

# RESCISSION OF EXECUTIVE ORDER 11246

What It Means and What It Doesn't  
Mean for Federal Contractor Employers

What We Know and What We Don't  
Know

DirectEmployers Association

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# MEET THE TEAM



**JOSHUA S. ROFFMAN**

MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. His practice focuses primarily on advising and overseeing the preparation of affirmative action plans, conducting privileged pay equity analyses, and representing clients in various matters before the Office of Federal Contract Compliance Programs (OFCCP).



# 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 representing clients in various matters before the OFCCP, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, and conducting live and in-person training seminars on OFCCP compliance.



# MEET THE TEAM



**JAMES M. MCCAULEY**

ASSOCIATE ATTORNEY

James McCauley is an Associate Attorney with Roffman Horvitz. James's experience includes creation and review of affirmative action plans, preparation of EEO-1, VETS-4212, and CA Pay Reporting employment data, pay equity analyses, and analysis of applicant and hire records to address potential claims of hiring disparities.

# OUTLINE

- President Trump's Executive Order
- Rescinded Federal Obligations
- Remaining Federal Obligations
- Job Listings and Outreach
- Employee/Applicant Self-Identification
- OFCCP's Future Role
- Status of OFCCP Initiatives
- Construction Employers – Direct vs. Federally-Assisted
- State Laws
- Gender Identity
- Revising Policies, Procedures, Taglines, and Statements
- “Unlawful” DEI
- Lawful EEO and Nondiscrimination Efforts
- Adverse Impact and Selection Procedure Validation
- The Future of Employment Data Analysis
- Language and Messaging
- Legal Advice and Attorney-Client Privilege

# PRESIDENT TRUMP'S EXECUTIVE ORDER (1 of 3)

- “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 DEI A] that can violate civil-rights laws in this Nation”
- Terminate DEI within Federal government
  - New Executive Order “Ending Radical and Wasteful Government DEI Programs and Preferencing”
- Rescind Executive Order 11246



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

- 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)

- Encouraging private sector to end illegal DEI discrimination and preferences
- All agencies identify within 120 days:
  - 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



# RESCINDED FEDERAL OBLIGATIONS

- Affirmative Action Plans for Women And Minorities
  - Placement goals
  - 41 CFR 2.17 obligations
    - Identification of problem areas by evaluating:
      - Selection disparities (hires, promotions, terminations, and other personnel actions)
      - Analysis of compensation systems for gender-, race-, or ethnicity-based disparities
    - Action-oriented programs
    - Internal audit and reporting
  - Sex and race/ethnicity invitations to self-identify
  - Internet Applicant

# REMAINING FEDERAL OBLIGATIONS

- VEVRAA and Section 503
  - Veterans hiring benchmark (VEVRAA)
  - Disability utilization goals (503)
  - Data collection analysis (both)
  - Invitations to self-identify
    - Pre-offer (both)
    - Post-offer (both)
    - 5-year employee resurvey (503)
  - Documentation and written assessment of outreach and positive recruitment efforts (both)
  - Job listings (VEVRAA)
  - Review of personnel processes (both)
  - Physical and mental qualifications (both)
  - Reasonable accommodations (both)
- EEO-1 / EEO-4 / IPEDS
- VETS-4212

# JOB LISTINGS AND OUTREACH

- Still Required:
  - List all employment openings with the appropriate employment service delivery system (VEVRAA)
  - Request priority veteran referrals (VEVRAA)
  - Undertake outreach and positive recruitment activities reasonably designed to effectively recruit protected veterans and individuals with disabilities (both)
  - Document all outreach and positive recruitment efforts (both)
  - Review efforts annually and assess the effectiveness of each effort (both)



# EMPLOYEE/APPLICANT SELF-IDENTIFICATION

## (1 of 2)

- VEVRAA (Protected Veterans)
  - Pre-offer
  - Post-offer
  - Follow requirements at 41 CFR 60-300.42
- Section 503 (Individuals with Disabilities)
  - Pre-offer
  - Post-offer
  - Workforce resurvey at least every 5 years
  - Must use form developed by DOL/OFCCP

# EMPLOYEE/APPLICANT SELF-IDENTIFICATION

## (2 of 2)

- Gender/Race/Ethnicity
  - New Hires
    - EEO-1s
  - Applicants (?)
    - Required by other laws?
    - Possible to adjust timing of solicitation
      - Internet Applicant definition tied to Executive Order 11246 regulation
    - Needed for adverse impact analysis
    - Could potentially be needed for requirements under this new Executive Order
    - Potentially useful to defend discrimination allegations, including those alleging unlawful DEI
- Language indicating reasons for solicitation may need to be updated

# OFCCP'S FUTURE ROLE

- Will the “Ending Radical and Wasteful Government DEI Programs and Preferencing” Executive Order’s purge of government DEI personnel include OFCCP personnel?
- Still responsible for VEVRAA and Section 503 compliance
- Role in monitoring/investigating unlawful DEI programs?
- Contractor certification portal
- Regulations under President Trump’s Executive Order?



# STATUS OF OFCCP INITIATIVES

- Executive Order 11246 investigative and enforcement activities ended
- VEVRAA and Section 503 investigations and enforcement activities on hold pending further guidance

# CONSTRUCTION EMPLOYERS – DIRECT VS. FEDERALLY-ASSISTED

- There are two bases for affirmative action obligations for construction employers
  - Direct federal contracts or subcontracts
  - Federally-assisted federal contracts or subcontracts
- All EO 11246 requirements are gone
- VEVRAA
  - Applies only to direct federal contracts/subcontracts of \$150,000 or more
- Section 503
  - Applies only to direct federal contracts/subcontracts
    - \$15,000 – Equal opportunity/nondiscrimination requirements
    - \$50,000 – Affirmative action requirements

# STATE LAWS

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



# GENDER IDENTITY

- New Executive Order - “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”
- *Bostock v. Clayton County* (2020)
  - Discrimination on the basis of sexual orientation and gender identity unlawful under Title VII prohibition of discrimination “because of sex”
- State laws

# REVISING POLICIES, PROCEDURES, TAGLINES, AND STATEMENTS

- Equal opportunity clauses needs to remove references to EO 11246 and 41 CFR 60-1.4
  - Also 41 CFR 60-4.3 for federally assisted construction contractors
  - Must maintain references to VEVRAA, Section 503, 41 CFR 60-300.5, and 41 CFR 60-741.5
  - If want/need to have equal employment opportunity for other categories (race, color, religion, sex, sexual orientation, gender identity, national origin, etc.) in purchase orders and contracts, may want to include in a separate clause from the clause referencing VEVRAA and Section 503
- EEO tagline/statement for employee solicitations or advertisements
  - Do not need to use exact language or categories prescribed by OFCCP regulations
  - VEVRAA and Section 503 regulations require explicit references
    - “equal employment opportunity, including veterans and individuals with disabilities”
- Signed affirmative action plan policy statement
- Posters/Notices
- May comply with EO 11246 regulations for 90-day period (until April 21, 2025)
  - Have all statements and policies updated by that date
- External and internal websites with specific diversity metrics and statements
- Are leaders evaluated in performance reviews on commitment to equal employment opportunity (lawful) or diversity (careful)?

# “UNLAWFUL” DEI

NOTHING MANDATED UNDER EXECUTIVE ORDER 11246 OR ITS  
IMPLEMENTING REGULATIONS WAS OR IS UNLAWFUL UNDER  
TITLE VII

- So, what is unlawful?
  - Making hiring, promotion, placement, termination, selection for interview, and other employment decisions based on sex, race, ethnicity, and other categories protected by Title VII
  - Set asides (probably)
  - Diverse slates (probably)
  - Programs available to one specific gender, race, ethnicity, etc.
  - Rooney rule (probably)
  - Mansfield rule (probably)



# LAWFUL EEO AND NONDISCRIMINATION EFFORTS

## (1 of 2)


- Targeted recruiting that does not mandate specific composition of applicant pool, interview slates, or hires
- Analysis of hires, promotions, placements, terminations, and other selection decisions and employee compensation to ensure equal employment opportunity, nondiscrimination, and meritocracy
- Make sure initiatives, programs, affinity groups are open to everyone; not just a specific sex, race, or ethnicity category

# LAWFUL EEO AND NONDISCRIMINATION EFFORTS

## (2 of 2)

- OFCCP-type placement goals used as specified in OFCCP regulations (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.”

# ADVERSE IMPACT AND SELECTION PROCEDURE VALIDATION

- UGESP (1978)
  - 41 CFR Part 60-3 (Public Contracts and Property Management / OFCCP)  

  - 29 CFR Part 1607 (Labor / EEOC)
- SIOP Principles (2018)
- Title VII
  - Disparate treatment, pattern and practice
  - Disparate impact (Civil Rights Act of 1991)
- State and local laws

# THE FUTURE OF EMPLOYMENT DATA ANALYSIS

- Title VII / UGESP / state and local laws
- More flexibility for employers
  - No longer done in context of OFCCP regulatory requirements
    - Flexibility on definition of applicants
    - Sex/race/ethnicity analyses no longer need to be linked to AAP job groups
- Use to ensure EEO/non-discrimination
- Use to ensure/defend that employer doesn't have "unlawful" DEI programs
- Advisable (even more so now) to do under attorney-client privilege
  - Not derived from requirements of federal regulations
  - Protection from targeting of DEI initiatives



# LANGUAGE AND MESSAGING

- Reconsider use of acronyms
- Evaluate pros and cons of changing message
- Better terminology
  - Meritocratic / meritocracy
  - Equal employment opportunity
  - Nondiscrimination
- Make sure everyone feels included
  - Programs intended to benefit all employees; not limited to one sex, people of color, or LBGTQ+
  - Affinity groups only for “diverse” employee constituencies to the exclusion of groups for male and white employees?
- Branding matters, now more than ever

# LEGAL ADVICE AND ATTORNEY-CLIENT PRIVILEGE

- Updating existing DEI programs, including program names
  - Meritocracy, equal employment opportunity, nondiscrimination
  - Ensure initiatives are all within Title VII requirements and don't overreach into preferences or exclusions
- Training on proper equal employment opportunity practices and refined (no longer called) DEI initiatives with updated messaging
- Performing equal employment opportunity analytics under privilege and with the advice of counsel
  - Can still do all of the EO 11246 analyses
  - If no longer mandatory, option to do all of it under privilege
- Pay equity (meritocratic, nondiscrimination)
- Legal advice for and partnering with non-lawyer data analytics consultants

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THANK  
YOU