

# Major Change to Federal Contractors' Affirmative Action Requirements

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On Tuesday, President Trump radically changed the legal landscape for federal contractors when he revoked an executive order that had been in effect for nearly 60 years. Executive Order 11246, issued by President Johnson in 1965, prohibited federal contractors and subcontractors from discriminating against employees and applicants on the basis of their race, color, religion, sex, or national origin. It also required federal contractors to take affirmative action to employ and advance in employment qualified women and minorities. Trump issued an order on January 21 titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which revokes Executive Order 11246 and related executive orders (including one that added sexual orientation and gender identity to the list of protected classes). This action will significantly impact federal contractors and subcontractors, who will be relieved of some (but not all) of their obligations under the federal contract compliance programs.

## What Does Trump's Executive Order Say?

Trump asserts that he issued the executive order to end "illegal preferences and discrimination." The executive order he signed on January 21 purports to do this in several ways that will directly impact private companies, especially those that are federal contractors or subcontractors:

- **Revocation of Executive Order 11246:** Executive Order 11246 is principally known for requiring covered federal contractors and subcontractors to develop affirmative action plans if they have at least 50 employees and more than \$50,000 in contracts. However, Executive Order 11246 contains a number of additional requirements, including language that must be used in a job posting, equal opportunity clauses to be included in covered subcontracts, and notices to be posted. All of these requirements are now nullified, given the revocation of Executive Order 11246. Under Trump's new order, contractors may continue to comply with the regulatory scheme under Executive Order 11246 for a period of 90 days (*i.e.*, until April 21).
- **Limiting the Powers of the OFCCP:** The Office of Federal Contract Compliance Programs (OFCCP) has been responsible for enforcing the federal contract compliance programs, including Executive Order 11246. But Trump's new order directs the OFCCP to immediately cease (A) promoting "diversity," (B) holding federal contractors and subcontractors responsible for promoting "affirmative action," and (C) allowing or encouraging federal contractors and subcontractors to "engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin." Thus, we expect that the OFCCP will immediately stop its investigation of complaints and its audits of contractors' compliance with Executive Order 11246 (but may proceed with investigations and complaints relating to requirements under other laws, as explained below).
- **Requiring Contractors to Affirm They Are Not Operating DEI Programs That Violate Anti-Discrimination Laws:** Under Trump's new executive order, the head of every federal agency is required to include requirements in every contract or grant award that the federal contractor or grant recipient "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." This

requirement will likely come into play when a new contract is awarded, but also when a contract is revised or renewed. Presumably, most companies have already evaluated their diversity, equity, and inclusion (DEI) programs to ensure compliance with applicable laws, but it is likely that Trump's administration will take a more expansive view of the DEI programs that are prohibited under the law. As a result, companies wishing to enter into or renew contracts with the federal government will have to weigh the benefit of those contracts against the benefit provided by their DEI programs, and consider the consequences of a determination by the administration that their DEI programs violate the law. It is unclear what penalties might be imposed if such a violation is found, but we expect guidance to be provided on that point.

- **Encouraging the Private Sector to End DEI Programs.** While the president cannot directly prohibit private companies that are not federal contractors from developing DEI programs, Trump's new order seeks to discourage such programs by asking each federal agency to recommend ways his administration can end DEI initiatives. In addition, each agency is directed to identify up to nine public companies, nonprofits, foundations, associations, or universities that the administration should consider targeting in a compliance investigation. This part of the executive order could impact many private companies (not just federal contractors), but the impact of this provision will not be immediate. Thus, companies may wish to reevaluate their DEI programs in light of the more hostile environment for such programs under the Trump administration, to determine whether they wish to make any changes to such programs.

### **Are There Other Changes Federal Contractors Should Be Aware Of?**

In addition to revoking Executive Order 11246, Trump also revoked Executive Order 14055 governing the nondisplacement of workers under service contracts.

### **What Federal Contractor Obligations Are Left Unchanged?**

It is important that federal contractors realize that Trump's January 21 order only affected one of the three main laws mandating affirmative action for federal contractors. As explained above, Executive Order 11246 required most federal contractors to develop and maintain an affirmative action plan for the benefit of women and racial/ethnic minorities. However, there are two other laws that require many federal contractors to develop and maintain affirmative action plans benefiting disabled employees and veterans. The Rehabilitation Act prohibits discrimination and requires affirmative action for disabled employees, and the Vietnam Era Veterans Employment and Reemployment Rights Act (VEVRAA) prohibits discrimination and requires affirmative action for certain types of veterans, including disabled veterans, recently separated veterans, Armed Forces service medal veterans, and active duty wartime or campaign badge veterans. Trump's order only revoked Executive Order 11246 and not the Rehabilitation Act and VEVRAA. Consequently, federal contractors remain subject to the requirements that they have affirmative action plans for disabled employees and veterans (provided that the contractor meets certain employee and contract value thresholds). Moreover, the OFCCP will continue to enforce all of the requirements of the Rehabilitation Act and VEVRAA, including both affirmative action plans, self-identification processes, job-posting requirements, and reporting requirements.

Federal contractors also currently remain subject to other executive orders that govern minimum wage, drug-free workplaces, E-Verify, pay transparency, and paid sick leave.

If you have any questions about Trump's January 21 executive order, please contact a member of Troutman Pepper Locke's [Labor + Employment practice group](#).

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