What Clients Should Know About President Trump's Anti-DEI and Affirmative Action Executive Order and Its Potential Effects on Government Contractors, Grant Recipients, Nonprofits, and Private Sector Employers

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On January 21, 2025, President Trump signed a wide-ranging Executive Order entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the "**Order**") that seeks to eliminate "diversity, equity, and inclusion" ("**DEI**") and affirmative action programming and preferences in both the federal government and private sector. In doing so, the Order impacts not only government agencies and their polices, but also revokes multiple executive orders issued by prior administrations directly applicable to federal contractors and entities receiving federal grants, such as nonprofit organizations.

While the long-term impacts of the Order are yet to be determined and will likely be subject to legal challenges along the way, this alert provides an overview of what our clients should know about the Order and its near-term impacts on the operations of Government Contractors, Grant Recipients, Nonprofits, and Private Sector Employers.

Overview

As its title suggests, the Order seeks to put an end to DEI and affirmative action initiatives within both the federal government and private sector by declaring all such programs that provide race-based and sex-based preferences illegal in violation of federal anti-discrimination laws. To accomplish this goal, the Order revokes, as of January 21, 2025, several long-standing Executive Orders from prior administrations that attempted to promote diversity and inclusion some of which date as far back as the civil rights era of the 1960s, including:

- Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations).
- Executive Order 13583 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce).
- Executive Order 13672 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity).
- Executive Order 11246 (Equal employment opportunity).

Executive Orders 12898 and 13583 required Federal agencies to build policies and programs focused specifically on DEI and affirmative action initiatives, such as the Diversity and Inclusion Plans established by Executive Order 13583. These policies and plans will have to be revoked or heavily modified to comply with the new Order. Additionally, by revoking Executive Order 13672, "sexual orientation and gender identity" are no longer included under the original Executive Order 11478's prohibition against discrimination.

Finally, the revocation of Executive Order 11246 has a direct impact on federal contractors required to enter into DEI and affirmative action compliance agreements as a condition for receiving federal funds on projects. The Order provides a 90-day period wherein these entities may continue to comply with the regulatory scheme in effect prior to the execution of the Order.

Requirements for Federal Agencies

Along with the revocation of the above Executive Orders, the Order requires the following:

- The Office of Federal Contract Compliance Programs within the Department of Labor must immediately cease promoting diversity and holding Contractors responsible for taking "affirmative action."
- The head of each agency shall include in every contract or grant award the following:
    - A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and
    - A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal antidiscrimination laws.
- The Attorney General, within 120 days, shall consult with the heads of all agencies, to provide a report containing recommendations for enforcing federal civil rights laws and taking other appropriate measures to encourage the private sector to end the practices the Order has identified. The report shall include the following:
    - Identify within the key sectors of concern in each agency's jurisdiction the most egregious and discriminatory DEI practitioners;
    - A plan to deter DEI programs or principles that constitute illegal discrimination or preferences;
    - Other strategies to encourage the private sector to end illegal DEI discrimination;
    - Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and
    - Potential regulatory action and sub-regulatory guidance.

Impact on Federal Contractors, Grant Recipients, Nonprofits, and Private Sector Employers.

The scope of the Order covers not only formal DEI and affirmative action programs, but also any DEI principles or protocols "under whatever name they may appear" and "whether specifically denominated 'DEI' or otherwise."

- "Publicly traded companies" and "large nonprofit corporations or associations" are specifically called out as potential targets for investigation.
    - Any diversity initiatives or protocols may be in jeopardy of being flagged for investigation, "whether specifically denominated 'DEI' or otherwise."
- Other private sector organizations are also in the crosshairs, as the Order directs the Attorney General and the heads of all federal agencies to make recommendations for enforcing Federal civil rights laws and take appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.
    - We suspect that all employers, including those in the private sector, are more likely to see "reverse" discrimination lawsuits in the future.
- For nonprofits, the Order could encompass programmatic activities in addition to hiring or internal diversity practices because the wording of the Order is so broad.

    - Eliminating certain programs or making fundamental changes to a nonprofit's mission may lead to federal and state tax and nonprofit law implications.

- An example of where this will have the largest impact is in compliance agreements contractors and grant recipients must execute when receiving federal funds.
    - For example, the Small Business Administration ("**SBA**") requires the execution of a compliance agreement that currently conforms to the prior Executive Orders.

- Beginning April 21, 2025, Federal contractors shall no longer comply with the requirements of Executive Order 11246, which required contractors to submit a notice to the applicable labor union advising the labor union or workers representative of the contractors' commitments under Executive Order 11246.
    - Additionally, the Federal contractor shall no longer have to make the notice available to employees by posting the notice in a conspicuous place.

- Any parties who have previously complied with Executive Order 11246 as a condition for receiving federal funds on construction projects or other federal government contracts shall have 90 days to begin complying with the new order.
    - Under the Order, any such compliance agreement should be modified, along with the company policies of the entity signing the agreement, by the end of the 90-day period identified above.

- It should be noted that the Order does not affect affirmative action requirements for veterans or persons with disabilities because affirmative action requirements for those individuals are covered by the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act of 1973.

The long-term effects of the Order will depend on how government contractors, nonprofits, and private sector organizations navigate the changing regulatory landscape. Some may see this as an opportunity to redefine their diversity strategies, while others may struggle to balance compliance, workforce diversity, and public perception.

Next Steps and Recommendations

The Order leaves a lot of questions unanswered, such as the criteria to be used by federal agencies in creating their investigation lists, the investigation methods to be used, and what consequences will follow an investigation. With these uncertainties, ways to prepare include:

- An internal examination of hiring processes, staffing procedures, employment opportunities, terms and conditions of employment, and even communications of your organization's culture to determine if any language or employment practices involved points to the presence of DEI or affirmative action initiatives or preferences for women or minorities in programs or terms and conditions of employment. Employers must continue to be diligent in complying with all applicable Federal and state discrimination laws.
    - While there is a risk of future "reverse" discrimination lawsuits, employers must bear in mind that employees will continue to be able to utilize statistical evidence that tends to show discriminatory hiring and promotion practices in discrimination lawsuits filed under Federal and state anti-discrimination laws.
    - The extent to which you adjust these protocols will depend on your organization's tolerance for risk, but any evaluation of risk should involve a conversation with your counsel.
    - In a similar light, careful consideration should be given to the authorities and responsibilities of individuals with titles such as "Diversity Officer" or something of the like.

- Examine government contracts with a high degree of scrutiny to ensure your duty of compliance

under these contracts does not go against the requirements of the Order.
    - Some agencies may recycle language from prior contracts that may not have been updated to meet the new standards, which may lead to penalties under the Order.

- While the Order does not mention city, county, or other local government ordinances or programs, any policies found within that act like a DEI program, or organizations that operate to comply with such ordinances or programs, should be evaluated for policies that agency investigators could flag as potentially violating the Order.
- If a contractor was previously identified on the Corporate Scheduling Announcement List as being subject to an annual compliance review, that contractor should ask for guidance from the Office of Federal Contract Compliance Programs to verify whether such review will still take place.

Ultimately, the true impact of the Order will not be felt until the dust settles following the compliance deadline of April 1, 2025, and federal agencies reporting deadline of May 1, 2025. Until then, our team can help in determining your level of risk and guiding you through the new landscape of the Federal government.

A copy of the Executive Order can be found here.

The Seigfreid Bingham team will continue to monitor the latest developments and legal requirements in this area of the law. If you have any questions concerning the President's Executive Order, its potential effects on your operations, or compliance concerns, please do not hesitate to contact the authors or any of Seigfreid Bingham's Employment Law practice group attorneys.

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