

CLIENT UPDATE

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NEW EXECUTIVE ORDER ESTABLISHES ENHANCED ENFORCEMENT PROTOCOLS TARGETING FEDERAL CONTRACTOR DEI PRACTICES

On March 26, 2026, President Trump issued Executive Order 14398 (“Addressing DEI Discrimination by Federal Contractors”). The new Executive Order (EO):

- supplements previous executive orders and other Trump Administration enforcement initiatives by adding a six-paragraph clause to all federal contracts and subcontracts,
- introduces a new enforcement regime, with every new contract being the basis for a potential DEI audit conducted by the contracting agency itself,
- requires prime contractors to report knowable subcontractor noncompliance, and
- authorizes contracting agencies to cancel the contract and make the contractor ineligible for future contracts.

In short, the EO introduces a much more aggressive enforcement regime to the Administration's anti-DEI efforts, with a much quicker implementation timeline than the initial January 2025 DEI EO (EO 14173).

“Racially Discriminatory DEI Activities”

The new EO targets “racially discriminatory DEI activities,” which it defines as follows:

- a. For the purposes of this order, “racially discriminatory DEI activities” means disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity's resources.
- b. “Program participation” means membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor.

Executive Order 14398, Section 2.

There are a few things that are noteworthy about this definition.

First, it is narrower and more precise than the definition in EO 14173, which encompassed the operation of “any programs promoting DEI that violated any applicable Federal anti-discrimination law.” Executive Order 14173, Section 3(b)(iv)(B) (emphasis added). The EO 14173 definition is far reaching, applicable to all classifications covered by Federal anti-discrimination laws—not only race or ethnicity, but also sex, religion, national origin, age, and disability status. The new EO limits itself to discrimination based on race or ethnicity. The new EO also is much more precise in defining what activities are discriminatory—specifically, disparate treatment in the recruitment, employment, contracting, program, participation, or allocation or deployment of an entity's resources.

It is unclear what is covered by the prohibition against disparate treatment in recruitment. Historically, targeted recruiting to get an inclusive pool of candidates has not been considered disparate treatment so long as the candidates were evaluated similarly regardless of how they were recruited to apply. That said, the term recruitment could refer to other activities, such as internships, mentoring programs, interview selection, etc. Perhaps the prohibition against disparate treatment in recruitment is limited to situations where an employer recruits exclusively from certain preferred “diverse” organizations.

Interestingly, although the name of the term in the EO is “racially discriminatory DEI activities,” the definition does not in fact include a qualifier limiting its application to DEI programs. The definition instead is tied to disparate treatment by race or ethnicity; not merely “DEI” involving disparate treatment. Despite the name of the EO and the name of the defined term, the definition itself is neutral.

We suspect that the Administration chose to specify that the EO prohibits disparate treatment as to specific practices and programs to maximize the legal defensibility of the EO. The neutrality of the definition also will likely help it survive legal challenges. Several courts have raised concerns about the lack of specificity in defining “unlawful” DEI in EO 14173 (the original January 2025 anti-DEI EO). When questioned by judges, Justice Department attorneys have avoided specifying. Perhaps relatedly, formal regulations implementing the clauses of that EO still haven’t been promulgated—more than 14 months after the EO was signed by President Trump. In addition, the Department of Education was enjoined by a federal court from enforcing the certification provision it distributed to K-12 school districts, and it has since withdrawn its guidance regarding unlawful DEI as well as the certification document.

Mandatory Clause for Federal Contracts and Subcontracts

The new EO applies to only federal contractors and subcontractors. The earlier January 2025 EO applied to all recipients of federal funds—both contractors as well as grant recipients.

Indeed, the new EO establishes an enforcement mechanism tied specifically to each individual government contract. Contracting agencies are instructed to include the six-paragraph clause in all contracts as well as to ensure that the clause is included in “contractors’ subcontracts and subcontractors’ lower-tier subcontracts” by April 25, 2026. The clause reads as follows:

1. The contractor will not engage in any racially discriminatory DEI activities, as defined in section 2 of the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors);
2. The contractor will furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency pursuant to the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors), for purposes of ascertaining compliance with this clause;
3. In the event of the contractor’s or a subcontractor’s noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor or subcontractor may be declared ineligible for further

Government contracts;

4. The contractor will report any subcontractor's known or reasonably knowable conduct that may violate this clause to the contracting department or agency and take any appropriate remedial actions directed by the contracting department or agency;
5. The contractor will inform the contracting department or agency if a subcontractor sues the contractor and the suit puts at issue, in any way, the validity of this clause; and
6. The contractor recognizes that compliance with the requirements of this clause are material to the Government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code (False Claims Act).

Executive Order 14398, Section 3.

Other Highlights

Deputizes Contracting Agencies and Prime Contractors to Enforce the Executive Order

The Director of the Office of Management and Budget has been commanded to issue guidance to contracting agencies, giving them the power to ensure compliance with EO 14398. Unlike the enforcement mechanism that existed under the now-rescinded EO 11246 (affirmative action for women and minorities) in which one centralized agency (OFCCP) had responsibility for overseeing and enforcing federal contractor compliance with nondiscrimination obligations, including conducting audits and processing and investigating complaints of discrimination, this EO appears to return to the enforcement scheme that existed until the Carter Administration, whereby each separate federal contracting agency had its own civil rights enforcement department. This approach is consistent with leveraging the contracts themselves as a primary enforcement mechanism. Contractors can anticipate that there will be inconsistencies in how the EO is interpreted and enforced by each individual agency.

In addition to enforcement by contracting agencies, the EO requires contractors to "report any subcontractor's known or reasonably knowable conduct that may violate this clause to the contracting department or agency." Just as the EO deputizes contracting agencies to enforce compliance, it also deputizes the contractors themselves to do the same thing vis-à-vis their subcontractors, whether the contractor wants to or not.

Puts Contracts at Risk of Cancellation and Contractors at Risk of Ineligibility for Future Contracts

The penalty section of the EO enables contracting agencies to:

- “cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract or contract-like instrument, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the clause [set forth above]” and
- “take appropriate action to suspend and debar contractors or subcontractors for failure to comply.”

Executive Order 14398, Section 4(a).

The OFCCP’s primary enforcement mechanism was resolving contractor noncompliance vis-à-vis conciliation agreements that remedied areas of noncompliance and imposed progress reports to ensure ongoing compliance. If unable to negotiate a conciliation agreement with the contractor, the OFCCP could refer the matter to the Department of Labor’s lawyers to initiate litigation to enforce the nondiscrimination obligations and, as a last resort, seek contractor debarment.

Contract cancellation and debarment are now the primary enforcement mechanism under this new EO, putting a lot more at stake under this new compliance regime. With so much at stake, the various contracting agencies will have much more leverage in influencing contractor policies and practices than the OFCCP had under EO 11246.

Imposes an Accelerated Timeline for Implementation and Enforcement

- *By April 25, 2026:* executive departments and agencies, contractors, and subcontractors must include the clause in contracts and subcontracts
- *By May 25, 2026:* the Federal Acquisition Regulatory Council must issue deviation and interim guidance regarding agency implementation of the clause, even before the Federal Acquisition Regulation (FAR) has been officially amended
 - o By contrast, EO 14173 did not have this same direction
 - o No FAR clauses have been promulgated yet to implement the anti-DEI provisions of EO 14173

- o The only deviation issued related to EO 14173 was the removal of clauses tied to rescinded EO 11246
- *By August 24, 2026:* each federal agency is required to report to the Assistant to the President for Domestic Policy regarding its implementation of assessing (a.k.a. auditing) contractor compliance and enforcing the EO

Parallels the Administration's Most Effective Strategies in Achieving DEI Retreat

By tying enforcement to the government contracts themselves, EO 14398 parallels the strategies that have proved most effective in the Administration's efforts to achieve retreats from DEI. The Administration has been able to secure DEI retreats and abandonment in situations where the organizations were dependent on regulatory approvals—in other words, situations where there was the most at stake for the organization and where the government had maximum leverage. Most notably, the Federal Communications Commission (FCC) has received explicit assurances regarding DEI programs from media companies needing regulatory approval before proceeding with mergers and acquisitions. These organizations knew approval would be withheld pending these assurances, with regulatory approval occurring within days of their submitting written assurances to the FCC about their DEI programs.

Another strategy that has proven effective for the Administration is issuance of burdensome information requests like those sent to twenty of the country's largest law firms in March 2025, several of which entered into agreements with the Administration related to their DEI programs based on the presence of the information requests alone. The Equal Employment Opportunity Commission (EEOC) also has initiated several subpoena enforcement actions seeking to compel employers to turn over large volumes of documents and data. A recent federal district court ruling noted that the EEOC is afforded broad deference in the information it seeks in order to conduct an investigation.

Paragraph 2 of the EO 14398 contract clause requires contractors to “furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency . . . for purposes of ascertaining compliance with this clause.” This parallels the strategy employed by the EEOC.

Moves Away from Areas That Have Proved Most Challenging in Implementing the Administration's Anti-DEI Agenda

Fourteen months into implementing its anti-DEI agenda, the Administration has been able to observe which areas have created road bumps. The approach of the new EO addresses those

challenges.

Definition of Unlawful DEI

The rollout of EO 14173 has been held up because of its very vague definition of unlawful DEI. Litigants (primarily grant recipients as opposed to contractors) whose grants were in play have obtained federal court injunctions vis-à-vis the specific agency funding their grant. The only occasion where the courts haven't issued an injunction is where the litigant raised a hypothetical situation rather than actual imposition of the EO requirements on the entity bringing the lawsuit. For example, a federal appeals court withheld enjoining the EO pending actual application of its requirements and mandates against the party bringing suit, noting that it is quite possible that the EO will be enforced in an unlawful manner (i.e., asserting that programs that do not violate federal anti-discrimination laws are unlawful).

At the same time, EO 14173 also has been imperiled when agencies are too specific regarding what constitutes unlawful DEI. The Department of Education issued specific guidance regarding unlawful DEI activities, seeking certifications from K-12 grant recipients tied to that guidance. Both the certification and guidance itself were enjoined by a federal court. The Department of Education abandoned both its guidance and certification requirement. Similarly, the EEOC chose to abandon the information requests it sent to the twenty large law firms after several of the firms sued the EEOC.

By comparison, the new EO uses a defined and very defensible definition of what activities it views as unlawful—disparate treatment by race or ethnicity in employment practices, programs, and resources. It seems to be sufficiently precise while avoiding inclusion of things that the courts are likely to conclude are lawful. Other than perhaps the application of its prohibition of “disparate treatment” in recruiting, it is a defensible and uncontroversial definition. Moreover, the definition itself is not limited to DEI-related disparate treatment. The neutrality of the definition also should help the Administration defend its legality.

Enforcement Mechanism

The primary enforcement mechanism for the January 2025 DEI EO was the False Claims Act. Under the False Claims Act, the Department of Justice (DOJ) or a whistleblower can sue a recipient of federal funds who seeks payment despite not complying with a material term of its contract or grant. Individual federal agencies can conduct investigations related to false claims. FCA investigations and lawsuits tend to be unwieldy and slow. The Administration likely thought linking compliance to false claims maximized its leverage. We suspect that it concluded that it has been an ineffective and inefficient enforcement mechanism for achieving organizational DEI

retreats.

The EEOC only investigates in response to charges. Charges are typically brought by workers, although EEOC Commissioners are allowed to initiate charges themselves. This approach also has its limitations.

By tying enforcement to each individual contract, placing enforcement with each contracting agency, and imposing responsibility on contractors for the compliance of subcontractors, the new EO greatly expands the resources available to enforce this initiative in a more immediate manner.

Contractors and Other Recipients of Federal Funds are Still Subject to Executive Order 14173

Federal fund recipients continue to be required to comply with EO 14173. That means that its vague and broad definition of unlawful DEI, applicable to all categories subject to federal anti-discrimination laws (race, color, sex, religion, national origin, age, disability status, etc.), still applies. Likewise, the FCA continues to be an enforcement mechanism, not only for the original January 2025 DEI EO but also under this new EO. That said, we anticipate that this new EO will be the primary tool used to achieve federal contractor DEI retreats.

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