

## PRESIDENT TRUMP ELIMINATES MOST FEDERAL CONTRACTOR AFFIRMATIVE ACTION REQUIREMENTS BY RESCINDING EXECUTIVE ORDER 11246

With the stroke of a pen, President Trump rescinded Executive Order 11246 ("EO 11246"), which has been the foundation for workforce-related affirmative action obligations for federal contractors since 1965. Effective immediately, contractors are no longer required to maintain affirmative action programs for minorities and women, though they may continue to comply with the existing framework until April 21, 2025. Contractors must continue to maintain affirmative action programs for individuals with disabilities and protected veterans, as those requirements derive from federal statutes (Section 503 of the Rehabilitation Act and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), respectively), not executive orders.

### WHAT DID EO 11246 REQUIRE?

Federal affirmative action laws are enforced by the Office of Federal Contract Compliance Programs ("OFCCP"), an agency within the U.S. Department of Labor ("DOL"). Only entities with federal contracts or covered subcontracts are subject to OFCCP's jurisdiction. Except in the construction industry, federal *grant* recipients are not covered and therefore not required to comply with federal affirmative action requirements.

The federal affirmative action requirements under EO 11246 went beyond merely ensuring non-discrimination in employment. Contrary to a common misconception, they did *not* require federal contractors to set rigid hiring quotas or give preference to underqualified candidates. Indeed, sex- and race-based preferences in employee selections have always been unlawful under EO 11246 along with several other federal and state anti-discrimination laws.

Instead, federal contractors had to, among other things, regularly analyze their workforce to determine whether they had underrepresentation of women and minorities compared to what would be statistically expected in their recruitment areas. If underrepresentation was identified, they had to engage in proactive outreach efforts designed to increase the percentage of women and minorities who applied for positions. They were still permitted to hire the best-qualified candidate, but with a higher percentage of women and minorities in the applicant pool, it became mathematically more likely that the most qualified candidate would be a woman or minority. That is the essence of federal affirmative action in the employment setting.

Federal contractors were also required to collect sex, race and ethnicity data from applicants and employees and to self-audit their hiring, promotion, termination and compensation practices. If selected for a compliance audit, OFCCP would collect this data from contractors and mine it for statistical indicators of discrimination. This is where OFCCP compliance audits became financially risky for contractors. Those with inadequate recordkeeping related to applicant tracking and past compensation practices could face OFCCP findings of systemic discrimination accompanied by conciliation demands in the six and seven figures.

### OFCCP AND THE HEALTH CARE INDUSTRY

For a while, OFCCP aggressively pursued jurisdiction over health care providers based on their participation in major federal health care programs like Medicare and TRICARE. Through litigation and legislation, the health care industry has largely avoided OFCCP's jurisdiction and the notoriously risk-laden compliance audits that accompany it. This is primarily because Medicare Parts A and B have been treated like a federal grant rather than a federal contract. Uncertainty has always remained, however, regarding whether OFCCP has jurisdiction over certain coordinated care arrangements under Medicare Parts C and D as well as other federal health care programs like the Veterans Affairs Health Benefits Program. With the rescission of EO 11246, that uncertainty seems less important for health care providers – at least for the time being.

Plenty of health care providers *are* federal contractors or covered subcontractors, however. Prime federal contracts and covered subcontracts with agencies like the Federal Bureau of Prisons, Department of Defense and Department of Health and Human Services are not uncommon. Those health care providers were required to comply with the affirmative action obligations under EO 11246 and were simultaneously subject to OFCCP compliance audits.

## OFCCP GOING FORWARD

The rescission of EO 11246 arrived amidst a flurry of executive orders at the outset of President Trump's second term. These actions reflect a sweeping shift in federal policy *against* diversity, equity and inclusion ("DEI") measures such as, but not limited to, affirmative action measures.

For the time being, OFCCP has been ordered by the acting DOL Secretary, Vincent Micone, to "cease all investigative and enforcement activity," including "all pending cases, conciliation agreements, investigations, [and] complaints." Pending investigations regarding affirmative action programs under Section 503 of the Rehabilitation Act and VEVRAA have been suspended until further notice.

OFCCP's official responsibilities going forward have yet to be determined. It is possible that its role will eventually involve rooting out what the Trump administration has declared "illegal DEI" programs. This anti-DEI stance, along with a new requirement to *certify* that their DEI programs do not violate anti-discrimination laws, has recipients of federal funding concerned about potential liability under the federal False Claims Act as we discuss [here](#).

It is also possible that some or all of these actions by the Trump administration will be challenged in court. Unless or until that happens, recipients of federal financial assistance, including health care providers, should consider taking the following actions.

## PRACTICAL TAKEAWAYS

For those entities who were covered by EO 11246:

- Suspend sending data or information to OFCCP in response to requests arising under EO 11246.
- Review policies, EEO statements, taglines and job postings and remove references to EO 11246 and/or its implementing regulations. It is not unlawful, however, to continue to use general statements such as, "We are an equal opportunity employer."
- Cease referencing EO 11246 and/or its implementing regulations in flow-down notice provisions in contracts.
- Consider the pros and cons of continuing to collect demographic information from employees. Although this is no longer a requirement under EO 11246, the obligation to annually file EEO-1/EEO-4 reports has not changed.
- If applicable, continue to prepare affirmative action plans for protected veterans and individuals with disabilities as required by Section 503 of the Rehabilitation Act and VEVRAA.
- Be mindful of affirmative action obligations deriving under applicable state laws.

For all entities that receive federal financial assistance regardless of whether it is in the form of contracts or grants:

- Ensure that there are no unlawful preferences in their employee selection procedures, such as race- or sex-based preferences. Making hiring determinations on the basis of race and sex is unlawful, even prior to the rescission of EO 11246.
- Review new and existing *employment-adjacent* programs, such as scholarships or internships, to ensure that their availability is not limited to one specific race, gender or ethnicity.
- Train and retrain managers and others involved in employee selection procedures regarding federal discrimination law compliance.
- Continue to monitor the status of any new anti-DEI laws that might be passed.
- Be mindful of how policies and training could be perceived. As an example, although unconscious bias training is likely still permissible, references to things like "white male privilege" could be interpreted by the new administration as unlawful "race or sex stereotyping" or "scapegoating." Indeed, President Trump signed an Executive Order that prohibited federal contractors from engaging in this type of DEI training toward the end of his first term, although it was promptly rescinded by President Biden.

If you have any questions or would like additional information about this topic, please contact:

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