

THE FIRST 90 DAYS: DEVELOPMENTS SINCE EXECUTIVE ORDER 11246 WAS RESCINDED

DirectEmployers Association

ROFFMAN HORVITZ, PLC
LEGAL COUNSELING
FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

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APRIL 23, 2025

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MEET THE TEAM



JOSHUA S. ROFFMAN
MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. Josh's practice focuses on advising and assisting employers with using data and statistical tools to evaluate their employment practices. He has been advising federal contractor employers about compliance with federal and state equal employment opportunity and "affirmative action" requirements for over twenty years. He currently is guiding employers in assessing their DEIA and similar programs for risk mitigation and compliance with nondiscrimination laws.

Josh also advises and assists employers with privileged pay equity statistical analyses. He develops and runs the statistical analyses and combines that with knowledge of the law and a pragmatic understanding of businesses and other employers to ensure analytical rigor, usefulness, and legal soundness.

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MEET THE TEAM



ALISSA A. HORVITZ
MEMBER ATTORNEY

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on evaluating nondiscrimination and equal opportunity throughout all phases of employment using data and employment analytics. This includes analysis and advice regarding EEO in recruiting, hiring, promotions, terminations, and compensation (pay equity), as well as DEI reviews for government contractor employers seeking to unwind their compliance with EO 11246. Alissa also does live and virtual training on relevant employment law topics.

MEET THE TEAM



JAMES M. MCCAULEY
ASSOCIATE ATTORNEY

James McCauley is an Associate Attorney with Roffman Horvitz. James's experience includes evaluation and analysis of employment practices to ensure equal opportunity; preparation of EEO-1, VETS-4212, and California Pay Data Reporting filings; pay equity analyses; and analysis of applicant and hire records to address potential claims of hiring disparities.

OUTLINE

- Developments Since January 20
 - Relevant Executive Orders and White House Initiatives
 - Federal and State Government Anti-DEIA Activity
 - Lawful DEIA Insights from Former EEOC/OFCCP and State Officials
 - Litigation Activity
 - DOL/OFCCP
- Ongoing Federal Obligations
- State Laws
- Self-Identification of Gender/Race/Ethnicity
- “Unlawful” DEI
- Lawful EEO and Nondiscrimination Efforts
- False Claims Act Certification
- Review of DEIA Programs

PRESIDENT TRUMP’S EXECUTIVE ORDER (1 of 3) EXECUTIVE ORDER 14173

- “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
- Employers “have adopted and actively used dangerous, demeaning and immoral race- and sex- based preferences under the guise of so-called [DEI or DEIA] that can violate civil-rights laws in this Nation”
- Terminate DEI within Federal government
 - Executive Order 14151 “Ending Radical and Wasteful Government DEI Programs and Preferencing”
- Rescind Executive Order 11246
 - Permissive compliance through April 21

PRESIDENT TRUMP'S EXECUTIVE ORDER (2 of 3) EXECUTIVE ORDER 14173

- DOL/OFCCP to 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 based on race, color, sex, sexual preference, religion, or national origin
- Contracts and grants:
 - Noncompliance with Federal anti-discrimination laws is material to government’s payment decisions under the False Claims Act
 - Contractor must certify that it does not operate any programs promoting DEI **that violate any applicable Federal anti-discrimination laws**

PRESIDENT TRUMP'S EXECUTIVE ORDER (3 of 3) EXECUTIVE ORDER 14173

- Encouraging private sector to end illegal DEI discrimination and preferences
 - All agencies identify within 120 days (May 21, 2025):
 - key sectors of concern
 - most egregious and discriminatory DEI practitioners in each key sector
 - identify up to 9 civil compliance investigations of:
 - Publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more
 - State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars

OTHER EXECUTIVE ORDERS AND WHITE HOUSE PROCLAMATIONS (Slide 1 of 3)

- EO 14151 – January 20 – Ending Radical and Wasteful Government DEI Programs and Preferencing
- EO 14168 – January 20 – Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
 - Bostock v. Clayton County (2020)
- EO 14170 – January 20 – Reforming the Federal Hiring Process and Restoring Merit to Government Service
- Memorandum – January 21 – Keeping American Safe in Aviation
- EO 14190 – January 29 – Ending Radical Indoctrination in K-12 Schooling
- EO 14201 – February 5 – Keeping Men Out of Women's Sports

OTHER EXECUTIVE ORDERS AND WHITE HOUSE PROCLAMATIONS (Slide 2 of 3)

- EO 14230 – March 6 – Addressing Risks From Perkins Coie LLP
 - EO 14237 – March 14 – Addressing Risks From Paul Weiss
 - EO 14244 – March 21 – Addressing Remedial Action by Paul Weiss
 - EO 14246 – March 25 – Addressing Risks From Jenner & Block
 - Presidential Proclamation – March 27 – Addressing Risks From WilmerHale
 - EO 14263 – April 9 – Addressing Risks from Susman Godfrey
- Memorandum – March 19 – Removing Discrimination and Discriminatory Equity Ideology From the Foreign Services
- Memorandum – March 22 – Preventing Abuses of the Legal System and the Federal Court

OTHER EXECUTIVE ORDERS AND WHITE HOUSE PROCLAMATIONS (Slide 3 of 3)

- Presidential Proclamation – March 27 – Restoring Truth and Sanity to American History
- **Memorandum – April 9 – Directing the Repeal of Unlawful Regulations**
 - Directs agencies to identify unlawful regulations within 60 days and begin plans to repeal them
 - References 10 US Supreme Court decisions
- **OPM Proposed Rule – April 23 – Improving Performance, Accountability and Responsiveness in the Civil Service**
 - Issued pursuant to EO 14171 (January 20) – Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce
 - Creates “Schedule Policy/Career” class of federal employees
 - Estimated 50,000 policy-influencing positions will be moved into the new class of at will “quasi-political” positions
- April 21 Court Motion Indicating Intent to Rescind Biden Administration ESG 401(k) Rule

RESCINDED EXECUTIVE ORDERS

- EO 11246 – 1965 – Equal Employment Opportunity
- EO 14069 – 2022 – Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency
- EO 14026 – 2021 – Increasing the Minimum Wage for Federal Contractors
 - Reversion to Obama Federal Contractor Minimum Wage Executive Order 13658
 - Biden Executive Order 14026 Rescinded by President Trump
 - 14026 “superseded” Obama Executive Order 13658, which hasn’t been rescinded
- EO 14035 – 2021 – Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce

ANTI-DEIA ACTIVITY – FEDERAL AGENCIES

- OPM Guidance Regarding Ending DEIA Offices, Programs and Initiatives – February 5

- Keep EEO Offices
- Employee Resource Groups and Social and Cultural Events – Okay
 - No restrictions in attendance/participation or segregation by protected characteristics
 - No distinctions based on protected characteristics in granting permissions to/for groups and events

ANTI-DEIA ACTIVITY – LAW FIRMS – FEDERAL CONTRACTORS

- Perkins Coie and other law firm specific executive orders and proclamations

“Sec. 4 . Racial Discrimination. (a) The Chair of the Equal Employment Opportunity Commission shall review the practices of representative large, influential, or industry leading law firms for consistency with Title VII of the Civil Rights Act of 1964, including whether large law firms: reserve certain positions, such as summer associate spots, for individuals of preferred races; promote individuals on a discriminatory basis; permit client access on a discriminatory basis; or provide access to events, trainings, or travel on a discriminatory basis.

(b) The Attorney General, in coordination with the Chair of the Equal Employment Opportunity Commission and in consultation with State Attorneys General as appropriate, shall investigate the practices of large law firms as described in subsection (a) of this section who do business with Federal entities for compliance with race-based and sex-based non-discrimination laws and take any additional actions the Attorney General deems appropriate in light of the evidence uncovered.”

ANTI-DEIA ACTIVITY – LAW FIRMS – STATE OF FLORIDA CONTRACTORS (slide 1 of 2)

- Florida Attorney General's Office will no longer engage private law firms "who have or continue to engage in illegal and inappropriate discrimination and bias"
- Law firm "practices/programs/affiliations/memberships" with "disqualifying presumption":
 - DEI ("give rise to a disqualifying presumption")
 - Mansfield Certification
 - Minority Corporate Counsel Association Scorecard
 - Diversity Targets in Hiring Promotion, and Contracting
 - Diversity Fellowships
 - Leadership Council for Legal Diversity
 - SEO Law Fellowship
 - Diversity Mentorship Programs
 - DEI Websites
 - Workplace DEI Trainings

ANTI-DEIA ACTIVITY – LAW FIRMS – STATE OF FLORIDA CONTRACTORS (slide 2 of 2)

- Law firm "practices/programs/affiliations/memberships" with "disqualifying presumption" (continued):
 - ESG ("illegal and immoral social engineering:" give rise to a disqualifying presumption")
 - NetZero Lawyers Alliance
 - Legal Charter 1.5
 - NetZero Practice Groups Promoting ESG To Clients
 - Programs mandated by clients
 - Hewlett-Packard
 - Microsoft Law Firm Diversity Program
- Takeaways
 - Most of these things are unquestionably lawful; none are definitively unlawful
 - The leverage is not getting (or losing) state contracts
 - Targeting third-party diversity initiatives and requirements imposed by law firm clients

ANTI-DEIA ACTIVITY – 20 LARGE LAW FIRMS

- EEOC Letters to 20 Large Law Firms – March 17
 - Inquired about specific diversity initiatives listed on firm websites or other public documents as well as websites of diversity organizations that listed the law firms
 - Asked for demographic data about individual considered for and selection for various programs and positions within the law firm
 - Letter to Acting EEOC Chair from Former EEOC Officials – March 18
- “Red State” Attorney Generals Letter to EEOC’s 20 Law Firms – April 3
 - States have authority “to enforce employment discrimination laws that ensure DEI and other policies that promote the employment of a person based on race, color, religion, sex or national origin are not being used.”
 - Send the information requested by EEOC also to the offices of these twelve state attorney generals
- Four of the firms settled with the Trump administration agreeing to (1) “no longer categorize any lawful employment or practices” as DEI and (2) \geq \$100,000 in pro bono work for causes advocated by the Trump administration
- No public information about how the remaining law firms chose to respond

ANTI-DEIA ACTIVITY – EDUCATIONAL INSTITUTIONS

- Department of Education “Dear Colleague” Letter and FAQs – February 14
 - “Blue State” Attorney Generals Response Letter – March 5
- DC US Attorney Letter to Georgetown Law School – February 17
 - Inquires about teaching and promotion of DEI
 - Dean’s response letter – March 6
- Department of Education Office of Civil Rights Investigations of 51 universities for violation of Title VI of the Civil Rights Act
- Department of Education Certification Requirement for K-12 School Districts Receiving Federal Financial Assistance – Announced April 3
 - Sites Title VI and *Students for Fair Admissions v. Harvard*
 - Follow up from February 14 “Dear Colleague” Letter
 - Certification document explicitly references “illegal DEI practices” without specifying what practices are illegal

OTHER ANTI-DEIA ACTIVITY

- FCC Letters to Comcast / NBCUniversal (February 11) and Disney / ABC (March 27) about Promotion of DEI
- FCC Chairman Interview Statement – February 21
 - Blocking mergers and acquisitions of business “promoting invidious forms of DEI discrimination”
- “Red State” Attorney Generals Letter to Costco – January 27
- USCIS Updated Policy Manual to Recognize Only Two Biological Sexes – April 2
 - Reverse of 2023 Biden administration policy

LAWFUL DEIA INSIGHTS FROM FORMER EEOC/OFCCP AND STATE OFFICIALS

- February 13 “Blue State” Guidance Concerning DEIA Employment Initiatives
- March 5 “Blue State” Attorney Generals Response to US Department of Education’s “Dear Colleagues” letter
- April 3 Statement of Former EEOC Officials In Response to March 19 “What You Should Know About DEI-Related Discrimination at Work” EEOC Document
- April 15 “Open Letter to Federal Contractor Community” from Former U.S. Department of Labor Officials

LITIGATION ACTIVITY

- Challenges to Trump Administration Executive Orders 14151 and 14173
 - National Association of Diversity Officers in Higher Education (NADOHE) v Trump – Maryland Federal District Court
 - Chicago Women in Trades v Trump – Illinois Federal District Court
 - San Francisco Unified School District v. AmeriCorps – California Federal District Court
- Injunctions against Department of Defense Transgender Ban
- Current EEO Litigation Landscape

OFCCP – LEADERSHIP

- Secretary of Labor – Lori Chavez-DeRemer – Confirmed March 10
- Deputy Secretary of Labor – Keith Sonderling – Confirmed March 18
- OFCCP Director – Catherine Eschbach – Appointed March 24
- Solicitor of Labor – Jonathan Berry – Nominated on March 31
 - Held Chief Counsel and DOL Principal Deputy Assistant Secretary for Policy roles during President Trump’s first term
 - Role oversaw changes to DOL regulations during previous Trump term
 - Authored the Department of Labor chapter of Project 2025
 - Worked on matters challenging ESG and corporate board diversity initiatives in his private practice

OFCCP – STATUS OF AGENCY AND ITS INITIATIVES (Slide 1 of 2)

- Class Deviation of FAR Regulations Related to EO 11246
- Secretary's Order-03-2025 – January 24
 - Cease and desist all investigative and enforcement activity under rescinded EO 11246 and its implementing regulations
 - Inform regulated parties with open reviews and investigations:
 - Executive Order 11246 component has been closed
 - VEVRAA and Section 503 investigations and enforcement activities on hold pending further guidance
- All Investigations and Enforcement Activities Under EO 11246 Have Been Closed

OFCCP – STATUS OF AGENCY AND ITS INITIATIVES (Slide 2 of 2)

- OFCCP Reorganization and Staffing Reduction Plan – February 25
 - 90% Workforce Reduction
 - To carry out the requirements of Section 503 and VEVRAA
 - Eliminate district offices
 - Consolidate to four regional offices
 - “The agency may be tasked with operationalizing additional directives related to federal contractors such as Executive Order 14173.”
 - Eliminate Division of Enforcement Labor Economists and Statisticians
- Employees Placed on Leave – April 16
 - Field employees in every OFCCP region except SWARM
 - National office enforcement branch employees

OFCCP – DIRECTOR ESCHBACH EMAIL (Slide 1 of 2)

- March 24 Director Eschbach Internal OFCCP Email
 - Questionable Assertions:
 - “President Trump has rescinded EO 11246, determining that the affirmative action plan requirements, imposed by that executive order and investigated and enforced by OFCCP, facilitated federal contractors adopting discriminatory DEI practices out of step with our nation’s civil rights laws.”
 - “The reality is, most of what OFCCP had been doing was out of step, if not flat out contradictory, to our country’s laws, and all reform options are on the table to bring OFCCP into compliance with its Constitutional and statutory bounds.”

OFCCP – DIRECTOR ESCHBACH EMAIL (Slide 2 of 2)

- March 24 Director Eschbach Internal OFCCP Email (continued)
 - Initiatives:
 - Verify that all federal contractors have wound down their use of affirmative action plans by April 21
 - Examine previously submitted AAPs for presence of unlawful discrimination and whether OFCCP should take investigation/enforcement actions or refer to other agencies for investigation/enforcement
 - Autopsy of legality of OFCCP’s actions and regulations in light of Supreme Court cases addressing powers of and deference to administrative agencies and affirmative action in higher education
 - Identify entities for civil compliance investigations into unlawful DEI per EO 14173
 - Review statutory authority of Section 503 and VEVRAA
- America First Legal Letter to DOL – February 14

ONGOING FEDERAL OBLIGATIONS

- Executive Order 14173
 - Certifications
 - Investigations
- Veterans and Individuals with Disabilities AAPs
- EEO-1s and VETS-4212s
 - EEOC submitted for approval a “non-substantive” change to the instructions for 2024 EEO-1s
 - Removes guidance regarding voluntary option to report on non-binary employees
 - Instruction Booklet continues to reference federal contractors, OFCCP, and EO 11246 and its implementing regulations
 - Instruction Booklet identifies May 20, 2025 data collection open date and June 24, 2025 filing deadline
 - Unclear what to make of EEOC’s submission

STATE LAWS

- Affirmative action
- Equal employment opportunity
- Employment and compensation data filings
- Pay transparency

SELF-IDENTIFICATION OF GENDER/RACE/ETHNICITY

- New Hires
 - EEO-1s
- Applicants
 - Requirements of other laws
 - Adverse impact analysis
 - False Claims Act certification
 - Defend discrimination allegations, including those alleging unlawful DEI
- Language indicating reasons for solicitation should not be tied to Executive Order 11246 or its implementing regulations

EEOC/DOJ GUIDANCE ON “UNLAWFUL” DEIA (Slide 1 of 2)

- EEOC DEI at Work Poster and DEI-Related Discrimination at Work FAQs – Issued March 19
- Illegal DEIA
 - Disparate treatment in:
 - Hiring
 - Firing
 - Promotion
 - Demotion
 - Compensation
 - Fringe benefits
 - Access to or exclusion from training (including training characterized as leadership development programs)
 - Access to mentoring, sponsorship, or workplace networking / networks
 - Internships (including internships labeled as “fellowships” or “summer associate” programs)
 - Selection for interviews, including placement or exclusion from a candidate “slate” or pool
 - Job duties or work assignments

EEOC/DOJ GUIDANCE ON “UNLAWFUL” DEIA (Slide 2 of 2)

- EEOC DEI at Work Poster and DEI-Related Discrimination at Work FAQs (continued)
 - Illegal DEIA (continued)
 - Limiting membership in ERGs or employee affinity groups
 - Separating employees based on race, sex, or another protected category
 - Harassment
 - DEI training messaging
- Attorney General February 5 Memorandum
 - Footnote: “This memorandum is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. It does not prohibit educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.”
- “Blue State” Attorney Generals Guidance on DEIA Employment Initiatives – February 13

FORMER EEOC OFFICIALS ON LAWFUL DEIA

- March 19 guidance fails to specify what DEI programs are lawful
- Having an interest in diversity is lawful and can and is done without illegal preferences
- Diversity training very unlikely to create a hostile work environment and rarely singles out specific groups of criticism
 - No guidance about lawful diversity training and specific things to avoid
- Employee Resource Groups
- Expanded recruiting initiatives
- Collecting workforce data and running equal employment opportunity barrier analyses

OBLIGATIONS UNDER EXECUTIVE ORDER 11246 DO NOT VIOLATE FEDERAL ANTI-DISCRIMINATION LAW

- Placement Goals (41 CFR « 60-2.16(e)):

- In establishing placement goals, the following principles also apply:

- (1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.
 - (2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.
 - (3) Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.
 - (4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

- In-Depth Analysis (41 CFR « 60-2.17(b))

- Personnel Activity
 - Compensation Systems

CONTRACTOR CERTIFICATION

- That compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of the False Claims Act
- It does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws

FALSE CLAIMS ACT

“Two essential elements of an FCA violation are (1) the falsity of the claim and (2) the defendant’s knowledge of the claim’s falsity.”
United States et al. Ex Rel. Schutte v. Supervalu, Inc., 143 S.Ct. 1391, 1394 (2023).

- Knowledge (based on subjective beliefs)
 - Actual Knowledge
 - Deliberate Ignorance
 - Reckless Disregard

See id.

REVIEW OF DEIA PROGRAMS (slide 1 of 2)

- Assessing from three perspectives
 - Ensuring all initiatives are lawful
 - Assessing risks to the organization
 - Risk don't flow in one direction; retreating from DEI initiatives may have negative ramifications vis-à-vis customers, recruiting, employees, workforce morale
 - Programs that are likely lawful will be targets of federal, state, and private party anti-DEI initiatives
 - Determining organization's core values
- Recommended that it be done under privilege
- Time is of the essence
 - April 21
 - Publicly available information probably already being scrutinized

REVIEW OF DEIA PROGRAMS (slide 2 of 2)

- Areas for review:

- Language
- Participation in third-party diversity initiatives
- Internal website and communications
- External website and communications
- SEC filings, annual reports / quarterly statements, ESG programs
- Employee resource/affinity groups
- Internships, trainings, and other “diversity” employment programs
- Diverse slates and preferences for “diverse” candidates
- Performance evaluations and bonuses tied to diversity metrics
- Documents, policies, clauses, and language explicitly tied to Executive Order 11246 and its implementing regulations
- Adverse impact and other data analyses
- Messaging

UPCOMING ROFFMAN HORVITZ DIRECTEMPLOYERS PRESENTATIONS

- Webinar – May 9 – State Laws Relevant to Contractor Employers
- DEAMcon – May 21 – Federal Contractor Compliance Under Executive Order 14173

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**THANK
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