President Trump Rescinds 60-Year-Old Executive Order 11246 on Equal Employment Opportunity and Signals New Area of FCA Enforcement

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On Tuesday, January 21, 2025, President Donald Trump signed an executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the EO). The EO targets what the administration refers to as "illegal … diversity, equity, and inclusion (DEI) or diversity, equity, inclusion, and accessibility (DEIA) [preferences] that can violate the civil-rights laws of this Nation." Section 3 of the order, "Terminating Illegal Discrimination in the Federal Government," revokes a series of executive actions from prior administrations including, most significantly, Executive Order 11246 – Equal Employment Opportunity.

On Friday, January 24, 2025, the acting secretary of labor ordered the Department of Labor to immediately cease and desist all investigative and enforcement activity under the now-rescinded EO 11246. This directive ceases "all pending cases, conciliation agreements, investigations, complaints, and any other enforcement-related or investigative activity." Open reviews and investigations related to compliance with the Vietnam Era Veterans' Readjustment Assistance Act of 1972 and Section 503 of the Rehabilitation Act of 1973 are to be "held in abeyance pending further guidance" from the agency.

President Lyndon Johnson signed EO 11246 on September 24, 1965, granting the secretary of labor the authority to promote equal opportunity in federal contracts regardless of race or gender. For nearly 60 years, EO 11246 required federal government contractors, subcontractors and construction contractors on federally assisted projects to develop affirmative action programs for women and minorities in the workforce. The order further granted the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (the OFCCP) authority to enforce the anti-discrimination policies outlined in the order. The revocation of EO 11246 will have substantial ramifications for nearly all companies that do business with the U.S. government.

In addition to eliminating regulatory authority for affirmative action program requirements, the Trump administration's new EO also directs agencies to incorporate new clauses, including certifications of compliance in all federal contracts and grants. The administration is signaling with these requirements that it intends to enforce the changes in policy under the civil False Claims Act (FCA).[1]

I. Effects on Federal Procurement Requirements

EO 11246 is implemented in the Federal Acquisition Regulation (FAR) at Subpart 22.8 and the clauses it prescribes. The clause at FAR 52.222-26, Equal Opportunity has been in the FAR since it first went into effect in 1984. It requires all contractors with 50 or more employees and a contract or subcontract valued over $50,000 to maintain written affirmative action programs. Along the same

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lines, clause FAR 52.222-27, which is required in construction contracts expected to exceed $10,000, prescribes affirmative action requirements for federal construction contractors.

President Trump's order will directly affect these affirmative action obligations and prevent them from being included in new solicitations and contracts. The practical mechanics for addressing existing contracts remain uncertain, as the now-superseded requirements are—and over the medium term may remain—part of nearly every government contract. But the order, as carried out by the new administration, may bar contractors from implementing certain aspects of their contractually required affirmative action programs.

The EO states that federal contractors are *permitted* (but not required) to continue adhering to existing regulations for 90 days from January 21, 2025. The suggestion is that after the 90 days expire, contractors may be prohibited from maintaining certain aspects of their existing affirmative action programs. Contractors will be left guessing which aspects of these programs could theoretically be construed by the administration, or savvy relators, as "violat[ing] the civil-rights laws of this Nation."

The order also directs the OFCCP to "immediately cease":

> (1) Promoting "diversity";
>
> (2) Holding federal contractors and subcontractors responsible for taking "affirmative action"; and
>
> (3) Allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion or national origin.

II. New Area of FCA Risk

The EO requires that agency leaders "include in every contract or grant award":

> (1) "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 [the FCA]"; and
>
> (2) "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."

The EO thus directly addresses two key aspects of potential FCA claims. First, the order requires government contractors and assistance recipients to expressly certify that their DEI programs comply with anti-discrimination laws. As a result, if a contractor's or recipient's DEI program does not comply with anti-discrimination laws, that would constitute an express false certification, which is one type of actionable falsity under the FCA.

Second, the EO requires funding recipients to agree that compliance with anti-discrimination laws is "material" for FCA purposes. The FCA only imposes liability for material false statements.[2] The Supreme Court has explained that a central question in determining FCA liability is "whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."[3] Defendants in FCA actions premised on noncompliance with

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federal anti-discrimination laws will have a more difficult time refuting the "materiality" element with language in their contracts saying the requirements are material to payment.

By mandating these terms, the Trump administration is sending a message to government contractors and assistance recipients that it intends to aggressively enforce the EO.

III. Reading the Regulatory Tea Leaves

President Trump's first term offers some clues as to how the rescission of EO 11246 may flow through to the FAR and DOL implementing regulations.

On October 31, 2019, the president revoked EO 13495, "Nondisplacement of Qualified Workers Under Service Contracts."[4] EO 13495 required service contractors to offer employees of the predecessor contractors and their subcontractors a right of first refusal of employment for positions for which they were qualified. The executive order was implemented in DOL regulation at 29 C.F.R. Part 9 and in the FAR at Subpart 22.12 and the clause 52.222-17.

After rescinding that order, the administration promptly rescinded both sets of implementing regulations as well, by final rule, without going through notice-and-comment rulemaking. DOL reasoned in issuing its final rule: "Since the authority for these regulations no longer exists, the Department for good cause hereby finds that it is unnecessary and impracticable to afford notice and comment procedures on the rescission of the regulations at 29 CFR Part 9, and that such rescission should be effective upon publication," adding that the rescission extended to "all investigations or compliance actions based on [the] Executive Order."[5]

Similarly, the FAR Council observed that 41 U.S.C. § 1707(a)(1) only requires a procurement regulation to be published for public comment "if it relates to the expenditure of appropriated funds and has either a significant effect beyond the internal operating procedures of the [issuing] agency . . . or has a significant cost or administrative impact on contractors or offerors." With respect to the rescission of the EO 13495 FAR implementing regulations, it concluded that the final rule was "not required to be published for public comment, because it is simply removing a requirement that has become obsolete as a result of an executive action that compelled the Federal Acquisition Regulatory Council to rescind the requirement."[6]

It stands to reason that the new administration may act to summarily remove the government contractor affirmative action program requirements from DOL and federal procurement regulations in the coming months. Indeed, the regulations are now obsolete, given that the administration rescinded the authority for the regulations, and they may not be enforceable even without regulatory action.

The Nondisplacement of Qualified Workers rulemaking also suggests that the new administration will likely be able to navigate legal hurdles associated with imposing the new certifications contemplated by the EO. The FAR council is constrained by statute and regulation from imposing new certification requirements on government contractors that are not mandated by statute unless "[w]ritten justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement."[7] The FAR council prepared such a justification, and the OFPP administrator granted approval, to require contractors to provide certified lists of the names of service employees to the contracting officer to implement the Nondisplacement of Qualified Workers rule when it was first put in place under the Obama administration.[8] FAR Council

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justification and OFPP administrator approval are likely to be forthcoming for these new certification requirements as well.

IV. Open Questions

The EO directs that the director of the Office of Management and Budget shall "review and revise, as appropriate, all Government-wide processes, directives, and guidance." It remains to be seen how the government will implement the order, and what the full effects will be on federal contractors. Notably, the order does not, by its terms, affect affirmative action requirements for veterans[9] or persons with disabilities[10], which have separate statutory authority pursuant to the Vietnam Era Veterans' Readjustment Assistance Act of 1972 and Section 503 of the Rehabilitation Act of 1973, respectively. However, the acting secretary of labor has ordered that DOL reviews and investigations under those provisions are to be held in abeyance pending further guidance from the agency.

It is not yet clear whether the order will affect equal employment opportunity or nondiscrimination requirements under FAR 52.222-26 or the other clauses prescribed in FAR Subpart 22.8. Such requirements do not appear to have been the target of President Trump's order, but they could nevertheless be affected because they implement now-rescinded EO 11246. Presumably, OFCCP audits will continue as scheduled with review of affirmative action programs limited to protections for workers with disabilities and veterans, but that could change depending on the "further guidance" promised by the acting secretary of labor.

As to the FCA provisions, the EO notably does not define "federal anti-discrimination laws." If the administration does not provide further clarification, then guidance from the courts may be needed to understand the scope of FCA claims based on noncompliance with the EO's mandates.

All indications are that these new policies will be a compliance and enforcement focus in the coming years and will require urgent attention, notwithstanding the uncertainties. Government contractors and subcontractors, federal assistance recipients and subrecipients, and construction contractors on federally funded projects should review their existing affirmative action programs with counsel and establish a plan to comply with the Trump administration's new legal directives.

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[1] 31 U.S.C. §§ 3729–3733.

[2] *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 181 (2016).

[3] *Id.*

[4] This is a politically polarized requirement that has gone back and forth with every recent change in administration. President Joe Biden issued a new "Nondisplacement of Qualified Workers"

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executive order after he took office, EO 14055. President Trump then rescinded EO 14055 on his first day back in office.

[5] 85 Fed. Reg. 5,567 (Jan. 31, 2020).

[6] 85 Fed. Reg. 27,087 (May 6, 2020). The Administrative Procedures Act rulemaking provisions do not apply to matters pertaining to contracts or grants, but FAR rulemaking is subject to a similar notice and comment process under 41 U.S.C. § 1707. *See* 5 U.S.C. § 553(a)(2); 41 U.S.C. § 1707(a)(1).

[7] FAR 1.107; 41 U.S.C. § 1304(b)(2)(B).

[8] 77 Fed. Reg. 75,766, 75,774 (Dec. 21, 2012).

[9] FAR 52.222-35.

[10] FAR 52.222-36.

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