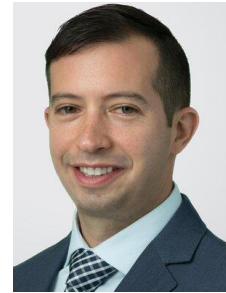


# A Look At Order Ending Federal Contractor Affirmative Action

By **Jeremy Burkhart** (February 3, 2025)

In a sweeping executive order, President Donald Trump has eliminated the requirement for federal contractors to maintain affirmative action programs. His executive order on ending illegal discrimination and restoring merit-based opportunity revokes Executive Order No. 11246 on equal employment opportunity, which was issued by President Lyndon Johnson in 1965.



Jeremy Burkhart

In addition, the executive order prohibits federal contractors, subcontractors and grant recipients from maintaining programs for either diversity, equity and inclusion, or diversity, equity, inclusion and accessibility.

The executive order also heavily curtails the Office of Federal Contract Compliance Programs, which was previously charged with enforcing affirmative action requirements, and had been used by the Biden administration to audit contractors in order to achieve pay equity.

On Jan. 24, in the wake of the executive order, Vincent N. Micone III, the acting secretary of labor, directed the OFCCP to halt all investigative and enforcement activities. This directive includes the U.S. Department of Labor's Office of Administrative Law Judges and Administrative Review Board, both of which review OFCCP enforcement actions against contractors.

## Background

The enforcement of affirmative action requirements has been the subject of recent scrutiny. In 2023, the U.S. Supreme Court issued its decision in *Students for Fair Admissions Inc. v. Harvard University*, holding that college admissions policies using race or diversity as a factor violate the Equal Protection Clause of the 14th Amendment of the U.S. Constitution.[1]

In the wake of that decision, some questioned whether the affirmative action requirements instituted by Johnson's executive order were constitutional, although the OFCCP had taken the position that the decision "does not address the employment context."

Then, in the Oct. 30 decision in *ABM Industry Groups LLC v. U.S. Department of Labor*, the U.S. District Court for the Southern District of Texas held that the OFCCP enforcement proceedings before a Department of Labor administrative law judge violate the take-care clause of Article II of the U.S. Constitution.

The history of contractors' equal opportunity and affirmative action obligations goes back decades. In 1941, President Franklin D. Roosevelt signed Executive Order No. 8802 outlawing discrimination based on race, color, creed and national origin in the federal government and defense industries.

In 1943, Roosevelt extended the executive order's coverage, making it applicable to all government contractors.

In 1953, President Dwight Eisenhower issued Executive Order No. 10479 requiring federal agencies "to include in their contracts a provision obligating the government contractor not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin and obligating the government contractor to include a similar provision in all subcontracts."

The policy of nondiscrimination implemented by Roosevelt and Eisenhower was changed in 1965 by the Johnson executive order requiring contractors to not only avoid discrimination, but also to take affirmative action.

On July 21, 2014, President Barack Obama signed Executive Order No. 13672, which amended Johnson's executive order, to include sexual orientation and gender identity as protected classes that had to be addressed in contractors' affirmative action policies and statements.

In 1978, under Executive Order No. 12086, President Jimmy Carter directed that enforcement of affirmative action obligations be overseen by the Office of Federal Contract Compliance Programs, a special office within the U.S. Department of Labor. Since then, the OFCCP has conducted compliance evaluations and investigations of federal contractors' and subcontractors' personnel policies and procedures.

In addition to responding to specific complaints of alleged discrimination and recommending enforcement actions to the Labor Department, the OFCCP annually audits federal supply and service contractors.

Under the Biden administration, the office had been used to audit contractors in order to achieve pay equity. On Nov. 20, 2024, the OFCCP published its annual corporate scheduling announcement list, identifying 2,000 federal supply and service contractors and subcontractors for compliance reviews.

Affirmative action requirements are codified in Title 41 of the Code of Federal Regulations, Parts 60-1 and 60-2. Pursuant to these regulations, federal contractors and subcontractors are required to take affirmative action to recruit and advance qualified minorities and women.

A contractor's affirmative action procedures must be incorporated into the company's written personnel policies and updated annually, and a contractor is charged with implementing these policies through an affirmative action program.

Some of the requirements of an affirmative action procedure include comparing the utilization of women and minorities to their availability, setting placement goals if women or minorities are underutilized, assessing recruitment and outreach efforts, and developing and executing action-oriented programs to address identified problems.

If women and minorities are not employed at a rate "to be expected given their availability in the relevant labor pool," then the contractor must take affirmative steps to remedy this underutilization. A contractor's noncompliance with its affirmative action obligations can result in the OFCCP taking enforcement actions against the company.

### **The Executive Order and Impact on Government Contractors**

Trump's new executive order revokes both Johnson's and Obama's executive orders on the topic as well as several other initiatives that were designed to promote diversity and

inclusion. For government contractors and grant recipients, the following parts of the executive order are particularly important.

Federal contractors and subcontractors shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws," under the executive order.

Contractors and grant recipients will be required to agree that they will comply "in all respects with all applicable Federal anti-discrimination laws" as a condition of all future contracts and grant awards.

Contractors and grant recipients will be required to certify that they "do not operate any programs promoting [diversity, equity, and inclusion] DEI that violate any applicable Federal anti-discrimination laws," under the executive order.

The OFCCP is now prohibited from enforcing affirmative action, promoting diversity or "allow or encourage Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin," under the executive order.

All executive departments and agencies "to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements," and "to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities," under the executive order;

The executive order further directs the director of the Office of Management and Budget to "[e]xcise references to DEI and [diversity, equity, inclusion and accessibility] DEIA principles, under whatever name they may appear, from Federal acquisition, contracting, grants, and financial assistance procedures to streamline those procedures, improve speed and efficiency, lower costs, and comply with civil-rights laws."

It also directs this office to terminate all diversity, equity, equitable decision-making, equitable deployment of financial and technical assistance and advancing equity requirements, programs and activities.

The executive order also directs certain officials to coordinate in order to prepare "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 executive order states that it "does not apply to lawful Federal or private-sector employment and contracting preferences for veterans of the U.S. armed forces or [blind] persons protected by the Randolph-Sheppard Act, 20 U.S.C. 107 et seq."

Similarly, the executive order does not apply to workers with disabilities, pursuant to Section 503 of the Rehabilitation Act. Nonetheless, Micone directed that compliance reviews and investigations related to these categories of protected individuals would be "held in abeyance pending further guidance."<sup>[2]</sup>

### **What's Next for Federal Contractors**

The executive order provides contractors and subcontractors 90 days to eliminate their

affirmative action programs to the extent they are inconsistent with the executive order's requirements. Starting April 21, contractors "shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws."

Furthermore, contractors, subcontractors and grant recipients are prohibited from maintaining any DEI programs.

In addition, companies that wish to do business with the federal government should take immediate steps to review their affirmative action and DEI programs to ensure compliance with the new executive order, and when deciding on policies and hiring practices, companies should follow directive to "not consider race, color, sex, sexual preference, religion, or national origin" in the executive order.

If a contractor was previously identified on the corporate scheduling announcement list as being subject to an annual compliance review, that contractor should ask for guidance from OFCCP to verify whether such review will still take place. At the moment, it appears that all such reviews are halted, but contractors should confirm this with OFCCP.

If contractors or grant recipients have personnel filling roles such as diversity officer, careful attention should be given to the authorities and responsibilities of these positions. Contractors and grant recipients should review their internal policies and procedures, to identify potential violations of the new directives.

Also, federal contractors should not completely dismantle their affirmative action programs, as they are still required to take affirmative action to employ and advance protected veterans and individuals with disabilities pursuant to the Vietnam Era Veterans' Readjustment Assistance Act and Section 503 of the Rehabilitation Act of 1973.[3]

It is very likely that additional clarifications will be issued in the coming months. Because the executive order effectively calls for the elimination of the implementing regulations of the Johnson executive order, currently codified at Title 41 of the Code of Federal Regulations, Parts 60-1 and 60-2, expect the secretary of labor to issue a notice of proposed rulemaking soon that provides a justification for rescinding these regulations.

---

*Jeremy D. Burkhart is a partner at Holland & Knight LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] 600 U.S. 181 (2023).

[2] Secretary's Order 03-2025 – To Cease and Desist All Investigative and Enforcement Activity Under Rescinded Executive Order 11246, Jan. 24, 2025.

[3] See also FAR 52.222-35 Equal Opportunity for Veterans; FAR 52.222-36 Equal Opportunity for Workers with Disabilities, 41 C.F.R. Part 60-300; 41 C.F.R. Part 60-741.