Littler | ASAP

President Trump Revokes 60-Year-Old Executive Order Requiring Equal Employment Opportunity in Government Contracting

By David Goldstein

January 22, 2025

On January 21, 2025, President Trump issued an executive order titled, "*Ending Illegal Discrimination and Restoring Merit-Based Opportunity*." The order is targeted at what the president describes as "illegal" diversity, equity, inclusion, and accessibility policies that:

> . . . not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system.

The order declares that it is the policy of the United States:

> to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.

As part of this order, Executive Order 11246 is revoked and the agency within the U.S. Department of Labor that is responsible for implementing EO 11246 is required to immediately cease:

> (A) Promoting “diversity”;
>
> (B) Holding Federal contractors and subcontractors responsible for taking “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.

As the obligations of government contractors and subcontractors under EO 11246 are contractual, there are many questions as to how the revocation of the executive order will be implemented. Government contractors currently undergoing compliance reviews should consult with their legal counsel as to how to proceed. The same is true for contractors currently subject to conciliation agreements with OFCCP. Contractors under audit may want to hold off on responding to information requests pending further guidance from OFCCP or advice from legal counsel. The order does provide that contractors that wish to continue to comply with the current regulations may, at a minimum, do so for 90 days from the date of the order.

It should be noted that Section 503 of the Rehabilitation Act of 1973 (protecting the disabled) and the Vietnam Era Veterans' Readjustment Act of 1974 (VEVRAA) (protecting certain veterans) and OFCCP's enforcement of these laws do not appear to be in any way impacted by the new executive order.

The executive order also includes provisions seeking to end so-called "DEI discrimination and preferences" throughout the government and in the private sector. As we continue to analyze the new executive order, we will not only be providing further information for government contractors, but will also publish additional ASAPs explaining the impact of these developments for health care providers, higher education, and employers in general.

Littler | ASAP

Higher Ed DEI Practices to Be Reviewed Under President's New Executive Order

By James Thelen, Darren Gibson, and Barbara Gross

January 24, 2025

- A new executive order, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, may impact DEI practices in higher education.
- Under the EO, by May 21, the secretary of education must report on "the most egregious and discriminatory DEI practitioners" in higher education.

President Trump issued an *executive order* on January 21, 2025 that, among other things, *revokes Executive Order 11246*, ending the long-

standing practice of requiring federal government contractors to take and report on affirmative action efforts thereunder in their work for the government.[1] In addition, the new executive order covers a number of other issues involving diversity, equity, and inclusion efforts in higher education and the private sector. This ASAP focuses specifically on the portions of the executive order that apply or refer directly to institutions of higher education.

The president's executive order ("Order" or "EO") includes higher education generally as being among the "critical and influential institutions of American society" that the Order says "have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil-rights laws of this Nation."

Asserting that DEI/DEIA practices violate federal civil rights laws that prohibit discrimination based on race, color, religion, sex, or national origin, the Order also declares in broad, sweeping language that such practices:

> *undermine [the country's] national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system ...*

The Order also asserts:

> *[t]hese illegal DEI and DEIA policies … threaten the safety of American men, women, and children across the Nation by diminishing the importance of individual merit, aptitude, hard work, and determination when selecting people for jobs and services in key sectors of American society, including all levels of government, and the medical, aviation, and law-enforcement communities.*

As a matter of national policy, the Order therefore directs all federal agencies, including the U.S. Department of Education, to "terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements" and "enforce [the country's] longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."

A number of remaining provisions in the Order apply or refer specifically to institutions of higher education, as follows:

For all Title IV institutions: The Order directs the United States attorney general and the secretary of the U.S. Department of Education to issue guidance by May 21, 2025 to all institutions that participate in federal student aid programs under Title IV regarding the measures and practices required to comply with the *Supreme Court's June 2023*

decision in *Students for Fair Admission v. Harvard*, which found race-conscious admissions policies unconstitutional.

For institutions of higher education generally: The Order directs the attorney general to work with the heads of all federal agencies, including the secretary of education, to submit a report to the assistant to the president for domestic policy by May 21, 2025 that makes recommendations "for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI." Notably, the Order directs the secretary of education to identify "key sectors of concern withing [USDOE]'s jurisdiction" and "[t]he most egregious and discriminatory DEI practitioners in each sector of concern." The report is also to recommend "specific steps or measures to deter DEI programs or principles (whether specifically denominated 'DEI' or otherwise) that constitute illegal discrimination or preferences."

As part of these latter recommendations, the Order directs the secretary of education to identify up to nine institutions of higher education from among those that have endowments greater than $1 billion dollars for potential civil compliance investigations of their DEI practices or compliance with federal civil rights laws. But given the Order's broader directive for the secretary to more generally identify "[t]he most egregious and discriminatory DEI practitioners in each sector of concern," it seems that institutions with smaller endowments may be targeted as well.

Finally, the DOE report is directed to identify:

- "[O]ther strategies" to encourage higher education institutions that have not already done so to end "illegal DEI discrimination and preferences" and comply with all federal civil rights laws;

- Litigation that would be potentially appropriate for federal lawsuits, intervention, or statements of interest; and

- Potential regulatory action and sub-regulatory guidance.

While this section of the Order refers to the "private sector," the express language does not limit this section to private institutions of higher education. In addition, this section of the Order also applies to "State and local bar and medical associations," suggesting that public institutions of higher education could be within its purview.

For institutions that are recipients of federal grants outside of Title IV/Federal Student Aid program participation: Institutions that receive federal fundings through grants and contracts with the various federal funding agencies (e.g., NSF, NIH, etc.) will be required to ensure that their employment, procurement, and contracting practices do not consider race, color, sex, sexual preference, religion, or national origin in ways that violate federal civil rights laws. Future grants will include terms requiring institutions (i) to agree that their compliance with all applicable federal anti-discrimination laws is material to the government's payment decisions and (ii) to certify that they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws.

The Order allows free speech: The Order states that it does not prevent institutions of higher education from engaging in First Amendment-protected speech, but does not specify any parameters for this protection.

The Order recognizes basic academic freedoms: The Order states that it does not prohibit persons teaching at federally funded institutions of higher education – presumably institutions that are participants in Title IV financial aid programs or federal grant recipients – from "advocating for, endorsing, or promoting" the asserted unlawful employment or contracting practices prohibited by the Order, so long as doing so is part of "a larger course of academic instruction." As with the recognition of free speech above, the Order does not define "a larger course of academic instruction" or provide any further guidance.

General implementation: The Order provides that it must be implemented "consistent with applicable law and subject to the availability of appropriations." It is not clear what new appropriations would be necessary to fund the requirements stated in the Order, however, so it is presumed that federal agencies and the attorney general will carry out the Order's requirements described above.

Littler's higher education attorneys are actively monitoring ongoing related developments and will provide further updates as additional information becomes available.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

Acting Secretary of Labor Brings All OFCCP Activities Under Executive Order 11246 to a Halt

By David Goldstein

January 25, 2025

On January 24, 2025, Acting Secretary of Labor Vincent Micone, III issued an order to all Department of Labor employees, including employees of the Office of Federal Contract Compliance Programs, Office of Administrative Law Judges, and the Administrative Review Board, instructing them to "immediately cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246" and its implementing regulations.

The order explicitly provides that all pending cases, conciliation agreements, investigations, complaints, and any other enforcement-related or investigative activity is to cease.

Contractors with impacted open reviews or investigations are to be notified by January 31, 2025, that the Executive Order 11246 component of the review or investigation has been closed and that the Section 503

and VEVRAA components of the review will be held in abeyance pending further guidance.

Contractors with conciliation agreement progress reports or other submissions that are due to OFCCP on or before January 31, 2025, should contact their legal counsel as to how to proceed.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

President Trump Relies on Executive Orders to Promote Anti-IE&D Policies

By Alyesha Asghar and Julian G.G. Wolfson

January 25, 2025

Since taking office on January 20, 2025, President Trump has issued several executive orders that address inclusion, equity, and diversity (IE&D) programs and policies.[1] Although these orders are important to consider, employers should be aware that they do not alter federal civil rights laws. Indeed, the language used in these orders specifically calls for the enforcement of existing laws, which provide that it is unlawful to make employment decisions based on an employee's protected traits.

These orders therefore do not call into question the continued legality of IE&D programs that are consistent with non-discrimination laws and recent Supreme Court rulings. That said, we expect the new administration (including the Equal Employment Opportunity Commission) to scrutinize IE&D programs and initiatives very closely. Indeed, in her first statement as acting chair of the EEOC, Commissioner Andrea Lucas noted, "Consistent with the President's Executive Orders and priorities, my priorities will include rooting out

unlawful DEI-motivated race and sex discrimination…" Given this fact—and that numerous high-profile advocacy groups are committed to publicly highlighting and calling for investigation of IE&D programs they consider unlawful—employers are strongly advised to review their current practices and policies with experienced counsel under attorney-client privilege.

IE&D Executive Orders Repealed by President Trump

The following are some of the more noteworthy executive orders implicating IE&D issues that were recently repealed by the president.

Executive Order Repealed	Summary	Proffered Reason for Repeal[2]
Executive Order 11246 (September 24, 1965)	Required federal contractors to implement and maintain affirmative action programs for	Illegal IE&D policies violate federal civil rights laws, undermine national unity, and shut out individuals

	women and minorities.	from pursuing opportunities. To improve the speed and efficiency of federal acquisition, contracting, grants, and financial assistance procedures, and to comply with civil rights laws.
Executive Order 13672 (July 21, 2014)	Amended executive order 11246 to require that government contractors take affirmative action to	Illegal IE&D policies violate federal civil rights laws, undermine national unity, and shut out

	ensure that applicants are employed and treated without regard to their sexual orientation or gender identity during their employment.	individuals from pursuing opportunities. To improve the speed and efficiency of federal acquisition, contracting, grants, and financial assistance procedures, and to comply with civil rights laws.
Executive Order 14035 (June 25, 2021)	Directed the Office of Management and Budget to: (a) coordinate a government-wide initiative	To ensure that the country is united, fair, safe, and prosperous, and to

		to promote diversity and inclusion in the federal workforce; and (b) develop and issue a government-wide IE&D Strategic Plan. Among other things, the Strategic Plan would define standards of success for IE&D efforts based on leading policies and practices in the public and private sectors as well as identify strategies to advance IE&D, and eliminate,	ensure that IE&D does not replace hard work, merit, and equality.

	where applicable, barriers to equity in federal workforce functions, including in recruitment; hiring; promotion; retention; performance evaluations and awards; professional development programs; and mentoring programs or sponsorship initiatives.	
Executive Order 13583 (August 18, 2011)	Directed the federal government's executive	Illegal IE&D policies violate federal civil

	departments and agencies to develop and implement a more comprehensive, integrated, and strategic focus on diversity and inclusion as a key component of their human resources strategies, including by developing a government-wide strategic plan focusing on workforce diversity, workplace inclusion, and agency accountability and leadership.	rights laws, undermine national unity, and shut out individuals from pursuing opportunities.

The *decision to repeal Executive Order 11246* will likely have the most significant impact on the private sector, as it will have a direct effect on government contractors, which employ millions of people throughout the country. Note that while federal contractors will no longer have to maintain affirmative action programs for women and minorities, the obligation to maintain such programs for veterans and the disabled, including the preparation of annual plans, remains in place.

Executive Orders Issued by President Trump that Impact IE&D

Executive Order	Notable Provisions
Ending Illegal Discrimination and Restoring Merit-Based Opportunity (January 21, 2025)	In addition to repealing a host of different executive orders that promote IE&D programs and policies, including Executive Order 11246 (requiring affirmative action in government

contracting), the order dictates that action be taken to address IE&D programs and policies in the private sector.

More specifically, the order instructs all agencies to "enforce our longstanding civil rights laws and to combat illegal private sector [IE&D] preferences, mandates, policies, programs, and activities."

The order also requires that the heads of all agencies "take all

appropriate action" to ensure that the private sector does not maintain IE&D programs or policies. To that end, the order further requires that within 120 days, the U.S. attorney general submit a report containing recommendations for enforcing federal civil rights laws "and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including [IE&D]."

The report shall also identify the “most egregious and discriminatory practitioners” and create a strategic enforcement plan of specific steps or measures to deter IE&D programs or principles.

Likewise, each agency is required 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 one billion dollars.
Keeping Americans Safe in Aviation (January 21, 2025)	The order explains that "[i]llegal and discriminatory [IE&D] hiring, including on the basis of race, sex, disability, or any other criteria other than the safety of airline passengers and overall job excellence, competency, and qualification,

harms all Americans, who deserve to fly with confidence. It also penalizes hard-working Americans who want to serve in the FAA but are unable to do so, as they lack a requisite disability or skin color."

To effectuate this position, the order instructs the Secretary of Transportation and the Federal Aviation Administrator to terminate all IE&D programs or policies, including all "preferencing policies or practices."

Initial Recissions of Harmful Executive Orders and Actions (January 20, 2025)	In addition to repealing Executive Order 14035, this order instructs the heads of each agency to "take immediate steps to end Federal implementation of unlawful and radical [IE&D] ideology."
Ending Radical and Wasteful Government DEI Programs and Preferencing (January 20, 2025)	The order calls for the termination of all IE&D programs or policies in the federal government, and for the review and revision of all existing federal employment

practices, union contracts, and training policies or programs.

The order further requires that within 60 days, all IE&D offices and positions, initiatives, programs, and performance requirements for employees, contractors, or grantees, be terminated.

In an apparent response to this order, the Office of Personnel Management issued a memorandum ordering all federal

employees in IE&D roles to be placed on paid leave by the evening of Wednesday, January 22, 2025.[3] The memorandum also requires offices focusing on IE&D to send "an agency-wide notice to employees [...] asking employees if they know of any efforts to disguise these programs by using coded or imprecise language [...]."[4] As stated in the memo, the "failure to report this information within 10 days

	may result in adverse consequences."[5] Similarly, Acting Chair of the EEOC, Andrea R. Lucas, has indicated in a *press release issued by the EEOC*, that her "priorities will include rooting out unlawful DEI-motivated race and sex discrimination."
Reforming the Federal Hiring Process and Restoring Merit to Government Service (January 20, 2025)	This order states, in pertinent part, that "[f]ederal hiring should not be based on impermissible factors, such as one's

commitment to illegal racial discrimination under the guise of 'equity,' or one's commitment to the invested concept of 'gender identity' over sex."

The order goes on to require that within 120 days, a new federal hiring plan be developed that "prevents the hiring of individuals based on their race, sex, or religion."

While some of the language used in these executive orders may give employers pause, it is important to note that employers may maintain

their commitments to inclusive, diverse, and equitable work environments through a host of initiatives and programs that do not violate anti-discrimination laws.

We recommend that both public and private institutions review their current programs and policies under privilege in light of these executive orders, including for example, by conducting a review of their mission statements, performing diversity audits, and ensuring that they are not resorting to unlawful quotas. Employers should also be on alert for any additional orders. Littler will continue to monitor future developments to keep readers apprised of any new orders or changes in existing policy.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

EEOC Acting Chair Issues Statement on Gender Identity, Removes Guidance on Transgender Issues

By Jim Paretti

January 29, 2025

On January 28, 2025, Andrea Lucas (R), the acting chair of the Equal Employment Opportunity Commission, issued a *statement* outlining her views on gender identity in the workplace, and listing a series of actions she has taken to "return" the agency "to its mission protecting women from sex-based discrimination in the workplace by rolling back the Biden administration's gender identity agenda." Among the actions Lucas identified that she has and will take to achieve this end include prioritizing compliance, investigations, and litigation to "defend the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work"; removing EEOC employees' ability to indicate pronouns in their communications; eliminating the use of the non-binary "X" gender marker for charges; and removing materials "promoting gender ideology" on the Commission's internal and external websites.

Lucas's statement comes on the heels of the president's recent *Executive Order 14166*, which, among other things, directs all federal agencies and federal employees to "enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes" and orders the removal of statements, policies and other communications that "promote or otherwise inculcate" gender ideologies.

In her statement, Lucas also indicated that there were certain documents relating to gender identity that she could not unilaterally remove or modify, because doing so would require a majority vote of the full Commission. These include the Commission's Enforcement Guidance on Harassment in the Workplace (issued by a 3-2 vote in 2024); the EEOC Strategic Plan 2022-2026 (issued by a 3-2 vote in 2023); and the EEOC Strategic Enforcement Plan Fiscal Years 2024-2028 (issued by a 3-2 vote in 2023). Lucas indicated that while she cannot currently rescind these documents without a majority vote of the Commission, she remains opposed to them.

The day prior to Lucas's statement, the president *terminated two sitting Democratic commissioners*, leaving Lucas and Democratic Commissioner Kalpana Kotagal as the only two members of the five-member Commission, and depriving the agency of a voting quorum. Until the agency has at least three sitting members, it will be unable to consider revocation of those policy documents. With respect to ordinary operations, however (such as charge intake, investigations, and the like), these efforts will continue: In December 2024 the Commission unanimously approved a resolution delegating the routine

operations of the agency to senior career staff in the event it lost its quorum.

Key Takeaways for Employers

Lucas's statement indicates what her priorities are for EEOC enforcement with respect to gender-identity issues. It is important for employers to bear in mind, however, that the U.S. Supreme Court in *Bostock v. Clayton County held* that Title VII's prohibition on sex discrimination and sexual harassment extends to discrimination and harassment on the basis of sexual orientation and gender identity. Unless and until the Court revisits that decision, individuals protected by Title VII can continue to file charges of discrimination relating to LGBT status under federal law. It is unclear whether going forward the agency itself will bring litigation relating to these issues, although individual employees may bring suit in federal court directly after exhausting administrative remedies.

Perhaps more important, more than half of states and the District of Columbia have laws that explicitly prohibit discrimination and harassment on the basis of sexual orientation and gender identity or have interpreted their state laws prohibiting sex discrimination and harassment to include LGBT status. These laws remain unchanged.

With the federal government's stated priority of ensuring access to single-sex facilities, employers may nevertheless find themselves facing potentially conflicting obligations under federal and state law and are advised to consider review of existing gender-identity related policies and practices with counsel.

Littler's Workplace Policy Institute (WPI) will continue to keep readers apprised.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

Trump Fires EEOC Commissioners, General Counsel, Depriving Agency of Quorum

By Jim Paretti

January 29, 2025

Following on the heels of the *January 27, 2025 dismissal* of National Labor Relations Board Member Gwynne Wilcox and NLRB General Counsel Jennifer Abruzzo, President Trump fired two of the three Democratic Commissioners on the five-seat Equal Employment Opportunity Commission that same day.

The president terminated Charlotte Burrows, who chaired the Commission during the Biden administration, and whose term on the Commission was scheduled to expire on July 1, 2028, and Jocelyn Samuels, the Biden-era vice chair of the Commission, who was confirmed to serve until July 1, 2026. The president also fired EEOC General Counsel Karla Gilbride, who was confirmed during the Biden administration for a four-year term ending in 2027. Both commissioners indicated they are exploring legal options to challenge their terminations.

These firings leave Acting Chair Andrea Lucas, a Republican, and Commissioner Kolpana Kotagal, a Democrat who began service in August 2023 (for a term scheduled to expire in July 2027), as the only sitting members of the Commission. Lucas's term is scheduled to expire in July of this year, but if she seeks renomination or if another nominee for the position is pending, she may stay on in holdover status for much of 2025. More immediately, these terminations deprive the Commission of a working quorum.

Gilbride's dismissal was generally expected. In March 2021, then-President Biden terminated the EEOC's general counsel, who had been appointed by President Trump in his first term. It was widely speculated that Trump would follow precedent and dismiss Gilbride early in his administration. The removal of commissioners was less certain, insofar as no sitting commissioner has been removed by the White House prior to the end of their term in the EEOC's 60-year history. It does not appear to be completely unexpected, however. On December 31, 2024, the Commission unanimously adopted a *resolution* providing for the agency to continue normal operations and routine investigations in the event that it lost a quorum.

In the absence of a quorum, the EEOC cannot move forward on any significant policy changes unless and until successors are confirmed to return the Commission to at least three sitting members. It also limits the agency's ability to commence high-stakes or high-profile litigation, although routine litigation may still be commenced without Commission approval.

Littler's Workplace Policy Institute (WPI) will keep readers apprised of relevant developments.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

Executive Order Targets Prohibitions Against Sexual Orientation and Gender Expression Discrimination

By Alyesha Asghar and Julian G.G. Wolfson

January 31, 2025

***UPDATE**: On January 31, 2025, the EEOC advised that at the present time all charges alleging discrimination on the basis of sexual orientation or gender identity will be sent to national headquarters for review to ensure that they "comply with applicable executive orders to the fullest extent possible." The agency also indicated that with respect to such charges it will issue a notice of right to sue if asked to by a charging party "as statutorily required." Finally, EEOC indicated that the acting chair intends to propose rescission or revision of anti-harassment and other guidance relating to gender identity and sexual orientation that is in conflict with these orders. As discussed below, employers must still be mindful of their obligations under state and local laws protecting against discrimination on these bases, and should consult with counsel regarding any questions about compliance.*

* * *

On his first day in office, President Trump issued an Executive Order titled, "*Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*." The order defines "sex" as each "individual's immutable biological classification as either male or female," and calls for eradicating "gender ideology," which, according to the order, "includes the idea that there is a vast spectrum of genders that are disconnected from one's sex."

Removing "Gender Ideology" from Federal Agencies

To implement these positions, the order requires all federal agencies and employees to "enforce laws governing sex-based rights, protections, opportunities, and accommodations to men and women as biologically distinct sexes." It directs federal agencies to "remove all statements, policies, regulations, forms, or other internal and external messages that promote or otherwise inculcate gender ideology" and to "cease issuing such statements, policies, regulations, forms, communications, or other messages."

We expect the new administration, including the Equal Employment Opportunity Commission (EEOC), to act swiftly to comply with these directives. Indeed, since the order was issued, the *EEOC has removed various informational pages from its website*, including fact sheets and technical assistance documents relating to the EEOC's efforts to enforce Title VII in a manner that protects LGBTQ employees.

Employers should anticipate there will be changes to the filing instructions associated with the EEO-1 form. While the form previously included only binary options for employers to report the sex of their employees, employers that chose to do so could include non-binary employees by using the comment section of the form. Moving forward, that option will likely be eliminated.

Rescinding EEOC Enforcement Guidance on Harassment in the Workplace

The order requires the head of each federal agency to rescind specific guidance documents, including the EEOC's *Enforcement Guidance on Harassment in the Workplace* (Enforcement Guidance). That document advised that Title VII prohibits discrimination based on sexual orientation or gender identity, stating in pertinent part:

> Sex-based discrimination under Title VII includes employment discrimination based on sexual orientation or gender identity. Accordingly, sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed. Harassing conduct based on sexual orientation or gender identity includes epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual's sexual orientation or gender identity without permission); harassing

> conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex; repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

The Enforcement Guidance also provided that employers were not required to grant accommodations for employees' religious beliefs (for example beliefs condemning homosexuality) if doing so would create a hostile work environment. As stated in the Enforcement Guidance, "[w]hile an employer must accept some degree of worker discomfort when providing an accommodation for religious expression under Title VII, it need not accept the burdens that would result from allowing actions that demean or degrade [...] members of its workforce." We expect that at least portions of the Enforcement Guidance will be rescinded in the future, permitting some employers to claim that religious beliefs (or the religious beliefs of their employees) prevent them from abiding by policies that protect the rights of LGBTQ employees. It is likely that this issue will be heavily litigated.

The EEOC has not yet taken formal action to rescind the Enforcement Guidance, but we expect it will make efforts to do so in the near future. Indeed, in her first statement as acting chair of the EEOC, Commissioner Andrea Lucas noted that her priorities will include "defending the biological and binary reality of sex and sex related

rights, including women's rights to single-sex spaces at work." Commissioner Lucas has also acknowledged that while she lacks the authority to unilaterally rescind the Enforcement Guidance, she remains opposed to a number of provisions relating to gender identity.

Measures recently taken by the Department of Justice (DOJ) indicate it will no longer defend the Enforcement Guidance from attacks in court. Indeed, in *State of Tennessee v. EEOC*, the DOJ recently moved to vacate an oral argument pertaining to a motion filed by the plaintiffs that sought to enjoin the Enforcement Guidance.[1] While the DOJ had previously defended the Enforcement Guidance in this case, the motion to vacate indicates that it has changed its position in light of the president's executive order.[2]

Single-Sex Spaces

The executive order directs the U.S. attorney general to issue guidance "to ensure the freedom to express the binary nature of sex and the right to single-sex spaces," such as bathrooms, "in workplaces and federally funded entities covered by the Civil Rights Act of 1964." The order further requires the attorney general, the secretary of labor, the general counsel and chair of the EEOC, and the heads of each of the other agencies with enforcement responsibilities under the Civil Rights Act to "prioritize investigations and litigation to enforce the rights and freedoms identified" in this order.

Similarly, the order directs the attorney general to "immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock v. Clayton County* (2020)" to the extent that

it has been interpreted as requiring "gender identity-based access to single-sex spaces." Although *Bostock* did not actually address the issue of "single-sex spaces," such as bathrooms and locker rooms, the executive order's intent to restrict facilities to one of the two recognized sexes is clear. Again, we expect that these issues will likely be subject to significant litigation moving forward. Nevertheless, it is important to recognize that discrimination against transgender and non-binary/gender non-conforming individuals remains illegal under federal law, as well as under many state and local laws.

With the federal government's stated priority of ensuring access to single-sex facilities, employers may nevertheless find themselves facing potentially conflicting obligations under federal and state law and are advised to consider conducting a review of existing gender-identity related policies and practices with counsel.

Eliminating the Use of Federal Funds to Promote Gender Ideology and Other Views that Are Inconsistent with the Order

Of particular concern to private employers with government contracts, the order prohibits the use of federal funds to promote gender ideology and directs agencies to ensure that grant funds are not used to advance this ideology. The order requires the director of the Office of Management and Budget to implement "agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order."

This portion of the order could directly affect millions of individuals employed by government contractors and grant recipients throughout

the country.

Implications for Employers

We recommend that both public and private employers review their current inclusion, equity, and diversity (IE&D) programs and policies under privilege in light of this executive order and be on alert for any additional orders. Littler will continue to monitor this issue to keep readers apprised of any new orders or changes in existing policy.

Littler | ASAP

Trump Rolls Back DEI in the US – Should UK Employers Change Course?

By Natasha Adom and Raoul Parekh

February 3, 2025

Almost immediately after taking the presidential oath of office, President Trump sprang into action, signing multiple executive orders that address diversity, equity and inclusion (DEI) programs and policies. This included two orders: One mandating the termination of DEI activities in the federal government, the other removing a 1965 obligation on federal contractors to take affirmative action in favour of women and minorities and requiring federal agencies to take action to address "illegal" DEI policies and programs in the private sector (see further *here*).

The Trump administration's prioritisation of this topic within minutes of taking power reflects a rise of discontent with DEI within some quarters in the United States, with such programmes characterised by some as divisive and unmeritocratic. The *U.S. Supreme Court's Harvard decision*, which ruled that race-conscious admissions practices at Harvard College and the University of North Carolina (which are

generally similar to many other higher education institutions' admissions processes) violate the Fourteenth Amendment's Equal Protection Clause of the U.S. Constitution, caused many U.S. employers to re-examine their own practices and to pull back or even pull the plug on some or all of their DEI efforts.

The picture in the UK and Europe is very different

In contrast, employers operating in the UK and EU are under rising pressure from new laws and regulatory expectations to drive forward DEI.

In the UK, the new government is proposing a raft of new diversity laws, including imposing mandatory ethnicity pay gap reporting on employers for the very first time. Likewise, while further detail is awaited, financial services regulators are proposing to require regulated firms to meet minimum standards to drive forward gender and ethnic diversity.

In the EU, there are significant new directives about to bite. These include:

- New gender quotas for women on boards in large-listed companies; and

- A new EU Pay Transparency Directive that will impose onerous obligations on employers to disclose pay data and address gender disparities.

What does this all mean for UK and global employers?

1. **Review DEI compliance:** While Trump's orders of course do not apply outside the United States, global employers may want to even more carefully assess the legality of their practices going forward against local requirements. The UK and EU have a different legal framework from affirmative action in the United States, which permits employers to take positive action within legal limits (see *here* and *here* as examples for the UK).

2. **Navigating anti-DEI sentiment:** Not all employees are in favour of DEI efforts. In view of these events, some may feel more confident to challenge them. In recent years, we have seen an uptick in well-publicised Tribunal cases where certain "anti-DEI" views have been upheld in the UK. To help reduce division, many employers are reframing initiatives to focus on inclusion for all – such as including parenting groups, men's mental health or opening up certain initiatives to allies.

3. **Risks of abandoning diversity goals:** However, given the starkly different political and regulatory trajectory in the UK and EU, abandoning DEI efforts would be risky. For example, if ethnicity pay gap reporting is implemented as expected, it is likely that employers will need to demonstrate actions taken to address disparities. This is something that a broad focus on inclusion alone may not achieve. Instead, it will be even more important for employers to develop legally compliant strategies and communicate them clearly.

4. **The role of DEI training:** Some employers may be tempted to cut DEI training, but this can increase legal exposure. For example, anti-harassment training can help defend against discrimination claims and UK employers now have a new legal duty to take reasonable steps to prevent sexual harassment, which typically includes delivering training.

5. **A more nuanced approach:** All of this means that it will be more difficult for global companies to make powerful sweeping statements about their commitment in this area. It's now more important than ever to work with local experts to tailor initiatives to local legal and cultural contexts.

Note in this article we refer to these initiatives as DEI initiatives as they are referred to in the executive orders, but others may refer to them as "IE&D" (inclusion, equity and diversity) initiatives or otherwise.

Littler | ASAP

Recent Executive Orders and Dear Colleague Letter Affecting Educational Institutions

By Barbara Gross, Eliza Kaye, and Shannon Huygens

February 6, 2025

In the two weeks since President Trump took office, he has issued numerous orders, many of which affect educational institutions. The following summarizes the most recent executive orders and directives affecting our education clients.

Revised Executive Order 13899 – Combatting Anti-Semitism

On January 29, 2025, President Trump issued additional measures to *Executive Order 13899*, which was first issued in December 2019 during his first administration to ensure that schools would protect Jewish Americans to the same extent to which all other American citizens are protected. The revised executive order claims that the Biden administration effectively nullified the original order and that additional measures were required in the wake of the Hamas terrorist attacks on October 7, 2023. The revised executive order promises to vigorously combat anti-Semitism using all available tools to "prosecute, remove or

otherwise hold to account the perpetrators of unlawful anti-Semitic harassment and violence."

Of note, within 60 days of the executive order, all executive departments and agencies are to provide to the president an inventory and analysis of all pending court cases and administrative complaints against or involving institutions of higher education alleging civil rights violations related to or arising from post-October 7, 2023 anti-Semitism that occurred at K-12 schools, and college and university campuses.

Significantly, the same executive order requires governmental agencies to include in the aforementioned reports recommendations for familiarizing higher education institutions with the grounds for permissible monitoring of activities violative of this order by non-U.S. citizen students and staff, and where appropriate and consistent with applicable law, the investigation and removal of such individuals. In the *accompanying fact sheet* to the executive order, the president vowed to "quickly cancel the student visas of all Hamas sympathizers on college campuses."

Executive Order 13958 - Ending Radical Indoctrination in K-12 Schooling

On January 29, 2025, President Trump ordered the secretary of education, the secretary of defense, and the secretary of health and human services, in consultation with the attorney general, to provide an "Ending Indoctrination Strategy" for K-12 schools, which is to include a plan for: (a) eliminating federal funding for schools that support illegal and discriminatory treatment, including that which is based on gender

ideology and discriminatory equity ideology, and (b) protecting parental rights under the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA). While the executive order incorporates by reference the definitions set forth in the president's *previous executive order*, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," the executive order also defines "discriminatory equity ideology" as an ideology that treats individuals as members of preferred or disfavored groups, rather than as individuals, and minimizes agency, merit, and capability in favor of "immoral generalizations." An enumerated list of such "immoral generalizations" can be found *here*.

The plan submitted must contain a summary and analysis of all federal funding sources or streams, including grants or contracts, that directly or indirectly support or subsidize the instruction, advancement, or promotion of gender ideology or discriminatory equity ideology in any school curriculum, instruction, program, or activity as well as in any K-12 teacher education, certification, licensing, employment, or training. Notably, the plan must also address a process for rescinding funds being used by an educational service agency (ESA), local educational agency (LEA), and state educational agency (SEA), elementary or secondary school that directly or indirectly supports or subsidizes: the instruction, advancement, or promotion of gender ideology or discriminatory equity ideology; the social transition of a minor student, including through school staff or teachers or through deliberately concealing the minor's social transition from the minor's parents; or

interference with a parent's right to information under PPRA or FERPA, or a violation of Title VI or Title IX.

The order also reestablishes the 1776 Commission, originally created under the president's first term in November 2020, and later terminated by President Biden a few months later, to promote patriotic education, including the coordination of bi-weekly lectures regarding the 250th anniversary of American independence.

Finally, the order requires all K-12 schools that receive federal funds to hold an educational program on the United States Constitution on September 17th every year and verify their compliance with the same.

Dear Colleague Letter re Title IX Enforcement

Although many educational institutions never implemented the 2024 Title IX regulations due to the numerous lawsuits challenging such regulations, the Office of Civil Rights of the Department of Education has now made clear in its *February 4, 2025 Dear Colleague Letter* (which replaced the similar January 31, 2025 Dear Colleague issued on the same topic) that it will enforce Title IX only under the provisions of the 2020 Title IX Rule, and that all open Title IX investigations initiated under the 2024 Title IX Rule should be immediately "reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule."

Some of the most significant issues impacted by this change include that the 2020 Title IX Rule does not allow for the single investigator model allowed under the 2024 regulations, reinstituting a rule that requires a formal hearing for alleged violations of Title IX. The

elimination of the single investigator model will allow individuals accused of sexual assault to cross-examine their accuser in formal proceedings, a decision that critics claim will have a chilling effect on victims willing to report their assailants. The 2020 Title IX rule also does not include the protections for transgender students, including inclusive bathroom and locker room policies, set forth in the 2024 regulations.

As the executive orders and directives impacting educational institutions are currently changing at a rapid pace and might face challenges on First Amendment and other grounds, we encourage you to consult with counsel regarding implementation of changes in connection with these issues and we will continue to monitor ongoing developments.

Littler | ASAP

GSA Announces FAR Deviations Consistent with the Revocation of Executive Order 11246

By David Goldstein, Carroll Wright, and Kelcy Palmer

February 19, 2025

UPDATED February 20, 2025

On February 15, 2025, the director of the U.S. General Services Administration (GSA), in his capacity as chair of the Civilian Agency Acquisition Council (CAAC), issued a *CAAC Letter* authorizing executive agencies to deviate from existing provisions of the Federal Acquisition Regulations (FAR) and procurement practices in order to implement President Trump's *Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity*.

This letter further clarifies the extent to which federal contractors are relieved from all obligations that applied under the now-revoked Executive Order 11246, including the maintenance of affirmative action programs for women and minorities and all related requirements established by the rules promulgated pursuant to Executive Order 11246.

The letter first instructs the executive agencies to exclude from new solicitations or contracts the following clauses that have been in use to implement now-revoked Executive Order 11246:

1. FAR 52.222-21, Prohibition of Segregated Facilities;

2. FAR 52.222-22, Previous Contracts and Compliance Reports;

3. FAR 52.222-23, Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction;

4. FAR 52.222-24, Pre-award On-Site Equal Opportunity Compliance Evaluation;

5. FAR 52.222-25, Affirmative Action Compliance;

6. FAR 52.222-26, Equal Opportunity;

7. FAR 52.222-27, Affirmative Action Compliance Requirements for Construction; and

8. FAR 52.222-29, Notification of Visa Denial.[1]

A *supplement to the CAAC letter* provides that "[a]s of February 15, 2025, FAR clauses and provisions covered under E.O. 11246, Equal Employment Opportunity, will no longer be enforced."

Therefore, contractors and their subcontractors will not be held accountable for applying the FAR clauses or provisions outlined in FAR subpart 22.8 – Equal Employment Opportunity, or the associated provisions and clauses prescribed at FAR 22.810.

The letter then further provides that “contractors will no longer be required to comply with the system for Award Management (SAM) representation requirements based on these provisions and clauses.”

Regarding E.O. 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, the CAAC letter states that the term "gender identity" is removed from FAR 22.801 and the clauses at FAR part 52 that include the term. The letter does not provide further commentary on this change or provide for any new obligations required of contractors in this regard.

Based on these actions, it would appear that the risk of a successful breach of contract or False Claims Act action based on a failure to comply with non-discrimination laws is unchanged absent the adoption of contract clauses requiring new and different representations concerning compliance with non-discrimination or equal employment opportunity obligations and the incorporation of those provisions into federal contracts and subcontracts.

The CAAC letter also explicitly notes that, regardless of the president’s executive orders, federal contractors “are still covered by existing United States laws on civil rights/nondiscrimination. These laws apply whether or not the company is a government contractor.”

Contractors are thus reminded that, to the extent that any of the president’s executive orders may be interpreted as inconsistent with Title VII or constitutional standards, compliance with the orders will not be a defense to claims of unlawful discrimination under federal law. Contractors should, therefore, be thoughtful in how they respond to

those portions of the executive order that for the time being are hortatory—this would include any stated desire to define gender identity in a manner inconsistent with the relevant science and law or to interpret statutory rights in a manner inconsistent with court decisions.

We will continue to monitor developments and provide further information for federal government contractors. Should you have questions about federal government contractors' obligations, please contact your legal counsel.

February 20, 2025 update:

Following the publication of this ASAP on February 19, we became aware of several federal entities that are purporting to add the following language to their contract terms:

> In accordance with EO 14173, Contractor agrees that its compliance with all applicable Federal anti-discrimination laws is material to the Exchange's payment decisions for purposes of 31 U.S.C. § 3729(b)(4). Contractor certifies it does not operate any programs in violation of any applicable Federal anti-discrimination laws.

See, for example, the February 2025 Terms and Conditions posted by the Army & Air Force Exchange Service at

https://www.aafes.com/Images/doingbusiness/termscon.pdf.

The inclusion in this type of a clause of an explicit reference to the False Claims Act, 31 U.S.C. § 3729(b)(4) is unusual, if not unprecedented. As violations of the False Claims Act can result in criminal and substantial civil penalties, it is very important that contractors obtain legal advice before agreeing to this term. This is particularly true as it is not clear that this term is being added to contracts in accordance with applicable legal requirements for adopting federal contracting terms or that the language of this term could survive legal challenge. Employers that are asked to agree to this term in either a contract or subcontract should consult with their legal counsel.

Littler | ASAP

Federal Court Enjoins Trump Administration's Broad Attack on DEI

By David J. Goldstein and Alyesha Asghar

February 22, 2025

On February 21, a federal district court judge *issued a preliminary injunction* against several elements of Trump's executive orders regarding DEI or DEIA. The reach of this preliminary injunction goes beyond the plaintiffs in this suit, encompassing similarly situated federal contractors, grantees of federal funds, and private sector entities. The court highlighted the necessity of preserving the current state of affairs during the litigation and halting the enforcement of the contested provisions.

The action was brought by the National Association of Diversity Officers in Higher Education, the American Association of University Professors, Restaurant Opportunities Centers United, and the mayor and city council of Baltimore, Maryland, and challenged the following provisions in Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing* and Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*:

Executive Order 14151 § 2(b)(i) (the "**Termination Provision**") (Requires termination of all "equity-related" grants or contracts within 60 days):

> Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM, as appropriate, shall take the following actions within sixty days of this order:
>
> > (i) terminate, to the maximum extent allowed by law, . . . all . . . "equity-related" grants or contracts[.]

Executive Order 14173 § 3(b)(iv) (the "**Certification Provision**") (Mandates that federal contracts and grants include terms requiring compliance with federal anti-discrimination laws and certification that no DEI programs violate these laws):

> The head of each agency shall include in every contract or grant award:
>
> > (A) 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
> >
> > (B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

Executive Order 14173 § 4(b)(iii) (the "**Enforcement Threat Provision**") (Directs the attorney general to submit a report with recommendations for enforcing federal civil rights laws and deterring DEI programs that constitute illegal discrimination or preferences):

To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall submit a report to the Assistant to the President for Domestic Policy containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying:
. . . (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated "DEI"' or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall 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 . . .

In an accompanying *63-page memorandum*, the judge found that the plaintiffs were likely to prevail in their challenges to these provisions as violating First Amendment rights to free speech and being unconstitutionally vague in violation of the Fifth Amendment.

Notable in the court's detailed discussion of the facts and the law was the court's recognition that the:

> White House and Attorney General have made clear, through their ongoing implementation of various aspects of [Executive Order 14173], that viewpoints and speech considered to be in favor of or supportive of DEI or DEIA are viewpoints the government wishes to punish and, apparently, attempt to extinguish. And, as the Supreme Court has made clear time and time again, the government cannot rely on the "threat of invoking legal sanctions and other means of coercion" to suppress disfavored speech.

Opinion at p. 51.

The district court also recognized how the vague language used by the executive orders furthers the administration's assault on constitutionally protected rights:

> "Vague laws invite arbitrary power." And Plaintiffs here have shown substantial evidence of the risks of such arbitrariness here. By threatening the "private sector" with enforcement actions, based on those vague, undefined standards, the Enforcement Threat Provision is facially unconstitutional under the due process clause of the Fifth Amendment.

Opinion at 54 (internal citations omitted).

The court's ruling provides that the attorney general, federal agencies and agency heads, "and other persons who are in active concert or participation" with them, may not:

a. pause, freeze, impede, block, cancel, or terminate any awards, contracts or obligations ("Current Obligations"), or change the terms of any Current Obligation, on the basis of the Termination Provision;

b. require any grantee or contractor to make any "certification" or other representation pursuant to the Certification Provision; or

c. bring any False Claims Act enforcement action, or other enforcement action, pursuant to the Enforcement Threat Provision, including but not limited to any False Claims Act enforcement action premised on any certification made pursuant to the Certification Provision.

The court's order and ruling does not impact the revocation of Executive Order 11246 or the removal from the Federal Acquisition Regulation of contract clauses relating to Executive Order 11246 and its implementing rules. Additionally, the judge did not prevent the attorney general from preparing reports or pursuing investigations related to the anti-DEI directives. The Trump administration is likely to appeal the preliminary injunction ruling, as the issues raise significant constitutional questions that could ultimately be addressed by the Supreme Court of the United States.

As discussed in some of our prior ASAPs regarding the Trump administration's views on DEI, in promoting diversity and in talking about diversity efforts, employers must comply with the requirements of Title VII and other federal and state laws prohibiting discrimination. These laws are interpreted by the courts and not by the president. Employers should continue to exercise judgment in determining – within the scope of what the law allows – what is right for their business, employees, and customer relations (including the government as a customer) when deciding how to maintain and support a diverse, well qualified, and productive workplace. These decisions are not always easy, so employers should seek assistance from their legal counsel in working through these issues.

Littler | ASAP

OCR Issues FAQs for Schools About Avoiding Racial Preferences Under Title VI

By Barbara Gross, Darren Gibson, Shannon Huygens, and Eliza Kaye

March 4, 2025

After giving educational institutions two weeks to comply with the Department of Education's *Dear Colleague Letter (DCL)*, on February 28, the Office of Civil Rights (OCR) issued *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act*. Title VI generally prohibits discrimination based on race, color or national origin in programs or activities that receive federal financial assistance. The DCL provided guidance on the Trump administration's interpretation of the Supreme Court decision *Students for Fair Admissions v. Harvard*, which prohibited colleges and universities from considering race, color, or national origin in school admissions programs.

The DCL, issued on February 14, 2025, extended the rationale of the Supreme Court decision beyond admission policies, applying it to virtually all school operations, including "admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support,

discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life." With the addition of the FAQs, we now have an even clearer picture of what areas OCR plans to focus on in its enforcement activities related to Title VI.

Schools that do not comply with the guidance set forth in the DCL and the FAQs risk the loss of federal funding. One of the greatest concerns for educational institutions based on the guidance in the FAQs may be their relationships with third-party suppliers and contractors. The FAQs provide that any race-based preferences in the procurement and selection of contractors will prompt OCR scrutiny. Many schools have awarded contracts in the past to minority-owned businesses, either to comply with state and local laws, or to proactively eliminate systemic barriers that minority-owned businesses may have historically faced. Likewise, OCR says that schools may not administer or advertise third-party scholarships, prizes or other opportunities based on race, even if the school itself does not sponsor such opportunities.

The FAQs also provide that, in addition to avoiding agreements and relationships with third parties that may use race-based preferences, schools may not endorse or sponsor any program that segregates the campus community on the basis of race, color or national origin. This would include events exclusively for students of a particular race, separate graduation ceremonies for students of a particular national origin, or housing units or floors segregated by racial preferences. The FAQs clarify that programming focused on particular cultures, heritages or historical observances that promote awareness are not *per se* unlawful so long as members of all races are welcome to participate in

such programs/events, and no one from a particular group is discouraged from attending.

Following the DCL, the FAQs reinforce the Department's stance that institutions cannot use covert methods to engage in racially preferential treatment in admissions, such as essay prompts that encourage students to identify themselves by race, color, or national origin, or required face-to-face interviews that can ascertain a student's racial identity.

The FAQs respond to the question of whether Diversity, Equity, and Inclusion (DEI) programs are unlawful this way:

> [w]hether a policy or program violates Title VI does not depend on the use of specific terminology such as "diversity," "equity," or "inclusion." Schools may not operate policies or programs under any name that treat students differently based on race, engage in racial stereotyping, or create hostile environments for students of particular races.

In addition, the FAQs state that nothing in Title VI or the DCL "requires or authorizes a school to restrict any rights otherwise protected by the First Amendment."

Where programs, trainings, or orientations touch on racially sensitive issues, however, schools are prohibited from mandating participation or forcing participants to identify themselves by race, which could lead to "school-on-student harassment" and create a hostile educational environment. The FAQs explain that OCR will look at each case individually to determine if a hostile environment exists based on the particular facts and circumstances. As examples of "more extreme practices at a university" that could create a hostile environment, the FAQs cite:

> requiring students to participate in privilege walks, segregating them by race for presentations and discussions with guest speakers, pressuring them to participate in protests or take certain positions on racially charged issues, investigating or sanctioning them for dissenting on racially charged issues through DEI or similar university offices, mandating courses, orientation programs, or trainings that are designed to emphasize and focus on racial stereotypes, and assigning them coursework that requires them to identify by race and then complete tasks differentiated by race.

Finally, the OCR sets forth a three-step test, citing to the *McDonnell Douglas* decision in which the Supreme Court created a three-step

burden-shifting framework used for employment-discrimination claims, to evaluate schools' facially neutral policies:

> First, did a school treat a student or group of students of a particular race differently from a similarly situated student or group of students of other races? Then, if so, can the school provide a legitimate, nondiscriminatory reason for the different treatment that isn't pretextual? Finally, if the school is unable to offer a legitimate, nondiscriminatory reason, or if the offered reason is found to be a pretext or cover for discrimination, OCR will conclude that unlawful discrimination has occurred.

Further explaining how OCR will proceed with schools that it determines are out compliance with Title VI, the FAQs refer to its *updated Case Processing Manual*, dated February 19, 2025.

A DCL does not have the force of law, nor do the newly issued FAQs. The DCL is currently the subject of a lawsuit filed on February 25, 2025 in the District of Maryland. In *American Federation of Teachers v. Dept. of Education*, the plaintiffs assert in their complaint that the DCL "radically upends and re-writes otherwise well-established jurisprudence" by attempting to ban efforts to advance diversity, equity and inclusion in education without "the lawmaking power of Congress nor the interpretative power of the courts." The plaintiffs further argue that the DCL, if implemented, will have devastating impacts, including:

(a) undermining schools as a training ground for informed, prepared citizens; (b) denying students opportunities to hone critical thinking skills and expand their world views, and (c) hampering efforts to further equal access to education. The plaintiff seeks relief for alleged violations of the First Amendment (free speech and free association), Fifth Amendment (due process vagueness), and the Administrative Procedure Act (5 U.S.C. § 706(2)).

Littler will provide updates as these issues unfold in the court system and through OCR enforcement.

Littler | ASAP

Fourth Circuit Stays Enforcement of Injunction on IE&D Executive Orders

By David Goldstein and Alyesha Asghar

March 15, 2025

On March 14, 2025, the U.S. Court of Appeals for the Fourth Circuit stayed enforcement of the *preliminary injunction* issued by a Maryland district court judge barring the Trump administration from proceeding with several elements of Trump's executive orders regarding DEI or DEIA.

The three-judge appellate panel *issued a short order* finding without discussion that the government had satisfied the factors for a stay as set forth by the U.S. Supreme Court. The basis for the decision appears to be a disagreement with the lower court's determination that the plaintiffs are likely to prevail on the merits. The three judges seemed to agree that actions taken by the federal agencies pursuant to the executive orders could prove to be unconstitutional but that the orders, on their face, are not unconstitutional. Although all three judges agreed to the stay, each wrote a separate concurring opinion.

Judge Harris provided the most detail regarding the basis for her vote:

As the government explains, the challenged Executive Orders, on their face, are of distinctly limited scope. The Executive Orders do not purport to establish the illegality of all efforts to advance diversity, equity or inclusion, and they should not be so understood. Instead, the so-called "Certification" and "Enforcement Threat" provisions apply only to conduct that violates existing federal anti-discrimination law. Nor do the Orders authorize the termination of grants based on a grantee's speech or activities outside the scope of the funded activities. Rather, the "Termination" provision directs the termination of grants, subject to applicable legal limits, based only on the nature of the grant-funded activity itself. On this understanding, the government has shown the requisite likelihood that the challenged provisions do not on their face violate the First or Fifth Amendment.

But my vote to grant the stay comes with a caveat. What the Orders say on their face and how they are enforced are two different things. Agency enforcement actions that go beyond the Orders' narrow scope may well raise serious First Amendment and Due Process concerns, for the reasons cogently explained by the district court.

This case, however, does not directly challenge any such action, and I therefore concur.

(citations omitted)

This decision frees the executive agencies to again seek to require contractors and grant recipients to certify that they do not operate any programs that violate any applicable federal anti-discrimination laws. Nevertheless, this does not mean that the manner in which the agencies proceed will be immune from further challenges, not only on constitutional grounds, but based on a failure to comply with required administrative procedures for adopting new contract terms.

Because the language that the agencies seek to impose may vary and because agreeing to these representations may have very significant legal consequences—including potential exposure to claims under the False Claims Act—federal contractors and grant recipients that are presented with such provisions should contact legal counsel before agreeing to accept them.

Implications of Decision

The Fourth Circuit's decision to lift the injunction on President Trump's executive orders targeting IE&D programs will have several impacts on such initiatives moving forward:

- **Federal Investigations**: Inclusion, equity and diversity (IE&D) programs, especially those in federal agencies and businesses with government contracts, will face heightened scrutiny to ensure they do not promote illegal preferences or discrimination.

- **Compliance Reviews**: Organizations will need to review their IE&D initiatives under privilege to ensure they align with federal civil rights laws and do not violate the executive orders.

- **Modification of Training**: Employers may need to adjust or discontinue certain IE&D training programs to avoid potential legal challenges.

- **Communication Strategies**: Employers will need to communicate clearly with employees about any changes to IE&D programs and the reasons behind them.

Littler | ASAP

EEOC and Department of Justice Issue Technical Assistance on DEI

By Jim Paretti

March 20, 2025

On March 19, 2025, the Equal Employment Opportunity Commission (EEOC), in conjunction with the U.S. Department of Justice (DOJ), issued two "technical assistance" documents "focused on educating the public about unlawful discrimination related to 'diversity, equity, and inclusion' (DEI) in the workplace." Unlike guidance documents, which must be approved by a majority vote of the Commission (which, with only two sitting members, currently *lacks a quorum*), a technical assistance document, which does not adopt new policy but applies existing policy to different sets of facts, can be issued unilaterally by the agency's head.

The first document, "*What To Do If You Experience Discrimination Related to DEI at Work*," was issued jointly by the EEOC and the DOJ. A second, longer document, *"What You Should Know About DEI-Related Discrimination at Work*," is presented in a question-and-answer format and was released by the EEOC.

The Q&A document in particular stresses that Title VII does not provide any exception for DEI or "diversity interests" in prohibiting discrimination based on race, sex, or other protected category, and a general business interest in diversity or equity is insufficient to support any employment decision being made in whole or in part on the basis of a protected characteristic. Both documents set forth the procedures for an employee who claims to have experienced DEI-related discrimination to file a charge and seek an investigation. Additionally, both include examples of what the agencies view as potential actionable discrimination if they take into account an employee or applicant's race, sex, or other protected category, including:

- Hiring;
- Firing;
- Promotion;
- Demotion;
- Compensation;
- Fringe benefits;
- Access to or exclusion from training (including training characterized as leadership development programs);
- Access to mentoring, sponsorship, or workplace networking or networks;

- Internships (including internships labeled as “fellowships” or “summer associate” programs);

- Selection for interviews, including placement or exclusion from a candidate “slate” or pool; and

- Job duties or work assignments.

The documents note that federal civil rights law also prohibits employers from limiting, segregating, or classifying employees or applicants based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities, including employee activities that are employer-sponsored (for example, where such activities are provided company time, facilities, premises, or other forms of official or unofficial encouragement or participation), where participation in or resources for such activities are limited on the basis of a protected characteristic.

With specific respect to employee affinity groups (such as Employee Resource Groups (ERGs), Business Resource Groups (BRGs), or other employee affinity groups), the EEOC takes the position that it is “unlawful segregation” to limit such opportunities to certain protected groups, or to restrict membership in any ERG or BRG to only members of a protected class. The EEOC also notes that it is unlawful for employers to separate workers into groups based on race, sex, or another protected characteristic when administering DEI or any trainings, workplace programming, or other privileges of employment (like ERGs and BRGs), even if the separate groups receive the same programming content or amount of employer resources.

Rather, the EEOC takes the position that employers instead should provide "training and mentoring that provides workers *of all backgrounds* the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs" and ensure that "employees *of all backgrounds* . . . have equal access to workplace networks" (emphasis in original).

Finally, with respect to DEI training, the EEOC notes that an employee may be able to show that such training created a hostile work environment where training was discriminatory in content, application or context (for example, its design or execution) in a manner that a reasonable person would consider intimidating, hostile, or abusive.

This guidance comes on the heels of the administration's earlier efforts to target so-called "unlawful DEI" by way of *executive orders* and every means available. And it bears note that on her first day as the head of the agency, the acting chair of the EEOC made clear that *among her top priorities* was the investigation and elimination of "unlawful" DEI in the workplace. Given the intense focus the EEOC and other federal agencies will give to these issues, employers that engage in DEI efforts or activities that may potentially run afoul of Title VII or other laws are advised to seek the advice of counsel in evaluating such programs.

Littler | ASAP

New OFCCP Director Appointed

By David Goldstein, Carroll T. Wright, and Kelcy L. Palmer

March 25, 2025

On March 24, 2025, the U.S. Department of Labor *announced* Catherine Eschbach[1] as the new director of the Office of Federal Contract Compliance Programs (OFCCP). In its announcement, Director Eschbach expressed that she is "honored" to "oversee its transition to its new scope of mission" and is "committed to carrying out President Trump's executive orders, which will restore a merit-based system to provide all workers with equal opportunity."

The director's appointment comes two months after *President Trump rescinded Executive Order 11246* with Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," and *OFCCP halted OFCCP investigative and enforcement activity* under the rescinded E.O. 11246 and issued an abeyance on activity under Section 503 and VEVRAA.

While the future of OFCCP was not clear following President Trump's January executive orders and federal workforce reductions, the appointment of Director Eschbach as OFCCP's director appears to indicate that OFCCP may still seek to play a role in investigating

violations and enforcing the requirements under E.O. 14173. Whether it has jurisdiction to do so following the revocation of Executive Order 11246 is another question. OFCCP's authority may be limited to referring matters to the EEOC or other federal agencies for consideration pursuant to existing memoranda of understanding between OFCCP and those other federal entities.

With regard to Section 503 and VEVRAA, OFCCP clearly retains jurisdiction to accept and process complaints and otherwise act in compliance with its statutory mandates.

As reported previously, the U.S. Court of Appeals for the Fourth Circuit in *National Association of Diversity Officers in Higher Education v. Trump stayed enforcement of the preliminary injunction* barring the Trump administration from proceeding with several elements of Trump's executive orders including some of those in E.O. 14173. The challenges have not included the revocation of E.O. 11246, which required federal contractors to maintain affirmative action plans with regard to women and minorities.

We will continue to monitor developments and report on significant changes as we learn more about OFCCP's new mission. Contractors should consult with employment counsel should they have questions about their obligations under federal and state law in light of the recent executive orders and litigation.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

Federal District Court Temporarily Enjoins DEI Certification Provision for DOL Grant Recipients

By Carroll Wright, David Goldstein, and Kelcy Palmer

March 28, 2025

At a Glance

- Federal court issued a temporary restraining order regarding two executive order provisions governing DEI programs for certain grant recipients of federal funds.
- The TRO enjoins the Certification Provision in Executive Order 14173 for DOL grant recipients, and the Termination Provision in Executive Order 14151 as to the plaintiff and its subcontractors.
- A hearing on a longer-term injunction is scheduled for April 10, 2025.

On March 27, 2025, a judge for the Northern District of Illinois *granted a temporary restraining order* (TRO) against the DEI Certification and Termination Provisions authorized by President Trump's Executive Orders 14151 and 14173. The Certification Provision TRO is nationwide with respect to Department of Labor grant recipients. The Termination Provision TRO is limited to the plaintiff and any federal grantee through which plaintiff holds a subcontract or is a subrecipient of federal funds. Although the opinion and the resulting TRO is thus limited in scope, it provides guidance as to how federal contractors and other recipients of federal funds might pursue relief from the president's anti-DEI directives.

The plaintiff is *Chicago Women in Trades* (CWT), a nonprofit established in 1981 with a mission to advocate for women seeking to enter and thrive in occupations historically dominated by men, including skilled labor positions in construction. Federal funding accounts for approximately 40% of CWT's annual budget.

CWT challenges the following provisions in Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing* and Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* for violating its rights under the First and Fifth Amendments to the Constitution and for running afoul of the Constitution's Spending Clause and the separation of powers:[1]

- Executive Order 14151 § 2(b)(i) (the "Termination Provision") mandates each agency within 60 days "terminate, to the maximum extent allowed by law, . . . all . . . "equity-related" grants or contracts."

- Executive Order 14173 § 3(b)(iv) (the “Certification Provision”) mandates each agency include in every contract or grant award a certification “that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws” and thus such certification be “material” for purposes of the False Claims Act.

In a 24-page memorandum, the judge found that the plaintiff had standing to challenge the Termination and Certification Provisions and the issues were ripe for review. The judge held the plaintiff was likely to prevail in challenging the Termination Provision for violating its First Amendment rights because of its coercive, vague threat. The court notably reasoned:

> At base, though, it seems that if the full range of the Termination Provision's applications is undefined such that it chills any protected speech that might touch upon whatever the government now contends to be "DEI," "DEIA," or "equity," then the full range of the provision's applications would be constitutionally impermissible.
>
> ***
>
> The Order provides no definition or even an example of what is considered "illegal DEI" that would be permissibly terminated, and the government has been unwilling or unable to clear it up during this litigation. Therefore, limiting termination to the maximum extent allowed by law offers no real protection, as the extent to which

> CWIT's programs may violate the law remains unclear.

The court also held the plaintiff was likely to prevail on the merits in challenging the Certification Provision because the Certification Provision attempts to regulate speech outside of federally funded programs (“any programs promoting DEI” irrespective of whether the program is federally funded) and the Certification is entirely vague. The court explained that the meaning of the Certification Provision:

> . . . is left entirely to the imagination. The Order that contains the Certification Provision does not define the term "DEI" itself, and it does not refer to any other source indicating what the term means as used in the Order—let alone what might makes any given "DEI" program violate Federal anti-discrimination laws. And although the government emphasized, both in its brief and at oral argument, that the Certification Provision implicates only illegal DEI programs, it has studiously declined to shed any light on what this means. The answer is anything but obvious. Indeed, the thrust of the Orders is that the government's view of what is illegal in this regard has changed significantly with the new Administration—even though the government has

> not (in the Orders) and has been unwilling to (in its briefs or at argument) define how it has changed.

The court aptly described the “difficult and perhaps impossible position” contractors and grant recipients are put in:

> CWIT or any other grantee must either take steps now to revise their programmatic activity so that none of it "promote[s] DEI" (whatever that is deemed to mean), decline to make a certification and thus lose their grants, or risk making a certification that will be deemed false and thus subject the grantee to liability under the False Claims Act.

As a result, and after finding a likelihood of irreparable harm and balancing the harms and the public interest, the court granted the temporary restraining order regarding the Termination and Certification Provisions.

This temporary restraining order’s scope is distinct from and narrower than the *injunction issued by a Maryland federal court* a little more than a month ago and then *stayed by the Fourth Circuit* two weeks ago. Unlike the District of Maryland preliminary injunction, this is not a nationwide injunction applying to all federal government agencies and

protecting both grant recipients and federal contractors. Rather, the Certification Provision TRO is nationwide only with respect to DOL grant recipients, to “protect grantees who cannot afford the risks inherent in biting the hand that feeds them.” The Termination Provision TRO is limited to the plaintiff and any federal grantee through which plaintiff holds a subcontract or is a subrecipient of federal funds.

A hearing on Chicago Women in Trades' motion for a longer-lasting injunction on these Certification and Termination Provisions is scheduled for April 10, 2025. This is only one lawsuit of several challenging President Trump's executive orders regarding DEI or DEIA programs. In these uncertain times, compliance is not always clear, so please contact experienced counsel when working through these issues.

Littler | ASAP

FCC Takes Aim at Media Companies' lE&D Efforts

By Emily Haigh, Alyesha Asghar, Ashley Jones, and Vinay Patel

April 14, 2025

Federal Communications Commission (FCC) Chair Brendan Carr recently revealed in a social media post the agency's latest probe into various media entities' inclusion, equity, and diversity efforts.

As detailed in a March 27, 2025, letter addressed to The Walt Disney Company CEO Robert A. Iger, Carr expressed concern that the company's inclusion, equity, and diversity practices "promot[e] invidious forms of DEI discrimination" in violation of FCC equal employment opportunity regulations. In particular, the letter targets Disney's efforts to make "DEI a key priority for the company's businesses" in recent years. Carr cites to multiple reports that the company has "embedded explicit race- and gender-based criteria" in its corporate operations, such as launching employee resource groups, amplifying underrepresented stories and voices through its "Reimagine Tomorrow" initiative which seeks to have "50% of regular and recurring characters" be drawn from "underrepresented groups," and offering incentives and bonuses based on diversity.

In recent weeks, the FCC has given other indications of where its challenges to inclusion, equity, and diversity efforts may lead. This latest probe comes on the heels of another FCC investigation into other media companies' inclusion, equity, and diversity policies. The FCC has also threatened to block mergers or other transactions needing FCC approval over such policies. In a March 21, 2025, interview with *Bloomberg News*, Carr stated that any businesses looking for FCC approval need to end "any sort of their invidious forms of DEI discrimination," because if they did not, FCC may not "reach the conclusion that approving the transaction is going to be in the public interest." The FCC may also look to pull broadcast licenses from entities that are deemed to have engaged in "DEI discrimination." In a March 31, 2025 *interview* on Fox News that discussed these investigations, Carr suggested that evidence of a company engaging in discrimination could "fundamentally go to their character qualifications to even hold a license." Such actions from the FCC could have major implications for how FCC-regulated entities conduct business.

First Amendment Implications

The current administration's engagement with inclusion, equity, and diversity efforts raises special considerations around free speech for employers in the entertainment and media industries. The FCC's March 27 letter raises questions about the scope of its investigation and whether such investigations may interfere with the entertainment and media companies' rights under the First Amendment to create expressive content of their choosing.

In the letter, the FCC refers not only to employment practices around affinity groups and hiring, but also to characters appearing on screen, television pilots that Disney chooses to pick up, and other considerations regarding societal representation in its programming. Governmental regulation on these practices would likely have direct consequences for the company's creative and artistic expression and its "creative decisions about what story to tell," which is protected by the First Amendment, even against the application of anti-discrimination statutes.[1] Disney has asserted a similar First Amendment defense in *Carano v. The Walt Disney Company*, an ongoing lawsuit in which Disney is attempting to protect its artistic expression in a termination decision. The terminated employee sued alleging she was wrongfully discharged due to her political views and her sex. The legal precedent around this defense is still developing, and now that the FCC has turned its focus to this area, we expect that similar cases may continue to arise in the future.

Time will tell whether the company will pursue a First Amendment argument in response to the FCC's investigation and how it may affect its outcome. Littler will continue to follow this situation and other developments on First Amendment defenses to claims of employment discrimination.

Probe Into Inclusion, Equity, and Diversity Efforts Impact on Other Industries

While Disney and other FCC-regulated organizations are currently facing scrutiny, organizations across all industries are facing pressure to

reduce language referencing inclusion, equity, and diversity, or eliminate inclusion, equity, and diversity initiatives altogether. Some organizations have pushed back against government proposals while others have eliminated, scaled back, or revised inclusion, equity, and diversity programs and initiatives.

Tips for Employers

As the legal landscape for inclusion, equity, and diversity efforts continues to change, and the federal government is now the driving force influencing these efforts, there are steps that employers can take to ensure compliance with anti-discrimination laws.

- Ensure that all benefits and opportunities related to employment are open to all employees in compliance with relevant laws, and without regard to any prohibited protected characteristics.

- Ensure that any affinity groups, program memberships, or events are not restricted to individuals who share a protected characteristic and do not exclude individuals who do not.

- Avoid using set numbers, percentages, or “quotas” related to individuals with certain protected characteristics when considering how to set or achieve goals related to inclusion, equity, and diversity.

- For employers in entertainment and media, consider which decisions relate to the creative process of producing expressive content and may be protected by the First Amendment, and which may not.

- Consider undertaking a privileged internal review or self-assessment of inclusion, equity, and diversity efforts to assess legal compliance,

identify risk factors, and understand employee perspectives on workplace culture.

Littler | ASAP

Trump Administration Moves to Eliminate Federal Government's Use of Disparate Impact Theory Liability

By Jim Paretti, Chris Gokturk, and Alyesha Asghar

April 24, 2025

On April 23, 2025, President Trump signed an executive order instructing that federal agencies cease using the disparate impact theory of liability under federal civil rights laws, including Title VII of the Civil Rights Act of 1964 (addressing employment discrimination) and Title VI (addressing discrimination in education).

The order states specifically, "It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals," and directs that all federal agencies shall "deprioritize" enforcement of statutes and regulations relying on disparate impact theory. The order further directs the attorney general to take appropriate action to repeal or amend Title VI regulations to the extent they contemplate disparate impact liability and

instructs the chair of the Equal Employment Opportunity Commission (EEOC), within 45 days, to review all pending investigations and civil lawsuits that rely on a theory of disparate impact liability and "take appropriate action" consistent with the policy of the executive order.

As a practical matter for employers, this means that at least through the remainder of the Trump administration, the EEOC is unlikely to investigate charges of discrimination premised on disparate impact liability under Title VII, and unlikely to file new cases in federal court relying on a theory of disparate impact liability. This is likely true as to educational institutions subject to Title VI as well. Whether the EEOC will move to dismiss or otherwise withdraw *pending* lawsuits in which it alleges disparate impact liability is not yet clear, although it is very possible that the agency will seek to voluntarily dismiss those cases, as it did with cases alleging discrimination on the basis of transgender status following the administration's executive order setting forth its policy with respect to gender identity.

Background

Disparate impact is a theory of liability under civil rights laws in which a facially neutral practice (for example, a credit check or aptitude test to screen job applicants) has a disproportionately adverse effect on a protected class of individuals. Unlike disparate treatment liability, which requires proof of intentional discrimination, disparate impact liability arises from the use of a neutral practice and requires no showing of intent to discriminate.

Disparate impact was first recognized as a viable theory of discrimination by the U.S. Supreme Court in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In *Griggs*, the Court addressed an employer's requirement that to be employed in its highest paying departments, an employee had to have a high school diploma, or pass tests of mechanical aptitude and IQ. White employees were almost 10 times more likely than Black employees to meet these requirements. The Court held that absent a showing of business necessity, the use of a test that disproportionately screens out individuals in a protected category is unlawful.

In 1991, via the Civil Rights Act of 1991, Congress codified disparate impact liability in Section 703(k) of Title VII. Under Section 703(k), an individual has the burden of proof to show that a particular employment practice has a disparate impact (usually by use of statistical evidence). The burden then shifts to the employer to show that the practice is "job related for the position in question and consistent with business necessity." If the employer is able to prove that the practice is justified by business reasons, a plaintiff may still prevail if it can show an equally effective alternative employment practice that does not have an adverse impact and which the employer refused to adopt. That law remains on the books insofar as an executive order cannot "unwrite" a law written by Congress.

What does this mean for employers?

The executive order makes clear that the administration is unlikely to pursue investigations or bring new litigation based on a theory of

disparate impact liability. Employers are cautioned, however, that unless and until changed by Congress, disparate impact liability is a viable theory of discrimination under Title VII, and while plaintiffs must bring a charge alleging such discrimination to the EEOC in the first instance, they ultimately are able to bring private suit in federal court absent any involvement by the EEOC. Moreover, many states impose laws establishing disparate impact liability under their state non-discrimination laws (although the order instructs the attorney general to examine whether any such laws are preempted by federal law or otherwise "have constitutional infirmities that warrant Federal action"). Employers facing challenges to employment practices or charges of discrimination alleging disparate impact liability are advised to consult with counsel.

Littler's WPI will keep readers apprised of relevant developments.

Littler | ASAP

DOJ Outlines Plans to Enforce the False Claims Act Against Recipients of Federal Funds that Knowingly Violate Civil Rights Laws

By Holly M. Robbins, David Goldstein, Jacqueline Mrachek, and Meredith Schramm-Strosser

May 22, 2025

At a Glance

- DOJ plans to use the False Claims Act (FCA) to investigate and pursue claims against recipients of federal funds that "knowingly violate civil rights laws."
- The initiative represents a new DOJ focus on use of the FCA to promote the administration's agenda opposing certain IE&D initiatives and transgender rights.

On May 19, 2025, Deputy Attorney General Todd Blanche issued a memorandum, *Deputy Attorney General Blanche Memo: Civil Rights*

Fraud Initiative, announcing an initiative to "utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws."

For many years, the government has required contractors and grant recipients to make representations regarding compliance with various federal civil rights laws. Historically, numerous agencies, including the Department of Justice (DOJ), have shared the responsibility for monitoring compliance. The Trump administration's announcement that it will use the FCA to enforce compliance with civil rights laws is, however, largely unprecedented. Similarly, the administration's focus on "illegal DEI" as a primary threat to American's civil rights also represents a significant departure from the past practices of prior administrations, including the first Trump administration. When combined with continuing uncertainty as to what constitutes illegal DEI, the Justice Department's new memo leaves many questions unanswered.

Nevertheless, what is clear is that now may be a good time for government contractors and grant recipients to review their compliance with federal civil rights laws and exercise caution when making representations to the government regarding compliance.

Background

The FCA, originally established in 1863 to combat defense contractor fraud during the Civil War, prohibits the knowing submission of false claims to the government. It prohibits contractors from making false representations to the government regarding a law, regulation, or federal contract. Only knowing noncompliance with material statutory,

regulatory, or contractual requirements can support an FCA claim regarding a false certification to the government. See *Universal Health Servs. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016). Because a violation must be knowing, a good faith defense may exist where an entity certifies compliance with the law based on an objectively reasonable interpretation of an underlying law. See *U.S. ex rel Schutte v. SuperValu Inc.*, 598 U.S. ____ (2023); *U.S. ex rel. Proctor v. Safeway, Inc.*, 598 U.S. ___ (2023). The FCA carries criminal and civil penalties, including treble damages. It also allows private citizens (known as "relators") to file "*qui tam*" suits on behalf of the government against entities that allegedly defraud the government.[1] In FY 2024, the DOJ reported that it collected nearly $3 billion in settlements and judgments from FCA cases.

On January 21, 2025, President Trump issued Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633, directing the executive branch agencies to take action to end the adoption and use of "dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil rights laws of this Nation." On February 5, 2025, the attorney general issued a memorandum promising that the DOJ's Civil Rights Division "will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."

The May 19, 2025 memo from Deputy Attorney General Blanche (the "DOJ Memo") appears to represent the next step in the implementation

of EO 14173.

The DOJ Memo

The DOJ Memo encourages use of the FCA against federal contractors or grant recipients that "defraud the United States by taking its money while knowingly violating civil rights laws." According to the DOJ Memo, a federal contractor or grant recipient may implicate the FCA if it "knowingly violates civil rights laws . . . and falsely certifies compliance with such laws." The DOJ Memo does not define the terms "federal contractors" or "grant recipients." Nor does it indicate the specific "claims" the government may use to support an action under the FCA beyond stating that the statute:

> is implicated when a federal contractor or recipient of federal funds knowingly violates civil rights laws—including but not limited to Title IV, Title VI, and Title IX, of the Civil Rights Act of 1964—and falsely certifies compliance with such laws. Accordingly, a university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's bathrooms, or requires women to compete against men in athletic competitions. Colleges and universities cannot accept federal funds while discriminating against their students.
>
> The False Claims Act is also implicated when federal funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences,

> mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin.

Notably, there are several hallmarks to a successful FCA action. The representation must be fraudulent, knowing, and material. To constitute a violation of the FCA, a representation regarding compliance with civil rights laws would have to be both false and material. In other words, an actual legal violation would have to be shown, based on statutory and case law. Importantly, the government's mere assertion that a particular representation is "material" (even if a contractor or grant recipient acknowledges the government's position) does not necessarily establish materiality for purposes of a claim. Materiality is ultimately an issue of law and fact to be decided by a court.

Likewise, the administration's positions as to what the law should require may be at odds with the current state of the law in some respects. For example, some of the administration's arguments regarding the rights of transgender individuals have not yet been heard or decided by the courts.

Conclusion

The DOJ Memo represents a change in the use of the FCA. This is not the first time the FCA has been used to enforce civil rights laws, but it represents a new DOJ focus on use of the FCA to promote the administration's agenda regarding issues such as IE&D initiatives and transgender rights. Questions exist as to whether the representations at

issue meet the materiality requirements of the FCA. Lack of precedent in this area may argue against materiality.

Government contractors and grant recipients that seek to limit exposure to FCA claims may want to:

- Engage in the appropriate due diligence to avoid knowing misrepresentations to the government and consult with counsel regarding certification language in government contracts and to establish a good faith defense to FCA claims.

- Evaluate policies and programs, including those related to inclusion, equity, and diversity, to ensure compliance with existing statutory and case law. Employers that abruptly change course on certain policies or practices may end up facing claims from aggrieved applicants or employees.

- Establish and maintain strong internal reporting policies and procedures and encourage such reporting in order to address concerns appropriately and avoid surprises.

- Pay attention to formal and informal complaints in order to evaluate and address them, if necessary.

- Investigate internal reports of civil rights violations.

- Establish policies that protect students and employees from behavior that violates civil rights laws.

- Consult with counsel regarding complying with state and federal civil rights laws.

- Consult with counsel regarding defenses, including a good faith defense, to threatened FCA actions.

Littler | ASAP

Federal Court Vacates EEOC Harassment Guidance Regarding LGBTQ Individuals

By Jim Paretti

May 22, 2025

On May 15, 2025, the U.S. District Court for the Northern District of Texas vacated portions of the Equal Employment Opportunity Commission (EEOC)'s *Enforcement Guidance on Harassment in the Workplace* relating to LGBTQ employees; the remainder of the guidance remains in effect. The *court's ruling* applies on a nationwide basis. In response to the decision, EEOC has on its website indicated those portions of the guidance that the court struck down.

Background

In 2021, the then-chair of the EEOC issued "technical assistance" setting forth the EEOC's position on discrimination based on sexual orientation and gender identity. That guidance was struck down by the district court for a number of reasons both substantive and procedural (among them was the court's determination that the then-chair exceeded her authority by unilaterally issuing what it saw as new

positions by way of a technical assistance document not subject to approval by the full Commission). At the time, the EEOC indicated that it was issuing this assistance to align the agency's view with the Supreme Court's decision in *Bostock v. Clayton County*, in which the High Court held that Title VII's prohibition on sex discrimination extends to prohibit discrimination on the basis of sexual orientation and gender identity.

Two years later, the Commission voted to approve an update to its Enforcement Guidance, which it adopted on a 3-2 vote. The substance of the guidance largely tracks that of the vacated technical assistance, expressing its position that sexual harassment includes harassment based on sexual orientation and gender identity, including, for example the "repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity" and "denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity." At the time, then-Commissioner Andrea Lucas voted against the guidance and issued a dissenting statement in which she indicated she disagreed with the Commission's position on these matters.

In January 2025, the president designated Commissioner Lucas to be acting chair of the agency. In her *first statement* she identified a number of her priorities as chair, including "defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work." This followed on the heels of the president's executive *order* regarding sexual orientation and gender expression discrimination.

Acting Chair Lucas subsequently issued a *statement* outlining her views on gender identity in the workplace and listing a series of actions she had taken to "return" the agency "to its mission protecting women from sex-based discrimination in the workplace by rolling back the Biden administration's gender identity agenda." She further indicated that there were certain documents relating to gender identity that she could not unilaterally remove or modify, including the subject Enforcement Guidance, because doing so would require a majority vote of the full Commission; she suggested that once the Commission regains its quorum she may move to rescind portions of the guidance or modify those section with which she disagrees.

Challenge to the Guidance

The State of Texas and the Heritage Foundation sued to enjoin the enforcement guidance in the same court that previously had struck down the technical assistance, arguing that the EEOC's guidance was contrary to law, arbitrary and capricious, and in excess of the EEOC's statutory rulemaking authority.

In a 34-page opinion, the court agreed with the plaintiffs. Specifically, it concluded that the EEOC's positions were contrary to law insofar as they, in the court's words, "expand[] the scope of sex beyond the biological binary" and "contravene Title VII by defining discriminatory harassment to include failure to accommodate a transgender employee's bathroom, pronoun, and dress preferences." The court held that in its guidance, the EEOC improperly misinterpreted *Bostock*, "by redefining the core definition of 'sex.'" In its view, the only question

decided in *Bostock* was whether "fir[ing] someone simply for being a homosexual or transgender" violates Title VII. In light of these facts, the court ordered that those sections of the guidance relating to sexual orientation and gender identity be vacated. As noted above, the agency immediately acted to indicate on its website precisely which provisions of the guidance were voided.

Going Forward

While the invalidation of these portions does not technically mean that the EEOC cannot file litigation alleging discrimination on the basis of sex or gender identity, it seems highly unlikely that the agency will do so any time in the near future. Indeed, the EEOC has previously indicated that all such charges will be sent to headquarters for review, and the agency has withdrawn a number of cases alleging discrimination on the basis of gender identity.

That notwithstanding, employers should still proceed with caution where these issues arise. First, unless and until reversed, the *Bostock* decision remains the law of the land, and Title VII protects against discrimination on the basis of sexual orientation and gender identity, although the full scope of those protections is not yet entirely clear. When it decided *Bostock*, the Supreme Court expressly noted that it was not "addressing bathrooms, locker rooms, or anything else of the kind" (including, presumably, pronoun usage) and that those were "questions for future cases." Second, a number of state and local laws and ordinances expressly prohibit discrimination on the basis of sexual orientation and gender identity. Third, in the wake of *Bostock*, courts

have come to differing conclusions as to the scope of the case's application and protections. Finally, even if the EEOC does not pursue a claim of discrimination or makes a no-cause determination, a private plaintiff is able to request a right-to-sue letter and institute a civil lawsuit on their own behalf.

Given the complex and changing legal landscape surrounding these issues, employers with questions about addressing such matters are advised to consult with counsel. In the interim, WPI will keep readers apprised of significant developments.

Littler | ASAP

High Court Eliminates "Background Circumstances" as a Requirement in "Reverse Discrimination" Cases

By Alyesha Asghar and Julian G.G. Wolfson

June 6, 2025

At a Glance

- Supreme Court rejects heightened evidentiary standard for majority-group plaintiffs bringing discrimination claims under Title VII.
- While it may now be more difficult for employers in certain jurisdictions to secure early dismissal of "reverse discrimination" claims, it does not change the ultimate burden of proof.
- Employers may still rely on the statutory framework, the *McDonnell Douglas* burden-shifting analysis, and other established defenses to demonstrate that employment decisions were based on legitimate, non-discriminatory reasons.

On June 5, 2025, the Supreme Court in *Ames v. Ohio Department of Youth Services* unanimously struck down the Sixth Circuit's "background circumstances" rule, which had required majority-group plaintiffs to meet a heightened evidentiary standard to establish a *prima facie* case of discrimination under Title VII.

Background

Ames, an agency administrator and heterosexual woman, was demoted by her employer. Soon thereafter, the employer promoted a gay man to fill her former position. Based on this decision, Ames filed a lawsuit in federal court asserting a claim under Title VII for sexual orientation discrimination.

The district court granted summary judgment to the employer and Ames appealed. On appeal, the Sixth Circuit affirmed the district court's decision, relying on the fact that Ames had failed to establish the presence of "background circumstances." At least five circuit courts have held that when "the alleged discrimination is against a member of the majority" (referred to as "reverse discrimination"), Title VII claims must be supported by evidence of "background circumstances."[1] To satisfy this requirement, plaintiffs asserting reverse discrimination claims in these circuits must generally demonstrate that a particular employer has "reason or inclination" to discriminate against the majority group (e.g., men, whites, heterosexuals) or that there is "something fishy" about the facts.

As the Sixth Circuit noted, Ames had not presented evidence that a gay employee made the decision to demote her or that her employer had

engaged in a pattern of discrimination against heterosexuals. Without this type of evidence, the Sixth Circuit concluded, Ames could not establish a *prima facie* case of discrimination and her claim was therefore properly dismissed. Ames appealed to the Supreme Court.

"Background Circumstances" Requirement Is Inconsistent with Title VII

Writing for the Court, Justice Jackson stated that the "background circumstances" requirement is incompatible with both the text of Title VII and the Court's longstanding precedent. Title VII's disparate-treatment provision prohibits discrimination against "any individual" based on race, color, religion, sex or national origin – without distinguishing between majority and minority-group plaintiffs. The Court held that imposing a unique burden on majority-group plaintiffs in therefore inappropriate.

The decision also emphasized that the rule contradicts the Court's directive to avoid rigid application of the *prima facie* framework, as it imposes a uniform evidentiary hurdle on all majority-group plaintiffs regardless of context.

In rejecting the rule, the Court dismissed Ohio's argument that the "background circumstances" requirement is merely a method for assessing whether the employment decision was based on a statutorily protected trait. Citing the Sixth Circuit's own language, the Court pointed out that the plaintiff in *Ames* was required to meet the additional element, and that her failure to do so led to dismissal at summary judgment.

Although Ohio urged the Court to affirm the lower court's decision on alternate grounds, the Court declined, stating that doing so would require resolving issues not addressed by the Sixth Circuit and beyond the scope of the question presented. The Court vacated the judgment and remanded the case for reconsideration under the "proper" *prima facie* standard.

Justice Thomas' Concurring Opinion Calls the Propriety of *McDonnell Douglas* into Question

In a concurring opinion joined by Justice Gorsuch, Justice Thomas criticized the creation of legal doctrines without a basis in the statutory text, warning that such "[j]udge-made doctrines have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for courts." Justice Thomas identified the "background circumstances" rule as one such example and expressed openness to reconsidering the *McDonnell Douglas* burden-shifting framework, describing it as a "judge-made evidentiary 'tool'" with "no basis in the text of Title VII."

Implications for Employers

The Supreme Court's decision in *Ames* requires that the discrimination claims of all Title VII plaintiffs—regardless of whether they are members of a majority or minority group—be evaluated under the same legal framework. The ruling eliminates the "background circumstances" requirement previously applied in some circuits, which had imposed a heightened evidentiary burden on majority-group plaintiffs.

Importantly, the decision does not alter the core legal standards of discrimination claims. Employers may still use the statutory framework, the *McDonnell Douglas* burden-shifting analysis, and other established defenses to demonstrate that employment decisions were based on legitimate, non-discriminatory reasons.

While removing the "background circumstances" requirement may make it more difficult for employers in certain jurisdictions to secure early dismissal of reverse discrimination claims, it does not change the ultimate burden of proof. Most federal circuits had already rejected the heightened standard, and there appears to have been no surge in successful reverse discrimination claims in those jurisdictions. This suggests that a significant increase in successful claims is unlikely, even in circuits where the standard has now changed.

The ruling does, however, eliminate a key defense previously available to employers in some jurisdictions, potentially exposing diversity initiatives to greater legal scrutiny. Employers should work closely with counsel to review whether any current practices—such as preferences based on protected characteristics or the structure of employee resource groups—could raise compliance concerns.

In short, *Ames* may open the door slightly wider for reverse discrimination claims to survive past early procedural stages, but it does not alter the legal standards that determine whether those claims ultimately succeed. It appears that well-documented inclusion, equity and diversity initiatives that do not rely on protected characteristics in decision-making will still be defensible under Title VII.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

Federal Court Partially Blocks Enforcement of Parts of Executive Orders on DEI and Gender Identity

By Jim Paretti and Alyesha Asghar

June 11, 2025

At a Glance

- **Scope of the Injunction Is Limited**. The court's decision applies exclusively to the nine nonprofit plaintiffs. Other recipients of federal funding remain subject to the executive orders unless and until they obtain legal relief.
- **Review IE&D and Gender Identity Programs for Compliance**. Organizations receiving federal funds should closely examine their inclusion, equity and diversity and gender-related initiatives to ensure alignment with current federal policies and constitutional standards. Legal guidance may be necessary to navigate this shifting regulatory environment, including the extent to which constitutional standards are determined to override current federal policies.
- **First Amendment Safeguards Remain in Force**. The ruling affirms that the government cannot impose funding conditions that

> suppress constitutionally protected speech or viewpoints, particularly when those conditions are unrelated to the purpose of the funding.

On June 9, 2025, the U.S. District Court for the Northern District of California issued a ruling in *San Francisco AIDS Foundation v. Trump*, temporarily blocking the enforcement of several provisions in executive orders issued earlier this year by President Trump. These orders target diversity, equity, and inclusion initiatives and so-called "gender ideology."

While the injunction applies only to the named plaintiffs in the case and the challenged provisions remain in effect for all others, the court's reasoning offers early insight into how similar legal challenges may be evaluated as litigation continues to unfold.

Background

Almost immediately after taking office, the president signed a number of executive orders, including two that restrict federal funding for programs deemed to support "illegal" *DEI initiatives*, and another targeting "*gender ideology*." The latter, among other provisions, restricts federal funding for programs that affirm gender identities differing from sex assigned at birth.

The plaintiffs—a group of nonprofit organizations that collectively receive millions of dollars in direct and indirect federal funding—filed

suit to block several provisions of these orders. These organizations provide services to members of the LGBTQIA+ communities, and they argue that the orders violate their constitutional rights and jeopardize their ability to continue providing essential services, particularly to transgender individuals and communities of color.

Enjoined Provisions of the Orders

The court's ruling enjoined three provisions of the orders that plaintiffs argued would cause them immediate and irreparable harm:

- a directive requiring federal agencies to terminate all "equity-related" grants or contracts with private entities (the "equity termination provision"); and

- two instructions to federal agencies to end funding for any programs that promote "gender ideology," defined in the order as recognizing gender identities that differ from biological sex (the "gender-related provisions").[1]

Regarding the gender-related provisions, the court found that they likely violate the Equal Protection Clause of the U.S. Constitution, insofar as they discriminate based on transgender status without serving a compelling government interest. The court further held that both the gender-related provisions and the equity termination provision likely infringe upon First Amendment protections by restricting funding for activities or expression related to equity or gender identity, and by violating the separation of powers requirement of the Constitution.

Additionally, the court concluded that the equity termination provision likely violates the Fifth Amendment's Due Process Clause due to its vagueness and lack of clear standards.

In rejecting the government's defense, the court emphasized that the executive orders did not merely articulate general policy preferences—they explicitly directed agencies to take concrete actions that could result in the termination of funding, even where such actions might conflict with congressional mandates.

Next Steps

The case will continue to move through the courts, and the government may appeal the preliminary injunction, and/or seek to stay the lower court's decision pending the outcome of such an appeal or other emergency proceedings. In the meantime, the ruling provides temporary relief to the plaintiff organizations, allowing them to continue operating their programs without the immediate risk of losing federal funding.

It is important to emphasize, however, that the injunctions apply only to the nonprofit agencies that are plaintiffs in the case. Other private employers and non-parties remain subject to the provisions of the challenged orders.

Given the heightened scrutiny surrounding inclusion, equity and diversity initiatives and programs relating to LGBTQIA+ individuals, employers—particularly those receiving federal funding—should carefully evaluate how their IE&D and gender-related efforts align with

current federal directives and constitutional protections. Employers are strongly encouraged to consult with legal counsel to ensure compliance.

**This article was also published in Connecticut Business & Industry Association.*

Littler | ASAP

OFCCP Director Invites Federal Contractors to Voluntarily Submit Information

By David J. Goldstein and Kelcy Palmer

June 27, 2025

On June 27, 2025, federal government contractors received an email from OFCCP Director Catherine Eschbach offering them the "opportunity" to "provide information about their efforts to wind down compliance with the [Executive Order] 11246 regulatory scheme and ensure full compliance with the Nation's non-discrimination laws."[1] Contractors are invited to provide this information in narrative form through the Contractor Portal that OFCCP previously established for contractors to use to certify compliance with the requirements of Executive Order 11246. Executive Order 11246, which was revoked by President Trump's Executive Order 14173 on January 22, 2025, prohibited discrimination by federal contractors against women and minorities and required affirmative action to remove any barriers to equal employment opportunity related to sex, race, or ethnicity.

The Director's email makes it clear that the decision to submit any information is entirely voluntary. The Director's email does not discuss

the direct benefits from providing information in the Contractor Portal, nor does the email indicate how OFCCP will use any information that is provided. It is not currently clear if OFCCP has remaining authority to request, collect, or use information relating to compliance with Executive Order 11246 as this executive order has been revoked and the Secretary of Labor's January 24, 2025 Order 03-2025 specifically required OFCCP to "[c]ease and desist all investigative and enforcement activity under the rescinded Executive Order 11246 and the regulations promulgated under it," including any "enforcement-related or investigative activity." In addition, the request does not appear to have been made in accordance with the Paperwork Reduction Act, which requires government agencies to obtain clearance from the Office of Management and Budget before commencing a collection of information.

While OFCCP's authority to enforce the now revoked Executive Order 11246 remains in question, this information (if provided) could be shared by the OFCCP with other groups – potentially including the Department of Justice, the Equal Employment Opportunity Commission, or non-governmental groups or attorneys looking for employers to focus on for allegedly engaging in discriminatory practices. It is concerning, for example, that Director Eschbach reads the OFCCP's former rules as "requiring that federal contractors engage in workforce balancing" and her stated view that "many contractors improperly engage[d]" in discriminatory conduct.

Given the administration's stated skepticism of diversity programs and the absence of a stated benefit to providing information in response to

this request, it is recommended that a government contractor consult with qualified legal counsel before doing so.

Federal contractors that have not yet formally wound down their Executive Order 11246 affirmative action programs should do so. Typically, this is fairly simple, involving some revisions to policies, notices, and contract language. Efforts to proactively look for and resolve barriers to equal employment opportunity remain lawful. It likewise remains lawful to maintain recruiting practices that ensure outreach to all qualified individuals, regardless of race, sex, or ethnicity.

Littler | ASAP

OFCCP Officially Closes All Pending Compliance Reviews and Resumes Processing of Section 503 and VEVRAA Complaints

By David J. Goldstein

July 2, 2025

Following President Trump's *revocation of Executive Order 11246* in January 2025, federal contractors with compliance reviews in progress received notice that the Executive Order 11246 component of the review was being closed, but that Section 503 of the Rehabilitation Act of 1973 (protecting the disabled) and VEVRAA (protecting certain veterans) components were only being held in abeyance until further notice.

Further notice has now been provided. On July 2, 2025, *OFCCP announced* that it will "administratively close all pending compliance reviews and will take no further action related to the scheduling list released in November 2024." Presumably, OFCCP will also take no further action with regard to audit targets that had been identified on

scheduling lists prior to November 2024. OFCCP states that contractors will be promptly receiving formal notice of the closures.

As part of this communication, OFCCP also reminds contractors that "Section 503 and VEVRAA, along with their implementing regulations, remain in effect and contractors should continue to otherwise comply with their obligations under the Section 503 and VEVRAA regulatory schemes." At the same time, OFCCP confirms that, at least for now, contractors are not being required to certify compliance with these requirements through the Contractor Portal.

Following the revocation of Executive Order 11246, OFCCP also ceased its processing of pending and new complaints filed under Section 503 and VEVRAA. According to OFCCP's announcement, "any Section 503 and VEVRAA complaints held during the abeyance will immediately resume being processed as appropriate and affected parties will be promptly notified of this development." OFCCP will also now begin normal processing of new Section 503 and VEVRAA complaints that were filed during the abeyance.

Finally, OFCCP announced a renewal through May 7, 2027, of its exemption of Veterans Affairs Health Benefits Program (VAHBP) providers from the enforcement of affirmative obligations under Section 503 and VEVRAA or from being neutrally scheduled for Section 503 and VEVRAA compliance evaluations. OFCCP notes that this moratorium does not relieve VAHBP providers of their nondiscrimination obligations or of being subject to discrimination complaint investigations under the laws enforced by OFCCP.

For any federal contractors that were questioning whether they need to continue to comply with Section 503, VEVRAA, and their implementing rules, the OFCCP has now provided a definitive answer: Yes, compliance is still required.

Littler | ASAP

OFCCP Proposes New Rules to Clarify Federal Contactor Obligations Following the Revocation of EO 11246

By David J. Goldstein

July 8, 2025

At a Glance

- OFCCP has issued three proposed rules that would invalidate prior rules enforcing Executive Order 11246, make non-substantive changes to VEVRAA enforcement, and make substantial changes to implementation of Section 503 of the Rehabilitation Act.
- The public has until September 2, 2025, to submit comments on the proposed rules.

President Trump's *revocation of Executive Order 11246* on January 21, 2025, left federal contractors and subcontractors wondering what

would be required going forward. On July 1, OFCCP published three Notices of Proposed Rulemaking (NPRM) setting forth its vision of the future of federal contract compliance.

The Proposed Rescission of the EO 11246 Rules

The *first NPRM* reasserts the Department of Labor's previously stated position that the Executive Order 11246 rules are "null and void as there is no source of valid legal authority supporting the regulations" and proposes formal rescission of the regulations. By taking this position, OFCCP makes it clear that federal contractors are no longer required to comply with OFCCP's internet applicant rule, pay transparency rule or any of the other requirements relating to affirmative action for women and minorities under Executive Order 11246.[1]

Among the rules that OFCCP is proposing to rescind is the requirement that federal contractors and first-tier subcontractors file EEO-1 reports. The rescission of this rule should end the obligation to identify as a federal contractor when filing EEO-1 reports and also end the EEOC's practice of sharing EEO-1 reports with OFCCP. This means that federal contractors' EEO-1 data will no longer be potentially available to the public through Freedom of Information Act requests. It also means that federal contractors and first-tier subcontractors with under 100 employees will no longer be required to file EEO-1 reports.

Finally, OFCCP is seeking to rescind its regulations at 41 CFR Part 60-3, which contain the Uniform Guidelines on Employee Selection Procedures (UGESP). The UGESP were jointly adopted in 1978 by the Equal Employment Opportunity Commission, Department of Labor,

Department of Justice, and the Civil Service Commission to establish principles to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of federal law prohibiting employment practices that discriminate based on race, color, religion, sex, or national origin. Among other things, UGESP is a source of authority for employers' inviting applicants to self-identify as to sex and race or ethnicity and periodically testing for adverse impact.

In proposing to rescind UGESP as it was incorporated into its own rules, OFCCP has explicitly stated, "[t]his action does not impact other agencies' interpretation and application of UGESP." Indeed, UGESP continues to be incorporated in the EEOC's rules at 29 CFR Part 1607. Therefore, employers should consult with legal counsel before changing practices relating to the collection of demographic data from applicants or discontinuing the periodic analysis of that data for potential adverse impact.

The public may file comments on the proposed rules through September 2, 2025. Although various groups are likely to disagree with some of the OFCCP's assertions regarding applicable law and its descriptions as to how the agency's programs operated in the past, such issues are probably irrelevant as there would seem to be no basis upon which to object to the recission of those rules that relied on Executive Order 11246 as their sole source of authority.

Proposed Revisions to the VEVRAA Rules

The *second NPRM* relates to the requirements under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). There are no proposed changes to the elements of the required affirmative action program for veterans. The only changes relate to the administrative process to be used in connection with enforcement actions. For the most part these changes are not substantive. The agency is simply moving rules that were located in the sections of the Code of Federal Regulations that related to EO 11246 to the section of the Code that relates to VEVRAA.

Under the revised rules, federal contractors and subcontractors that are subject to VEVRAA will have to continue to maintain affirmative action programs for protected veterans, list job openings with state employment delivery systems, prepare annual affirmative action plans, and annually file VETS-4212 reports. OFCCP also retains its authority to receive, investigate, and resolve complaints from applicants or employees and to conduct compliance reviews.

The public may file comments on the proposed rules through September 2, 2025.

Proposed Revisions to the Section 503 Rules

The *third NPRM* proposes to make some substantial changes to the implementation of Section 503. OFCCP proposes to rescind rules requiring contractors to invite applicants and employees to self-identify as to disability. Moreover, OFCCP includes as part of its discussion of this proposal an argument that such invitations to self-identify as to disability violate the Americans with Disabilities Act (ADA). Under the

OFCCP's interpretation of the ADA, state and local government requirements regarding self-identification as to disability are also unlawful. It is possible that the OFCCP's argument here is foreshadowing guidance on this issue that may come from the EEOC once it regains a quorum and is able to announce new policy positions.

OFCCP also proposes to rescind the utilization goal requirements. If the rules are adopted in their current form, contractors will still have to maintain affirmative action programs for individuals with disabilities, including a written plan, but the plan will not include any numerical data or analyses.

As with the VEVRAA rules, OFCCP is also proposing changes related to the administrative process applicable to enforcement actions. For the most part these changes are not substantive. The agency is simply moving rules that were located in the sections of the Code of Federal Regulations that related to EO 11246 to the section of the Code that relates to Section 503.

The public may file comments on the proposed rules through September 2, 2025. As OFCCP's efforts on behalf of individuals with disabilities were generally seen as being effective, it seems likely that advocates for the disabled will comment on both OFCCP's description of the law and the agency's proposed changes. Whether those comments will result in OFCCP revising its proposals or lead to congressional action is impossible to predict. In the meantime, the existing regulations remain in place. For the time being, federal contractors must continue to invite applicants and employees to self-

identify as to disability and prepare annual affirmative action programs including an analysis of the utilization of individuals with disabilities.

What Happens Next

As already noted, the public has until September 2, 2025 to submit comments on the proposed rules. This period may be extended by OFCCP if deemed appropriate. After the comment period closes, OFCCP is required to review the comments and address them as part of its publication of a final rule, which may differ from the original proposal. After adopting a final rule, OFCCP must then submit a report to Congress before the rule can take effect.

Typically, this remaining portion of the rulemaking process would take a year or more to complete. However, OFCCP was extraordinarily quick in publishing its proposed rules just over five months into this new administration. It might be able to complete the remainder of this process in a similarly accelerated manner. Nevertheless, it is still hard to imagine a final rule being published, yet alone becoming effective, in calendar year 2025. For now, it would be prudent to assume that the existing rules will still be in place in 2026 so that contractors will still have to prepare 2026 affirmative action plans for individuals with disabilities, including the utilization analysis.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Littler | ASAP

Department of Justice Offers Further Guidance Regarding Unlawful Discrimination and DEI

By David J. Goldstein

August 4, 2025

At a Glance

- Department of Justice memo provides guidance for recipients of federal funding regarding what it considers unlawful discriminatory practices.
- The memo pays particular attention to institutions of higher education, although all federal contractors and employers subject to Title VII can glean insight into the administration's views on potentially unlawful DEI.

On July 30, 2025, the Department of Justice *released a memo* from Attorney General Pam Bondi to all federal agencies providing guidance for recipients of federal funding regarding unlawful discrimination.

The attorney general's memo applies specifically to recipients of federal funds,[1] and directs much of its attention to institutions of higher education. Nevertheless, federal contractors and, indeed, all employers subject to Title VII, will find the guidance to be worth reading for the insights it provides into the administration's thinking.

The primary intention of the guidance is to clarify the administration's views regarding the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, especially those relating to diversity, equity, and inclusion or similar programs. The guidance provides examples of practices that the administration views as unlawful or potentially unlawful and offers recommendations on what it considers best practices.

As noted, many of the examples from the guidance are drawn from higher education. However, as employers in other industries and circumstances may engage in some analogous practices, they will also want to take into account the administration's views. Indeed, the memo explicitly states that not only entities "that receive federal financial assistance" should review the guidance but that all entities that "are otherwise subject to federal antidiscrimination laws, including educational institutions, state and local governments, and public and private employers, should review this guidance carefully to ensure all programs comply with their legal obligations."

In considering the guidance, it must be remembered that the views of the attorney general or the Department of Justice do not constitute law, but merely represent the administration's interpretation of the law or, in some instances, advocacy for changes in the law. Ultimately, it is for

Congress to establish the law through legislation and for the courts to interpret that legislation. It must also be remembered that state laws may differ from federal law. It is particularly important to keep this in mind when dealing with issues relating to transgender rights as the administration's efforts to tightly circumscribe such rights are not clearly supported by federal caselaw and run directly contrary to many state laws.

Examples in the guidance of allegedly unlawful practices include the following:

> **Race-Based Scholarships or Programs**: A university's DEI program establishes a scholarship fund exclusively for students of a specific racial group (e.g., "Black Student Excellence Scholarship") and excludes otherwise qualified applicants of other races, even if they meet academic or financial need criteria. This extends to any race-exclusive opportunities, such as internships, mentorship programs, or leadership initiatives that reserve spots for specific racial groups, regardless of intent to promote diversity. Such race-exclusive programs violate federal civil rights law by discriminating against individuals based solely on their race or treating people differently based on a protected characteristic without meeting the strict legal standards required for race-conscious programs.
>
> **Access to Facilities or Resources Based on Race or Ethnicity**: A university's DEI initiative designates a "safe

space” or lounge exclusively for students of a specific racial or ethnic group.

Segregation in Facilities or Resources: A college receiving federal funds designates a “BIPOC-only study lounge,” facially discouraging access by students of other races. Even if access is technically open to all, the identity-based focus creates a perception of segregation and may foster a hostile environment. This extends to any resource allocation —such as study spaces, computer labs, or event venues— that segregates access based on protected characteristics, even if intended to create “safe spaces.” This does not apply to facilities that are single-sex based on biological sex to protect privacy or safety, such as restrooms, showers, locker rooms, or lodging.

Race-Based Training Sessions: A federally funded university hosts a DEI training program that requires participants to separate into race-based groups (e.g., “Black Faculty Caucus” or “White Ally Group”) for discussions, prohibiting individuals of other races from participating in specific sessions. In contrast, a “Faculty Academic Support Network” open to all faculty interested in promoting student success avoids reliance on protected characteristics and complies with federal law.

Race-Based “Diverse Slate” Policies in Hiring: A federally funded research institute adopts a policy requiring that all

interview slates for faculty positions include a minimum number of candidates from specific racial groups (e.g., at least two "underrepresented minority" candidates), rejecting otherwise qualified candidates who do not meet this racial criterion. This extends to any policy that sets racial benchmarks or mandates demographic representation in candidate pools, such as requiring a certain percentage of finalists to be from "diverse" backgrounds.

Sex-Based Selection for Contracts: A federally funded state agency implements a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses without preferred group status. This includes any contract selection process that uses sex or race as a tiebreaker or primary criterion, such as policies favoring "minority- or women-owned" businesses without satisfying the appropriate level of judicial scrutiny.

This example is worth emphasizing as many government contractors are required under federal, state, or local laws to set goals for the use of women- or minority-owned disadvantaged businesses and some non-government contractors voluntarily set such goals. Such programs have generally been found to be lawful in the past, but their continuing viability is less clear.

The guidance also provides a number of examples of potentially unlawful proxies for the consideration of sex or race:

> **"Cultural Competence" Requirements**: A federally funded university requires job applicants to demonstrate "cultural competence," "lived experience," or "cross-cultural skills" in ways that effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications. This includes selection criteria that advantage candidates who have experiences the employer associates with certain racial groups. For instance, requiring faculty candidates to describe how their "cultural background informs their teaching" may function as a proxy if used to evaluate candidates based on race or ethnicity.
>
> **"Overcoming Obstacles" Narratives or "Diversity Statements"**: A federally funded program requires applicants to describe "obstacles they have overcome" or submit a "diversity statement" in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics, using the narrative as a proxy for advantaging that protected characteristic in providing benefits.

In reviewing these examples, it is worth noting the extent to which the Trump administration is narrowly interpreting the Supreme Court's explicit statement in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, that "nothing in this opinion should be

construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." 600 U.S. ____ (2023), *slip op*. at 39 (Roberts, C.J.)

Finally, the guidance recommends a number of "best practices," including the following:

- **Prohibiting Demographic-Driven Criteria**: Discontinue any program or policy designed to achieve discriminatory outcomes, even those using facially neutral means. Intent to influence demographic representation risks violating federal law. For example, a scholarship program must not target "underserved geographic areas" or "first-generation students" if the criteria are chosen to increase participation by specific racial or sex-based groups. Instead, use universally applicable criteria, such as academic merit or financial hardship, applied without regard to protected characteristics or demographic goals.

- **Documenting Legitimate Rationales**: If using criteria in hiring, promotions, or selecting contracts that might correlate with protected characteristics, document clear, legitimate rationales unrelated to race, sex, or other protected characteristics. Ensure these rationales are consistently applied and are demonstrably related to legitimate, nondiscriminatory institutional objectives.

- **Scrutinizing Neutral Criteria for Proxy Effects**: Before implementing facially neutral criteria, rigorously evaluate and document whether they are proxies for race, sex, or other protected characteristics. For instance, a program targeting "low-income students" must be

applied uniformly without targeting areas or populations to achieve racial or sex-based outcomes.

- **Eliminating Diversity Quotas**: Focus solely on nondiscriminatory performance metrics, such as program participation rates or academic outcomes, without reference to race, sex, or other protected traits. And discontinue policies that mandate representation of specific racial, sex-based, or other protected groups in candidate pools, hiring panels, or final selections. For example, replace a policy requiring “at least one minority candidate per slate” with a process that evaluates all applicants based on merit.

- **Including Nondiscrimination Clauses in Contracts to Third Parties and Monitor Compliance**: Incorporate explicit nondiscrimination clauses in grant agreements, contracts, or partnership agreements, requiring third parties to comply with federal law, and specify that federal funds cannot be used for programs that discriminate based on protected characteristics. Monitor third parties that receive federal funds to ensure ongoing compliance, including reviewing program materials, participant feedback, and outcomes to identify potential discriminatory practices. Terminate funding for noncompliant programs.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.