

SIX MONTHS IN – CURRENT STATUS AND LATEST DEVELOPMENTS RELATED TO EEO AND DEI COMPLIANCE

DirectEmployers Association

ROFFMAN HORVITZ, PLC
LEGAL COUNSELING
HUMAN RESOURCES COMPLIANCE AND EMPLOYMENT DATA ANALYTICS

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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

- Executive Order 14173 Implementation
- Contractor Certification and False Claims Act
- EEOC/DOJ Guidance on “Unlawful” DEIA
- OFCCP Voluntary Portal Submission – EO 11246 Wind Down and EO 14173 Compliance
- Regulatory Activity
- OFCCP and DOL
- EEOC
- Anti-DEI Activity

EXECUTIVE ORDER 14173 IMPLEMENTATION

EXECUTIVE ORDER 14173 TIMELINE

- January 21, 2025: Executive Order Issued
- April 21, 2025: End of permissive compliance period when government contractor employers were allowed to comply with Executive Order 11246 and the regulatory scheme in effect on January 20, 2025
- May 21, 2025: Deadline for Attorney General to submit a report containing recommendations for appropriate measures to encourage the private sector to end illegal discrimination and preferences

MAY 21 ATTORNEY GENERAL'S REPORT

- Directed to identify:
 - Key sectors of concern within each agency's jurisdiction
 - The most egregious and discriminatory DEI practitioners in each sector
 - A plan to deter DEI programs that constitute illegal discrimination (next slide)
 - Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil rights laws
 - Litigation that would be appropriate for federal lawsuits, intervention, or statements of interest
 - Potential regulatory action and sub-regulatory guidance.

PLAN TO DETER ILLEGAL DEI

- All agencies to 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

CONTRACTOR CERTIFICATION AND FALSE CLAIMS ACT

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.

DOJ CIVIL RIGHTS FRAUD INITIATIVE

- May 19, 2025 Deputy Attorney General Memo
- Utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws
- Will be co-led by the Civil Division's Fraud Section, which enforces the False Claims Act, and the Civil Rights Division, which enforces civil rights laws
 - Each division will identify a team of attorneys to aggressively pursue this work together
 - Each of the 93 United States Attorney's Offices will identify an Assistant United States Attorney to advance these efforts
 - Will engage with the Criminal Division, as well as with other federal agencies that enforce civil rights requirements for federal funding recipients, including the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Labor
 - Will establish partnerships with state attorneys general and local law enforcement to share information and coordinate enforcement actions
- Encouragement of private party qui tam action under the False Claims Act

EEOC/DOJ GUIDANCE ON "UNLAWFUL" DEIA

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

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

OFCCP VOLUNTARY PORTAL SUBMISSION – EO 11246 WIND DOWN AND EO 14173 COMPLIANCE

OFCCP VOLUNTARY PORTAL SUBMISSION

- OFCCP Director Eschbach Letter to Federal Contractors – June 27, 2025
- Contractors can (it's voluntary) provide information in Contractor Portal about:
 - their efforts to wind down compliance with the EO 11246 regulatory scheme and ensure full compliance with the Nation's non-discrimination laws
 - what actions they have taken in response to EO 14173
- Deadline for voluntary submissions is 90 days from June 27 or September 25, 2025
- Construction employers were not in the portal previously
- Regulations expressly forbade use of race and sex preferences, so what is there to unwind?

OFCCP VOLUNTARY PORTAL SUBMISSION UNWINDING PROMPTS

- Making trainings, sponsorship programs, leadership development programs, educational funding, or other privileges of employment available only to employees of a certain race or sex;
- Placement goals that were based on race or sex;
- Ratings by diversity organizations that graded employers on factors that included the provision of resources designed to promote the rise of non-white, non-male employees
- Using applicants' or employees' participation in race- or sex-related (internal and external) groups or organizations as a "plus factor" or proxy for race or sex in employment and hiring decisions;
- Tying executive compensation to meeting race- or sex-based hiring, promotion, retention, representation, or other employee-demographic-related goals;
- Mandating courses, orientation programs or trainings that are designed to emphasize and focus on racial stereotypes; and
- Encouraging employees to make recruitment efforts or employment referrals of certain candidates based on race or sex

REGULATORY ACTIVITY

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REGULATORY ACTIVITY

- [Interim Final Rule Implementing EO 14173](#) (FAR Council)
 - Submitted to OIRA on April 15, 2025
 - Opportunity to request a meeting
 - There have been 7 meetings
 - Most recent one with former OFCCP Director Craig Leen on July 2
- Proposed rescission of EO 11246 Regulations (OFCCP)
- Proposed revision of the VEVRAA Regulations, principally to remove cross references to the enforcement provisions previously set out in the EO 11246 regulations (OFCCP)
- Proposed revision of the Section 503 Regulations to eliminate the collection of disability self-identification data from applicants and employees, to eliminate the disability utilization analysis, and to remove cross references to the enforcement provisions previously set out in EO 11246 regulations (OFCCP)

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OFCCP AND DOL

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OFCCP – STATUS OF AGENCY AND ITS INITIATIVES (Slide 1 of 4)

- 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 Were Closed in January

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OFCCP – STATUS OF AGENCY AND ITS INITIATIVES (Slide 2 of 4)

- Secretary's Order 08-2025 – July 2
 - Lifts the abeyance, allowing OFCCP to resume processing complaints filed under Section 503 and VEVRAA
 - Administratively closes all pending compliance reviews
 - VEVRAA and Section 503 components
 - Confirms that OFCCP will take no further action related to the scheduling list that OFCCP released in November 2024
 - Section 503 and VEVRAA affirmative action plan certification period remains closed
 - Renews Veterans Affairs Health Benefits Program enforcement moratorium until May 7, 2027

OFCCP – STATUS OF AGENCY AND ITS INITIATIVES (Slide 3 of 4)

- 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 – STATUS OF AGENCY AND ITS INITIATIVES (Slide 4 of 4)

- March 24 Director Eschbach Internal OFCCP
 - 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

SECRETARY OF LABOR'S BUDGET PROPOSAL FOR FY26

- The FY 2026 Department of Labor budget proposes to eliminate OFCCP. The OFCCP section may be found [here](#).
- Rescission of EO 11246, permanently removing the primary basis for OFCCP's enforcement authority and program work.
- The Budget transfers enforcement of VEVRAA to Veterans Employment Training Service (VETS) and enforcement of Section 503 of the Rehabilitation Act of 1973 to EEOC.

EEOC

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STILL NO QUORUM

- Kalpana Kotagal
 - Democrat, Biden appointee
 - Assumed office on August 9, 2023
 - Term expires on July 1, 2027
- Andrea Lucas
 - Republican, Trump appointee
 - Assumed office on October 19, 2020
 - Made Acting Chair on January 20, 2025
 - Current term was scheduled to expire on July 1, 2025
 - Renominated on March 24, 2025 for term that expires July 1, 2030
 - Advanced by Senate HELP Committee on June 26, 2025
 - Awaiting confirmation by full Senate
- Brittany Panuccio
 - Republican, Trump nominee
 - Nominated by President Trump on May 6, 2025 for term that expires on July 1, 2029
 - Senate HELP Committee hearing held on July 16, 2025
 - Awaiting committee vote

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ACTING EEOC CHAIR ANDREA LUCAS STATEMENT ABOUT THE USE OF STATISTICAL EVIDENCE IN PURSUING UNLAWFUL DEI – MAY 7, 2025 POST ON X

“[E]mployers should take care not to conflate disparate impact claims arising from neutral employment practices with a materially different type of Title VII claim: intentional discrimination claims proven via the “pattern or practice” model of proof first set out by the Supreme Court in *Teamsters v United States*, which may entail the use of statistical evidence, along with other evidence, to prove disparate treatment.

“The Commission will continue to relentlessly combat unlawful patterns or practices of intentional discrimination in violation of Title VII, including race and sex discrimination that may arise from DEI programs and national origin discrimination involving anti-American bias.”

ANTI-DEIA ACTIVITY

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) >=\$100,000 in pro bono work for causes advocated by the Trump administration
- At least one firm (Goodwin Procter) submitted a substantive response. 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
- 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
- Georgetown Law School – DC US Attorney
- California University System – DOJ
- University of Virginia – DOJ
- George Mason – DOJ + ED
- Johns Hopkins Medical School – America First Legal

ANTI-DEIA ACTIVITY – OTHER

- FCC Letters to Comcast / NBCUniversal (February 11) and Disney / ABC (March 27) about Promotion of DEI
- Blocking mergers and acquisitions of business “promoting invidious forms of DEI discrimination”
 - Verizon
 - T-Mobile
 - Paramount/CBS
- HHS Solicitation of whistleblowers to provide information about discriminatory DEI – July 7

FINAL THOUGHTS

UPCOMING ROFFMAN HORVITZ DIRECTEMPLOYERS WEBINAR

- August 13 – Getting Ahead of the Developing Regulation of the Use of Artificial Intelligence Tools in Employment

- Registration Link:

https://directemployers.zoom.us/webinar/register/WN_L_kLua1ATee2KrdyALqrcw

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THANK
YOU

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