



DEI Under the Microscope

Navigating the Complexities of the New
Executive Order for Federal Contractors

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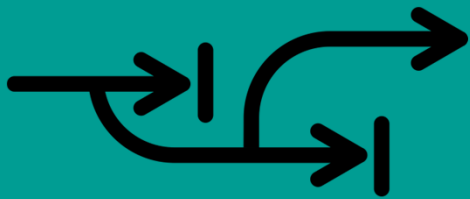


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DEI's Journey Under the Second Trump Administration



Immediate Focus

- “Day One” – January 20, 2025
 - EO 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*
 - EO 14168, *Defending Women from Gender Ideology Extremism and Resorting Biological Truth to the Federal Government*
- “Day Two” – January 21, 2025
 - EO 14173, *ending Illegal Discrimination and Restoring Merit-Based Opportunity*

Developing Landscape

- February 2025 – initial agency guidance
 - OPM & DOJ Guidance memos
 - Department of Education “Dear Colleague” letter & FAQs
- March 2025 – EEOC & DOJ joint technical guidance
- April 2025 – EEOC Commissioner’s Charges
- May 2025 – DOJ announces Civil Fraud Initiative
- July 29, 2025 – DOJ memo, “proxy discrimination”
- December 2025 – DOJ Civil Investigative Demands (“CIDs”)
- January 2026 – EEOC votes to rescind SOGI protections
- March 26, 2026 – EO 14398, *Addressing DEI Discrimination by Federal Contractors*



My Administration has made significant progress in ending racial discrimination in American society, including so-called “diversity, equity, and inclusion” (DEI) activities....

Despite this progress, some entities continue to engage in DEI activities and often attempt to conceal their efforts to do so.



EO 14398

“Addressing DEI Discrimination by Federal Contractors”

Significance

- Signals continued emphasis on DEI
- Draws “bright-line” definitions
- But introduces new “grey” areas
- Highlights priority of racial discrimination
- Continues to leverage the power of the purse



Overview of New DEI Executive Order



What Happened?

- New Executive Order requiring new contract terms regarding "racially discriminatory DEI activities."
- The order builds on January 2025 DEI-related EOs
- Introduces new contract clauses, enforcement mechanisms, and False Claims Act liability.

Key Obligations

- Prohibition on racially discriminatory DEI activities
- New mandatory contract clause in all covered contracts
- Subcontractor reporting duties
- Contracting Agency Audits
- OMB to issue guidance to contracting agencies to ensure compliance

Timing & Penalties

- Signed March 26, 2026
- Within 30 days – Clauses are to be included (April 25)
- FAR Council to amend Federal Acquisition Regulations within 60 days
- Agencies may cancel or suspend or debar contractors
- AG's office directed to ensure prompt review of False Claims Act actions brought by private individuals

KEY DEFINITIONS



RACIALLY DISCRIMINATORY DEI ACTIVITIES (Defined)

Disparate treatment based on race or ethnicity in:

- Recruitment & hiring
- Promotions
- Vendor / subcontracting agreements
- Program participation
- Allocation or deployment of resources

PROGRAM PARTICIPATION (Defined)

Membership, access, or admission to:

- Training, mentoring, or leadership development programs
- Educational opportunities
- Clubs, associations, or similar opportunities
(sponsored or established by the contractor)

PRACTICE NOTE

The definition of "racially discriminatory DEI activities" is notably broader than prior EOs, which referenced "unlawful DEI" without defining the term.

This new definition creates a targeted compliance lens focused on race- and ethnicity-conscious decision-making in all phases of contractor operations — including vendor selection and employee programs.

RACIALLY DISCRIMINATORY DEI ACTIVITIES

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Disparate *treatment* based on race or ethnicity in employment activity:

- Recruitment & hiring
- Promotions
- Other?
- Vendor / subcontracting agreements
- Program participation
- “Allocation or deployment of resources”
 - Not defined
 - Supplier Diversity?
 - Scholarships?
 - Charitable donations or community organizations?

“PROGRAM PARTICIPATION”

Membership, access, or admission to:

- Training, mentoring, or leadership development programs
- Educational opportunities
- Clubs, associations, or similar opportunities
(sponsored or established by the contractor)

Mandatory Contract Clause



Section 3: Applies to: “contracts,” “contract-like instruments,” “contractors’ subcontracts,” and “subcontractors’ lower-tier subcontracts”

1. No Racially Discriminatory DEI Activities
2. Books, Records & Access
3. Contract Cancellation Risk
4. Subcontractor Reporting
5. Litigation Notice
6. False Claims Act Materiality



Mandatory Contract Clause



1. No Racially Discriminatory DEI Activities

- Contractor agrees not to engage in any racially discriminatory DEI activities as defined in Section 2 of the EO.

2. Books, Records & Access

- Contractor must furnish all information and provide access to books, records, and accounts required by the contracting agency for compliance purposes.

3. Contract Cancellation Risk

- Noncompliance may result in contract cancellation, termination, or suspension — and contractor may be declared ineligible for future government contracts.
-

Mandatory Contract Clause



4. Subcontractor Reporting

- Contractor must report any subcontractor's known or reasonably knowable violations and take remedial action directed by the agency.

5. Litigation Notice

- Contractor must notify the agency if a subcontractor lawsuit puts the validity of this clause at issue in any way.

6. False Claims Act Materiality

- Compliance is deemed material to the Government's payment decisions under the False Claims Act (31 U.S.C. § 3729(b)(4)).
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Additional Impact of EO 14398

- Government “shall” identify **“economic sectors that pose a particular risk of entities engaging in racially discriminatory DEI activities based on current or past conduct”**
- Additional “best practice” guidance to be issued to contracting agencies
- Contracting agencies will have the authority to assess contractor compliance with EO 14398

Supply Chain Considerations

- Clause requires contractors to report “any subcontractor’s known or reasonably knowable conduct”
- Open questions:
 - Who is a “subcontractor”?
 - What is “reasonably knowable conduct?”
 - How will flow-down compliance be monitored?

Timing & Implementation

- Signed March 26, 2026
- Within 30 days – Clauses are to be included
– by April 25, 2026
- No specific timing - FAR Council to amend the Federal Acquisition Regulation (FAR)
- Within 60 days – FAR Council to issue deviation and interim guidance under FAR 1.4
- Within 120 days (July 24, 2026), each agency to report on its compliance with Section 3
- Some prime contractors are already inserting clauses in subcontracts

- Contractor recourse / ability to negotiate?

Penalties

- Contract Termination
 - Contracts may be canceled, terminated, or suspended in whole or in part
- Suspension/Debarment
 - Agencies shall “take appropriate action to suspend and debar contractors or subcontractors for such failures to comply”
- False Claims Act Risk
 - AG will consult with contracting agencies and decide whether to bring FCA actions “against any contractors or subcontractors” that violate Section 3
 - AG’s office directed to ensure prompt review of False Claims Act actions brought by private individuals
 - Clause includes acknowledgment that compliance is “material” for purposes of FCA

Impact on Existing Law

“This Order shall be implemented consistent with applicable law....”

Section 7(b)

- The Civil Rights Act of 1964 remains in effect, with its implementing regulations and precedent
 - Title VI: Discrimination in Federally Funded Programs
 - Title VII: Discrimination in Employment
- Section 1981 Civil Rights Act of 1991

Takeaways & Next Steps for Contractors

- Refresh audit of DEI programs and expand to include allocation or deployment of “resources”
- Carefully review all new contracts (including extensions and modifications) after 3/26/26 for the new clause
 - Ideally, implement a standardized review process or incorporate check into existing screening
- Look at who you consider a “subcontractor”
 - Added / unique consequence to designation now
- Add flow-down clause to those “subcontractors”
- Determine how to assess the “reasonably knowable conduct” of subcontractors



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Questions?



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Thank you for attending!