



K&L GATES

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DEI and EEO in the Second Trump Presidency

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Important Developments Related to Diversity, Equity, and Inclusion (DEI) in President Trump's Second Term

Important Developments Related to DEI in President Trump's Second Term

DEI Executive Orders	
Rescinding	Initial Rescissions of Harmful Executive Orders and Actions
Ending	Ending Radical and Wasteful Government DEI Programs and Preferencing
Defending	Defending Women from Gender Ideology Extremism and Restoring Biological Truth
Ending	Ending Illegal Discrimination and Restoring Merit-Based Opportunity

EO: Initial Rescissions of Harmful Executive Orders and Actions

Purpose:

- “The injection of ‘diversity, equity, and inclusion’ (DEI) into our institutions has corrupted them by replacing hard work, merit, and equality with a divisive and dangerous preferential hierarchy.”
- Rescinds 78 Biden-era executive orders and presidential memoranda, including several pertaining to federal DEI programs and LGBTQ+ issues.

EO: Ending Radical and Wasteful Government DEI Programs and Preferencing

By 20 May 2025, all federal agencies must:

- Terminate all:
 - DEI-related offices and positions.
 - Equity-related action plans, actions, initiatives, programs, grants, or contracts.
 - DEI-related performance requirements for employees, contractors, or grantees.
- Provide the Office of Management and Budget (OMB) director with lists of:
 - Federal contractors who provide DEI training or DEI training materials to federal agency or department employees (i.e., training vendors hired by government agencies to conduct DEI trainings).
 - All federal grantees who received federal funding to provide or advance DEI or environmental justice programs.
- Attend monthly meetings with the White House to monitor “progress and identify potential areas for additional Presidential or legislative action to advance equal dignity and respect.”

EO: Ending Radical and Wasteful Government DEI Programs and Preferencing

1/21/25 Memo from
Office of Personnel
Management

Directs agency heads to:

- Issue agency-wide notice to employees informing them that all diversity, equity, inclusion, and accessibility (DEIA) offices are closing and asking them “if they know of any efforts to disguise these programs by using coded or imprecise language.”
- Notify all employees of such DEIA offices that they are being placed on paid administrative leave effective immediately.
- Take down all outward-facing media (i.e., websites, social media accounts) of DEIA offices.

EO: Defending Women from Gender Ideology Extremism and Restoring Biological Truth

- Directs all federal agencies to define "sex" only as a binary biological classification determined at conception, and rejects "gender identity" in official documents and policy interpretations.
- Requires "single-sex" spaces (like restrooms) to be based on biological sex rather than gender identity in federal facilities and directs the attorney general to guide federal agencies to reverse any policies that allowed gender-based access to single-sex spaces.
- Requires government-issued identification (including passports) reflect the biological sex assigned at birth.

EO: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

Four Key Elements:

1. Revokes EO 11246, which imposed affirmative action obligations on federal government contractors and subcontractors to prevent discrimination against any employee or applicant because of certain protected characteristics.
2. Directs agencies to immediately cease DEI practices.
3. Requires federal contractors to “certify” that they do not operate programs promoting unlawful DEI.
4. Discourages DEI in the private sector through civil compliance investigations.

Note: Does not apply to lawful federal or private-sector employment and contracting preferences for veterans of the US armed forces or persons protected by the Randolph-Sheppard Act, 20 U.S.C. 107 et seq.

EO: Ending Illegal Discrimination

OFCCP Directives

Directs Office of Federal Contract Compliance Programs (OFCCP) to “immediately cease”

Promoting
diversity

Holding federal contractors and subcontractors responsible for taking affirmative action

Allowing or encouraging federal contractors and subcontractors to engage in workforce balancing

“All investigative and enforcement activity” conducted under EO 11246

EO: Ending Illegal Discrimination

Certification Requirements on Federal Contractors and Grantees

Requires all federal contracts and grants to contain the following terms:

1. The contractor/grantee “does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
2. That compliance with all applicable federal anti-discrimination laws is “material” to government payment decisions for purposes of the False Claims Act, 31 U.S.C. 3729(b)(4).

EO: Ending Illegal Discrimination

Private Sector

Section 4: “Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences”

By 21 May 2025, the US attorney general, along with heads of agencies and director of OMB, must propose enforcement actions and other appropriate measures against companies that engage in “illegal discrimination or preferences, including DEI” and submit a report containing recommendations for enforcing civil rights and discouraging DEI programming and practices. The report will identify:

- Key sectors of concern within each agency’s jurisdiction.
- The “most egregious” DEI practitioners in each sector of concern.
- A plan of specific steps or measures to deter DEI programming or principles—including by identifying up to nine potential civil compliance investigation targets focused on large employers.
- Other strategies to encourage the private sector to end DEI policies and practices.
- Potentially appropriate federal lawsuits or intervention; and potential regulatory action.

Interplay With Federal Law

- Discrimination under federal, state, and local laws in the United States remains unlawful, including Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Pregnant Workers Fairness Act (PFWA), the Genetic Information Nondiscrimination Act (GINA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Equal Pay Act (EPA), and Immigration Reform and Control Act (IRCA).
- *Bostock v. Clayton County*, 590 U.S. 644 (2020)
 - US Supreme Court determined that “sex” as defined by Title VII includes “gender identity.”
 - Discrimination against transgender and nonbinary/gender nonconforming people remains illegal under federal law.

Interplay With State and Local DEI Requirements

- Several state and local antidiscrimination laws include gender identity, sexual orientation, and gender expression as protected categories.

- Harassment and Discrimination Prevention Requirements
 - Sexual harassment training

- Pay Equity Considerations

The background features a dark teal horizontal band across the center. Above and below this band are abstract, out-of-focus light patterns in shades of blue, orange, and purple, resembling bokeh or digital data points.

Action Items for All Employers

What Does This Mean for DEI at My Company?



Employers should continue to ensure equal employment opportunity (EEO) in the workplace.



Employers must continue to maintain and enforce policies that prevent unlawful discrimination, harassment, and retaliation.



Employers must also continue to promptly, thoroughly, and impartially investigate allegations of unlawful employment discrimination.

But Is “DEI” Illegal Now?

President Trump’s executive orders take aim, expressly, at “**Illegal DEI and DEIA policies**,” which are characterized as, “dangerous, demeaning, and immoral race- and sex-based preferences.”

So, what is “illegal DEI”?

Making employment decisions impacting employees and applicants based on their membership in a protected class

Implementing a neutral policy or practice that unduly disadvantages individuals based on their protected class

Illegal DEI

- Most importantly, employment discrimination laws within the United States **prohibit plus-factors, preferences, quotas, or set-asides**. This means that employers cannot consider the membership of an employee or applicant in a protected class when making employment decisions. Examples:
 - When deciding between two qualified candidates for a job, an employer cannot select one candidate over another because it will improve the diversity of the team.
 - When making a promotion decision, an employer cannot select one candidate over another because it will improve the diversity of company leadership.
 - Employers cannot reserve a certain level of positions for members of a protected class.

Areas of High Risk for Illegal DEI

Diversity internship
or scholarship
programs

Employee resource
groups (ERGs)

Company diversity
“goals”

Tying executive
compensation or
performance criteria
to diversity metrics

Employment benefits
limited to individuals
in certain protected
groups

Diversity slates and
“Rooney Rule”
practices

What Should I Do?

- With the assistance of counsel and your PR team, you may wish to prepare internal and external messaging on this topic.
- Keep in mind any bold commitments and statements your company may have made not that long ago in response to things like the #metoo and #blacklivesmatter movements.

Understand

- Understand that your employees and other stakeholders may be expecting you to “**take a stance**” on DEI at this time.

Conduct

- Conduct an **internal audit** of your company’s DEI policies and practices to see whether you have any high-risk flags for “illegal DEI.” Work with quickly to address any such flags.

Be Ready

- Be ready to **proactively prevent retaliatory** behavior in the event employees raise questions or concerns about “illegal DEI” in the workplace or otherwise express frustration with your company’s stance on DEI.

Areas for a DEI Audit

- ✓ Job postings
- ✓ Job applications
- ✓ Interview questions
- ✓ Candidate scoring criteria for positions of employment
- ✓ Internship and scholarship programs
- ✓ Workforce training programs on DEI-related topics
- ✓ Promotion frameworks
- ✓ Compensation frameworks
- ✓ Professional development programs
- ✓ Company benefit programs
- ✓ Company policies and training programs
- ✓ Company DEI and careers webpage messaging

What Can I Expect?

An uptick in “reverse discrimination” claims by employees and applicants, as well as in the focus of government investigations.

“Discrimination testing” by applicants.

Pressure from some employees and stakeholders to “hold firm” on DEI and counter-pressure from others to disband these programs and initiatives.

Potential targeting for a compliance investigation by the federal government. *Employers may want to review the scope of their current employment practices liability insurance and other insurance policy coverage.*

Increased claims relating to discrimination based on national origin or citizenship.

Challenges to gender-identity policies and practices, including “single-sex spaces” in the workplace, such as bathrooms and locker rooms, and policies about pronoun usage.

Increased social media activity by employees and complaints about that behavior.

What Should I Keep Doing?

- Annual EEO training for the workforce
- Under privilege, an annual pay equity review
- Collecting EEO-1 demographic data, if you are required to do so
- Complying with other applicable state, local, and international legal obligations → **If these appear to conflict with US legal requirements, consult with counsel**
- Ensuring accessibility to applicants who seek positions of employment with your company and for employees who work for you
- Promptly and lawfully responding to legally protected leave or accommodation requests (e.g., related to disability, religion, or pregnancy)
- Disparate impact testing for employment actions that may implicate this issue (e.g., job qualifications, background check standards, layoffs)
- Reminding employees of your Employee Assistance Program (EAP) and other workplace well-being benefits
- Not tolerating harassment in the workplace and maintaining a healthy and inclusive workplace environment where employees treat each other with respect

Training

Train!



Ensure that your internal HR team members are trained on how to properly respond to and investigate all allegations of unlawful discrimination, harassment, and retaliation, including “reverse discrimination” claims.

Train!



Ensure that your talent acquisition team members and hiring managers are trained regarding lawful selection and interviewing criteria, as well as promotion criteria.

Train!



Consider company-wide training to reaffirm the company’s commitment to equal employment opportunity and clarify what constitutes “illegal DEI.”

Train!



Unconscious bias training likely remains permissible (as indicated by OFCCP in the first Trump administration relating to EO 13950), but ensure that training requirements are applied neutrally across the workforce and training covers unconscious bias from all angles.

Train!

Immigration

IRCA prohibits citizenship discrimination, national origin discrimination, over-documentation in the employment eligibility verification process, and retaliation.

Ensure that your job postings, applications, and job offers are phrased properly with respect to employment authorization requirements.

Ensure talent acquisition team members and managers are not inappropriately soliciting national origin or citizenship information in your hiring process.

Complete your Forms I-9 properly and on time.

Conduct an internal audit, with the assistance of counsel, of the Forms I-9 of your current workforce, and work to promptly and properly correct any errors that are correctable.

Ensure your team is trained and prepared for how to respond to an ICE raid.

A Note on Section 1981

- Section 1981 grants individuals in the United States the same rights to make and enforce contracts as “enjoyed by white citizens.” This has been interpreted to cover discrimination based on race, color, or ethnicity.
 - This language has been interpreted by courts to cover the employment relationship.
 - Section 1981 is also being used with more frequency by litigants to challenge things like:
 - Internship programs where criteria include membership in disadvantaged or historically underrepresented groups in a profession/industry.
 - Venture capital fund grants where the benefit is limited to companies with diverse ownership.
 - Scholarship or grant programs with diversity criteria.

The background features a dark blue field with out-of-focus, colorful bokeh lights in shades of orange, yellow, and cyan. Overlaid on this are several semi-transparent, geometric shapes in various shades of blue and teal, creating a layered, architectural effect.

Action Items for Contractors With Pre-Existing Compliance Obligations Under Section 503, VEVRAA, and Now-Revoked EO 11246

Revoked EO 11246

- Finish any EO 11246 affirmative action programs in the 90-day window (do these under privilege now to the extent possible).
- Do not include placement goals; too easy for these to be viewed as quotas now.
- Consider not completing EO 11246 programs if you have not started yet or if it will take you outside the 90-day window.
- Check if you have state or local affirmative action program obligations and, if so, consult with counsel as to how to align federal, state, and local compliance.
- Stop asking for race and gender information for applicants.
- Expect a closure letter from OFCCP for any EO 11246 components of ongoing audits.
- No Contractor Portal Certification as to EO 11246.

Section 503

- Continue Section 503 affirmative action programs (consider renaming), although it may be worth waiting a couple more weeks if you have not started to see if additional information is provided.
- Continue requesting voluntary self-identification of disability information.
- If OFCCP continues, expect Section 503 to become a primary focus with more audits, although likely to be focused reviews.
- Familiarize your compliance team with Section 503-focused review materials and seek to adopt best practices.
- Look to Office of Disability Employment Policy (ODEP) during this time, as there is significant guidance there on compliance with Section 503 and the ADA.
- Potential Contractor Portal Certification as to Section 503.

VEVRAA

- Continue VEVRAA affirmative action programs (consider renaming), although it may be worth waiting a couple more weeks if you have not started to see if additional information is provided.
- Continue requesting voluntary veteran self-identification information.
- If OFCCP continues, expect VEVRAA to become a primary focus with more audits, although likely to be focused reviews.
- Familiarize your compliance team with VEVRAA-focused review materials and seek to adopt best practices.
- Look to VETS during this time, as there is significant guidance there on compliance with nondiscrimination obligations and promoting veterans' employment.
- Consider participating in VETS Medallion Program.
- Potential Contractor Portal Certification as to VEVRAA.


Nondiscrimination Programs


- FAR clauses are likely forthcoming incorporating Title VII compliance and no unlawful DEI compliance.
- Contractor Portal may be used for no unlawful DEI certification.
- Open question whether OFCCP or another agency will enforce the no unlawful DEI measures for contractors.
- It is clear that False Claims Act liability is contemplated for these new FAR clauses/certifications, which involves the Department of Justice (DOJ).
- May be worth continuing with a Nondiscrimination Program under privilege that could provide support for future FAR Clause Compliance.
- Nondiscrimination Programs would include a compensation review, adverse impact analyses, and workplace trainings.


Future of OFCCP


Acting Secretary's Order has frozen OFCCP activities for the time being; likely that administration will wait until secretary-designate is confirmed for next steps.

 OFCCP's future is uncertain

 Acting OFCCP Director Michael Schloss was a longtime Department of Labor (DOL) civil servant at the Employee Benefits Security Administration who retired and has now joined the administration as a political appointee

 At maximum, OFCCP may have Section 503 and VEVRAA authority as well as authority to enforce Title VII and no unlawful DEI requirements

 Also possible that OFCCP authority is redelegated among ODEP, VETS, and the EEOC along with DOJ as to False Claims Act

 VEVRAA and Section 503 will remain; both are longstanding/popular statutes in Congress



Questions?

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