

We previously summarized the EO in this blog post. This Update further details this latest EO and addresses its anticipated impacts on federal contractors and private employers.

How Does the EO Affect Federal Contractor Nondiscrimination Obligations?

By rescinding Executive Order 11246, the EO strikes federal contractor-specific equal employment opportunity (EEO) requirements from the books. Notably, the EO also rescinds the Obama-era Executive Order 13672, which brought sexual orientation and gender identity into the protected classes for federal contractors. Nondiscrimination obligations for all employers continue to exist under Title VII, including those that were extended on the basis of sexual orientation and gender identity in the Supreme Court of the United States' *Bostock* decision. Moreover, the EO does not wholly abolish the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), despite significantly curtailing its authority. Because the administration's stated goal is to root out discrimination it believes has resulted from DEI programs—and it has stated its intent to leverage all facets of government to do so—it is possible that the administration will issue a targeted Executive Order or further guidance regarding federal contractors' nondiscrimination obligations that outlines the policies and practices it believes are illegal. That subsequent Executive Order or guidance could be a

vehicle to advocate for an expanded definition of "illegal" that aligns with the views of anti-DEI advocates.

How Does the EO Affect Federal Contactor Affirmative Action Obligations?

Executive Order 11246 required federal contractors to create and maintain affirmative action programs, which included affirmative action plans and other outreach to address underutilization. The new EO directs OFCCP to immediately cease "holding Federal contractors and subcontractors responsible for taking 'affirmative action.'" Programs may continue for 90 days, but it is expected that the compliance obligations to prepare gender and race plans under EO 11246 will end. While some authority exists to support that regulations can be repealed only by formal rulemaking, the rescission of EO 11246 could undercut the basis for continuing the regulatory scheme. One aspect of the regulatory scheme that remains an open question is the regulatory obligation to obtain applicant demographic data, which is collected to conduct utilization analyses. While this obligation may no longer exist under EO 11246, this data may still be required to comply with many state and local contracting requirements. Moreover, OFCCP has stated its intent to continue to audit and enforce obligations related to veterans (the Vietnam Era Veterans' Readjustment Assistance Act, or VEVRAA) and disabilities (Section 503 of the Rehabilitation Act).

How Will Contractors Meet the Certification Requirements of the EO?

Under the EO, federal contractor compliance with antidiscrimination laws will need to be "certif[ied]" as part of any government contract. Federal grant recipients will also need to undergo such certification. Going forward, federal contracts and grants must include new language guaranteeing that the federal contractor or grant recipient will comply with all applicable federal antidiscrimination laws and state that it "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." At a minimum, contracts and grants will be required to include language pertaining to this requirement, but this requirement may also show up as a contract or grant modification request. The exact language to be used for federal contracts and grants has not yet been identified. It is unclear whether this obligation will pertain solely to new contracts or be retroactively applied to existing contracts. Moreover, it is possible that the administration will turn to existing contractor portal obligations and require covered contractors to certify compliance with the EO in this manner.

Does This Mean All Efforts To Engage in Affirmative Action Are Illegal?

Although the EO significantly curtails the OFCCP's authority to enforce EEO obligations for federal contractors and takes aim at private employers' DEI efforts, the EO does not make all efforts to engage in affirmative action illegal. For now, employers may continue to engage in certain actions to remedy the effects of past discrimination. Long-standing guidance from the Equal Employment Opportunity Commission (EEOC), as well as the Supreme Court's decisions allowing limited affirmative action in *United Steel Workers of America AFL-CIO-CLC v. Weber* and *Johnson v. Transportation Agency, Santa Clara Cnty*. provide, in general, that employers may develop an affirmative action plan to address a manifest imbalance in the workplace as long as it does not trammel on the rights of nonminorities. However, quotas are explicitly forbidden. The latest EO does not disrupt this scheme and, despite some indications that the Supreme Court would have criticized this framework in *Muldrow v. City of St. Louis*, the Court did not wade into DEI programs. However, as discussed below, it remains to be seen whether later executive action may take a narrow view of the existing law.

How Does the EO Affect Private Employers?

The EO targets private employers and outlines a governmental effort to ultimately create a list of large organizations the government believes are violating the law. The EO "encourages" ending "illegal" DEI

programs and preferences. In addition to this policy goal, the administration outlines a process where officials in the U.S. Department of Justice and other agencies will generate a report, with each agency listing up to nine "potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of $500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments of over 1 billion dollars." Given that *each agency* was charged with identifying up to nine for the list, the reach of this specific part could be multiples of nine. This EO does not detail the legal authority for the government to undertake this effort against private employers, nor does it address whether the provisions of the Fourth Amendment against unlawful entry without cause would stymie this effort. Nonetheless, employers seeking to avoid scrutiny should ensure that their programs comply with existing federal law. Moreover, private employers should be prepared for additional regulatory actions or guidance that could move the goalposts and seek to expand the definition of "illegal" DEI programs.

How Does the EO Affect Current or Anticipated State or Local Affirmative Action Requirements?

The EO does not explicitly seek to preempt state and local affirmative action efforts and, as such, the EO would appear to have limited, if any, application to state and local contexts. The EO primarily functions by stripping the OFCCP of its authority to mandate affirmative action. It does not, in contrast, directly outlaw legal efforts that states or local governments may take. Due to the EO's narrow focus, it is likely that space remains for state and local governments to impose additional protections that would go beyond those now required by the federal government (*e.g.*, protections for sexual orientation, gender identity, or political activity). For instance, state mandates requiring contractors to continue collecting hiring data for affirmative action purposes may still be operative following the issuance of the EO. Contractors who cease collecting such data may be caught flat-footed. It is conceivable that some argument exists that future actions by the administration may directly conflict with state and local actions. But, for now, state and local actions remain viable.

What Additional Steps Could the Administration Take?

At its broadest level, the new administration may take further aim at DEI programs by expanding what constitutes "illegal" discrimination. The EO specifically includes language criticizing "workforce balancing" efforts, and a previous Executive Order related to internal government references criticized "illegal DEI and 'diversity, equity, inclusion, and accessibility' (DEIA) mandates, policies, programs, preferences, and activities" in its preamble. Moreover, the now acting chair of the EEOC, Andrea Lucas, has already made public statements attacking the following practices:

- Providing race-restricted access to mentoring, sponsorship, or training programs.
- Selecting interviewees partially due to diverse candidate slate policies.
- Tying executive or employee compensation to the company achieving certain demographic targets.
- Offering race-restricted diversity internship programs or accelerated interview processes. (Acting Chair Lucas' commentary on these programs can be found here.)

Other practices that have been attacked by advocacy groups and that could be targeted in further executive action include:

- Maintaining supplier diversity programs and goals.
- Financial and organizational support for affinity groups.
- Participating in LGBTQ+ efforts, such as Pride events and the Human Rights Campaign's Corporate Equality index.

We note that, conducted and managed appropriately, many of the above actions fall within legal efforts under the above-mentioned *Johnson/Weber* framework. However, future regulatory actions or guidance may not appreciate these nuances.

Of note, the EO does not explicitly forbid using federal funds for DEI programs. A broader prohibition on the use of federal funds for DEI work, which some expected to see in the EO, is a key part of the Dismantle DEI bill making its way through Congress. (See our insights on this legislation here.) It is possible that these provisions could appear in a later Executive Order.

What Steps Should Employers, Including Federal Contractors, Take Next?

Given the new administration's overt campaign promises to attack DEI practices and programs, more changes may arise in the coming days, weeks, and months. At this point, caution is recommended. Employers may also consider the following takeaways from the new administration's changes:

- **Expect more guidance to come**. Federal contractors should not immediately terminate their affirmative action programs. OFCCP has issued a short notice acknowledging the EO and promising additional guidance. We expect that guidance to come within the next 90 days, and litigation may change the landscape quickly. After the 90 days, voluntary efforts will remain on the table, but we expect that some employers will wind down their EO 11246 plans because of the administrative costs. However, Section 503 and VEVRAA affirmative action obligations remain.
- **Contract modifications**. Federal contractors should anticipate that contracting officers may seek to modify contracts with terms aimed at compliance with the Executive Order, including confirming that contractors are engaging in legal employment practices. In the future, new contracts will likely include such clauses.
- **Audit status**. While OFCCP's notice did not address the status of audits, we can report that audit activity has ceased for the most part. OFCCP may seek to restart Section 503 and VEVRAA reviews until additional guidance on nondiscrimination efforts is issued.
- **Diversity programs and practices**. In addition to federal contractors, private employers should also conduct evaluation of diversity programs to ensure that they comply with the law. At the same time, employers should not lose sight of the compliance focus of many of its efforts, which aim to decrease the legal liability risks posed by expensive, traditional discrimination claims. Further, employers should consider whether all future actions align with an employer's commitments to an inclusive culture.
- **Proxy and SEC representations**. One way the government may seek to target publicly traded companies could be through combing disclosures in proxy statements and other U.S. Securities and Exchange Commission filings. Companies should also consider these risks when addressing DEI issues in shareholder engagements, including responses to investor letters seeking information regarding DEI practices, discussions during engagement meetings, and shareholder proposals for inclusion in the proxy statement. Further information on this topic is available in this blog post.

Perkins Coie will continue to track the ongoing developments in the Trump administration's approach to DEI efforts. Please contact the firm to discuss any questions about compliance with the EO should they arise.

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