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Executive Order 11246 Is Revoked Enforcement of Some Federal Affirmative Action Programs Halted

Amidst the flurry of Executive Order actions undertaken by the President Trump in his first days in office is an Executive Order “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.”

Who is Impacted by this Order?

If you are a federal contractor, subcontractor or grant recipient of federal funding, this Order ([which can be found here](#)) will have an impact on you in varying degrees.

What Does It Do?

In repealing numerous Executive Orders enacted by previous presidential administrations, the effects on covered employers are many:

DEI Programs Halted: For businesses entering into federal contracts or becoming the recipients of grant funding, the Order will direct federal agencies to include language into those arrangements that federal contractors and grant recipients certify that they do “not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.” This of course raises questions still left to be answered such as:

- What DEI programs would violate "applicable Federal anti-discrimination laws"? What programs can remain?
- Does this only apply to future contracts and grants or all federal contracts and grants?
- When will the certification process take effect? At the point of vying for a contract or grant or at some other step?

While these details have yet to be sorted out, the reality is for such covered employers, there will ultimately be a need to terminate those programs that run afoul of Federal anti-discrimination laws from their workplaces. If you have DEI programs, be sure they are structured in ways that allow for participation of all employee groups rather than segregating or excluding certain groups from participation.

Federal Affirmative Action Programs Covering Females and Minorities Are Revoked: Executive Orders 11246 served as the foundation for requiring federal contractors to adopt federal Affirmative Action Programs covering females and minorities and further extended by Executive Order 13672 to extend those requirements to employment based on both Sexual Orientation and Gender Identity. With Executive Orders 11246 and 13672 among the orders being revoked, so too is the requirement for such employers to maintain those affirmative action programs.

Federal Disability and Veteran Affirmative Action Program Requirement Remain: While the Order does not revoke the federal affirmative action requirements found under Section 503 of the Rehabilitation Act or the Vietnam Era Veterans Readjustment Assistance Act and with that the recordkeeping and other components associated with those plans (since those requirements are rooted in statutes rather than prior Executive Orders), practically the enforcement of those programs remains in question. Why? Because.....

OFCCP is Directed to Cease Affirmative Action Enforcement: While the Order targets repealing certain previous Executive Orders and requirements, it is somewhat telling that the Order directs the Office of Federal Contract Compliance Programs to “immediately cease.....holding federal contractors and subcontractors responsible for taking “affirmative action”.

Is using this broader term (rather than expressly scaling the enforcement to just the Orders being revoked) by design to prevent enforcement of those other disability and veteran program requirements (that they did not have the power to revoke) as well? Will it be business as usual when it comes to enforcement of these plans? We hope to get further clarity on that, and federal contractors and subcontracts will have to weigh whether they want to move ahead with those components or not.

What is Not Covered by the Order?

The Order further does not invalidate state or municipal affirmative action requirements.

The Order also does not eliminate other federal reporting requirements (such as EEO-1 and Section 4212 Reporting).

I Am a Covered Federal Contractor or Subcontractor – What Do I Do Next?

As things are happening very quickly, we expect more details to be put forth at an agency level as they are charged with carrying out many aspects of this Order. Accordingly, when it comes to those with existing federal affirmative action programs, it may make sense to “pause but plan” for these changes.

What's more, the Order accounts for the disruption that these changes may cause some employers as the Order has a 90-day transitional period built in to allow federal contractors and subcontractors to continue to comply with the regulatory scheme that had been in effect previously.

Ultimately, such covered contractors will need to adjust their other practices. While, again, we expect more details to unfold, some of the “calls to action” include:

- Eliminating federal affirmative action policies and initiatives supporting their previous responsibilities under Executive Order 11246 and Executive Order 13672.

- Adjusting subcontracts or purchase orders moving forward to remove Executive Order 11246 and Executive Order 13672 requirements built into those instruments.
- Removing taglines in job advertisements and postings promoting Executive Order 11246 or Executive Order 13672.
- Ceasing self-identification forms or paperwork instituted for Executive Order 11246 data collection responsibilities.
- Terminating DEI programs to the degree that they violate federal anti-discrimination laws.

Additional Unresolved Questions:

Will the Affirmative Action Certification Requirements Go Away? For the past couple of years, federal affirmative action employers have had to certify that they are maintaining a plan. Will this certification requirement continue? Be tailored to just certifying Section 503 and VEVRAA plans alone? There is no official word on that. The portal had been scheduled to open at the beginning of April.

Will Construction Contractor Monthly Utilization Reporting Proceed? The OFCCP announced earlier that federal construction contractors would be required starting in April to file “CC-257” reports which included information on the contractors’ employee work hours and employee count by race/ethnicity, gender, and trade. Will this be halted as well?

As the Order requires agencies to submit reports containing recommendations for enforcement of this Order, we expect more to unfold in the weeks ahead and we will continue to keep you posted on further developments.

Do you have questions about how this impacts your organization?
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