

TYPES NOT MAPPED YET February 05, 2025 | TTR not mapped yet | Camille L. Chambers, Amy E. Oslica Dougherty, Jayna Marie Rust

5 Things Contractors and Grant Recipients Should Know about the Executive Order on DEI

On January 21, 2025, President Trump issued [Executive Order “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”](#) (“Order”) which, among other actions, rescinded Executive Order 11246 and Executive Order 13672 and addressed other actions relevant to Government contractors and grant recipients. These actions will have impacts on employment and hiring practices as well as broader programming offered by contractors and grant recipients. The following is a brief summary of the most significant parts of the Order for Government contractors:

- **Revocation of Executive Order 11246:** The Order revokes Executive Order 11246 (“EO 11246”) and other executive orders that amended EO 11246 (including Executive Order 13672). EO 11246 has existed since 1965 and required certain contractors to take particular affirmative actions to avoid discrimination in employment practices. Such actions required tracking and evaluating employment statistics and data. The Order also states that “For 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.” Notably, the Order does not direct agencies to modify contracts to remove clauses implementing EO 11246 or prohibit contractors from complying with EO 11246. This means that many contractors (i) will have an ongoing contractual obligation to comply with requirements related to EO 11246 (potentially even after the 90 days expires); and (ii) will not be able to recoup costs that they incur in updating their human resources practices and documents unless their costs are for activities required by a Government-ordered change to the contract. The former point means that contractors who have EO 11246 obligations in agreements will need to closely assess whether activities the contractor undertook for the purpose of EO 11246 compliance are otherwise compliant with other Civil Rights laws and regulations. The latter point means that contractors who decide to proactively incur costs now to update their practices and documents with the assumption that their contracts will be modified to remove EO 11246 compliance and to prohibit other actions will not be able to recoup any costs for doing so, and those who wait until their contracts are updated will only be able to recoup costs related to the specific contract change.
- **Changes in OFCCP Activities:** The Order directs the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”), the office that enforces EO 11246 compliance, to stop “promoting ‘diversity,’” to no longer hold contractors and subcontractors responsible for taking affirmative action, and to not allow or encourage contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin. Assuming OFCCP continues to exist, the language of the Order will mean that OFCCP changes how it refers to certain aspects of its work, but it is important to remember that “workforce balancing” has generally always been deemed illegal and was not required by OFCCP. It is further important to remember that this is a directive to an executive branch office and that future administrations could direct OFCCP or another office to address instances where contractors and subcontractors were required by contract to take particular affirmative actions under their EO 11246 obligations throughout this administration and did not do so.
- Government contractors should also keep in mind that although the OFCCP has been told to stop enforcing EO 11246, OFCCP, presumably, will continue to oversee contractors’ compliance with Section 503 of the Rehabilitation Act and the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”), which compliance is mandated by statute. However, the Secretary of Labor has instructed DOL employees to “pause” activities related to Section 503 and VEVRAA investigations until further guidance has been received.
- **Reference to Executive Order 13279:** The Order directs contractors and subcontractors to, “In accordance with Executive Order 13279,” not consider (in employment, procurement, or contracting practices) race, color, sex, sexual preference, religion, or national origin in ways that violate Federal civil rights laws. Notably, Executive

Order 13279 focused on protecting faith-based and community organizations and amended Executive Order 11246 to exclude contractors and subcontractors from complying with religious-discrimination prohibitions if the contractor/subcontractor is a faith-based organization. Thus, although the latter part of this statement is worded broadly, it appears that the Trump Administration may be using this reference to continue to allow faith-based organizations that are contractors/subcontractors to engage in religious discrimination.

- **Future Contract Language by Agencies:** The Order directs agencies to include the following terms in contracts and grant awards: (a) a term requiring contractors or grant recipients to agree that its compliance with applicable Federal anti-discrimination laws is material to payment under the False Claims Act, and (b) a term requiring contractors and grant recipients to certify that the contractor or grant recipient does not operate any programs promoting diversity, equity, and inclusion that violate Federal anti-discrimination laws. Executive orders that direct agencies to include terms in contracts and grants do not apply to contractors or grant recipients unless and until they are incorporated in agreement documents (which are often added into new agreements or prior to the exercise of options in contracts). Further, such clauses generally are first developed under regulations, which must go through the notice-and-comment process, or under deviation clauses issued by agencies. At this point, clauses have not yet been publicly issued, but current and future contractors and grant recipients should be diligent in monitoring solicitations and agreements so as to quickly identify these clauses and ensure that they can make the referenced representation before doing so given the potential False Claims Act liability. In confirming that, contractors and grant recipients will have to look carefully at the programs and policies they operate to ensure that they are not in violation of federal anti-discrimination laws before certifying any requests for payments involving federal funds, or receipt of federal funds. Entities that regularly pursue such awards should be reviewing their programs now to assess what changes they may need to make so that they can make the representation when needed.
- **General Effect on Private Sector.** The Order also directs the Government to develop recommendations and an enforcement plan to encourage the private sector in general to end illegal discrimination and preferences. As Government contractors and grant recipients are part of the private sector, these initiatives, when developed and implemented, may have future consequences or implications for them. The Order also requires each agency to “identify 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 over 1 billion dollars.” This will likely result in investigations into specific entities, and all entities should be prepared for such investigations.

Of course, the Order does not affect employers’ obligation to comply with nondiscrimination statutes such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Nonetheless, employers should be cognizant of the Trump administration’s increased scrutiny of DEI practices. Employers who are federal contractors should review their existing policies to ensure compliance with federal and state nondiscrimination laws, while also considering the limits imposed by the Order.

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