

DEIA DEVELOPMENTS WEBINAR SERIES

Webinar #1

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

**JOSHUA S. ROFFMAN
ALISSA A. HORVITZ
JAMES M. MCCAULEY**

MARCH 28, 2025

1

1

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.

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

2

2

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
 - Rescinded Federal Obligations
 - Remaining Federal Obligations
- Other Executive Orders and White House Proclamations
- Rescinded Executive Orders
- OFCCP
 - Leadership
 - Status of OFCCP and Its Initiatives
 - OFCCP's Future Role
- Litigation Activity
- Anti-DEIA Activity
 - Federal Agencies
 - Law Firms
 - Educational Institutions
 - Large "Brand Name" Employers
- EEOC/DOJ Guidance on "Unlawful" DEIA
- Contractor Certification and False Claims Act

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
 - New Executive Order "Ending Radical and Wasteful Government DEI Programs and Preferencing"
- Rescind Executive Order 11246

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:
 - 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 60-2.17 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

OTHER EXECUTIVE ORDERS AND WHITE HOUSE PROCLAMATIONS (Slide 1 of 2)

- 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 2)

- 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
- 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
- Presidential Proclamation – March 27 – Restoring Truth and Sanity to American History

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
- EO 14035 – 2021 – Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce

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
- Prior Acting Officials
 - Acting Secretary of Labor – Vincent Micone
 - Acting OFCCP Director – Michael Schloss

OFCCP – STATUS OF AGENCY AND ITS INITIATIVES

- 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 – FUTURE ROLE (Slide 1 of 3)

- 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

OFCCP – FUTURE ROLE (Slide 2 of 3)

- 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 – FUTURE ROLE (Slide 3 of 3)

- 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

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

LITIGATION ACTIVITY

• National Association of Diversity Officers in Higher Education (NADOHE) v Trump – Maryland Federal District Court

- February 21 – Nationwide preliminary injunction on the termination provision of EO 14151 and the certification and enforcement threat provisions of EO 14173
- February 27 – Government appeals preliminary injunctions to 4th Circuit
- March 3 – District court denies motion to stay of injunction pending appeal
- March 14 – District court emergency status conference regarding government non-compliance with injunction
- March 14 – Fourth Circuit stays preliminary injunction

• Chicago Women in Trades v Trump – Illinois Federal District Court

- March 27 – Preliminary injunction on the termination provision of EO 14151 and certification provision of EO 14173
 - Injunction limited to Department of Labor
 - Nationwide injunction on the certification provision vis-à-vis any grantor or contractor
 - Injunction on termination provision only as to Chicago Women in Trades

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

- 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.”

- 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

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

ANTI-DEIA ACTIVITY – LARGE “BRAND NAME” EMPLOYERS

- FCC Letter to Comcast about Promotion of DEI – February 11
 - Looking to shut down any programs that “promote invidious forms of DEI discrimination”
 - Letter doesn’t point to anything that is unlawful under antidiscrimination laws
- 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

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

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.

ROFFMAN HORVITZ, PLC
LEGAL COUNSELLING
ROFFMAN HORVITZ, PLLC is a professional corporation.

JOSHUA S. ROFFMAN

Managing Attorney
(703) 752-3775
jroffman@roffmanhorvitz.com

ALISSA A. HORVITZ

Member Attorney
(703) 752-3776
ahorvitz@roffmanhorvitz.com

JAMES M. MCCAULEY

Associate Attorney
(703) 752-3766
jmccauley@roffmanhorvitz.com

THANK
YOU