

WHAT TO MAKE OF EXECUTIVE ORDER 14398 AND THE DOJ'S SETTLEMENT WITH IBM

DirectEmployers Association

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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.

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



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James McCauley is Of Counsel 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.

TOPICS

- Executive Order 14398
- Department of Justice Settlement with IBM
- Proposed System for Award Management Certification for Federal Grant Recipients
- Status of VEVRAA and Section 503

EXECUTIVE ORDER 14398

HIGHLIGHTS

- Targets “racially discriminatory DEI activities”
- Applies only to contractors and subcontractors; does not apply to recipients of federal financial assistance
- Implements contract-focused enforcement mechanism
- Specifies aggressive implementation timeline
- Builds on Administration’s most effective strategies in achieving DEI retreat
- Addresses areas that have hindered implementation of the Administration’s anti-DEI agenda

“RACIALLY DISCRIMINATORY DEI ACTIVITIES”

- 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.
- “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.

OBSERVATIONS ABOUT THE DEFINITION

- More precise than EO 14173
 - EO 14398: “disparate treatment based on race or ethnicity” vis-à-vis “recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity's resources.”
 - EO 14173: “any programs promoting DEI that violated any applicable Federal anti-discrimination law”
- Applies only to discrimination based on race or ethnicity
 - Does not include sex, religion, national origin, age, disability status, etc.
- Despite its name and the name of the EO, the definition does not include a qualifier limiting its application to DEI programs
 - Disparate treatment based on race or ethnicity; not merely “DEI” involving disparate treatment
- Definition is generally legally defensible

DISPARATE TREATMENT IN RECRUITMENT?

- Targeted recruiting to get an inclusive pool of candidates
 - As part of an overall recruiting strategy
 - To the exclusion of other recruiting strategies
- Priority consideration for interview, hire, etc.
- Programs, jobs opportunities, internships/mentorship for “diverse” candidates

THE SIX PARAGRAPH CONTRACT CLAUSE

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).

ENFORCEMENT MECHANISMS – CONTRACTING AGENCIES

- 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
- 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

ENFORCEMENT MECHANISMS – PRIME CONTRACTORS

- 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
- 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

ENFORCEMENT MECHANISMS – FALSE CLAIMS ACT

- “The contractor recognizes that compliance with the requirements of this clause are material to the Government’s payment decisions for purposes of . . . [the] False Claims Act.”
- 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
- Remedies
 - Treble damages
 - The damage to the government is payment on the false claim
 - Civil penalties
- Whistleblower incentives/awards

FALSE CLAIMS ACT REFRESHER

“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

31 U.S.C. § 3729(b)(1)

IMPLEMENTATION TIMELINE

- By April 25, 2026: executive departments and agencies are to ensure that the clause appears in contracts, including contractors' subcontracts and subcontractors' lower-tier 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
 - By contrast, EO 14173 did not have this same direction
 - No FAR clauses have been promulgated yet to implement the anti-DEI provisions of EO 14173
 - The only deviation issued related to EO 14173 was the removal of clauses tied to rescinded EO 11246
- By July 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

IMPLEMENTATION – MODEL DEVIATION ESTABLISHING NEW FAR CLAUSE 52.222-90

- [Model deviation](#) issued on April 17, 2026
- Added FAR clause 52-222.990
 - Clause is applicable to contracts and subcontracts at all tiers above the micro-purchase threshold (currently \$15,000).
 - Clause to be inserted into all new solicitations and resulting contracts with values over the micro-purchase threshold beginning April 24.
 - “[C]ontracting officers must make every effort to bilaterally modify existing contracts by July 24, 2026. If a contractor refuses to agree to a bilateral modification, the contracting officer should consider whether, absent the modification, the contract no longer meets the agency’s needs and should therefore be terminated for convenience.” Contracting officers have discretion on whether to modify contracts that expire by December 31, 2026.
 - The FAR clause adds a new paragraph (c), which explicitly requires the contractor as well as subcontractors to include the clause in subcontracts (i.e., flow down requirement): “The Contractor must include the substance of this clause, including this paragraph (c), in subcontracts at any tier, including those for commercial products and commercial services, for which the place of delivery or performance is in the United States.”
- Clauses have been added to the FAR sections on debarment and suspension to incorporate failure to comply with new FAR clause 52-222.90 as a basis for debarment or suspension.

IMPLEMENTATION – PROPOSED INFORMATION COLLECTION

- Published in [Federal Register](#) on May 6, 2026
- Seeking “clearance of a new information collection” to comply with Executive Order 14398
- Information collection relates to paragraphs 2, 4 and 5 of the six-paragraph contract clause:
 - 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.
 - 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.
 - 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.
- No information about the substance of the information collection
- Burden estimates:
 - 1,365 respondents; 6,825 total annual responses; 7,965 total burden hours
 - 1.176 hours per response; 16 hours of review time per response
- Have until July 6, 2026 to submit comments about the proposed information collection

COMPARISON TO ENFORCEMENT MECHANISMS UNDER RESCINDED EXECUTIVE ORDER 11246

- Executive Order 11246
 - Compliance reviews and complaint investigations from one central government agency within the Department of Labor
 - Resolved through negotiated 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
 - Last resort: seek contractor debarment
- Executive Order 14398
 - Oversight sits with each separate contracting agency and with each prime contractor
 - Risk of contract loss is the primary enforcement tool

COMPARISON OF EXECUTIVE ORDER 14398 TO EXECUTIVE ORDER 14173

- Contract-centered enforcement regime rather than exclusively reliant on the DOJ and False Claims Act
 - Enforcement by contracting agencies and prime contractors
 - Also includes a link to the False Claims Act
 - EO 14173 enforced by DOJ and whistleblowers (civil compliance investigations and False Claims Act)
- Unlike EO 14173, EO 14398 specifies an implementation timeline
 - Regulations implementing the two EO 14173 contract clauses still haven't been promulgated
- EO 14398 does not apply to grant recipients
- Narrower and more precise definition of unlawful activities

DESIGNED TO BE MAXIMALLY EFFECTIVE IN ACHIEVING DEI RETREAT (slide 1 of 2)

- Parallels the Administration's Most Effective Strategies
 - Leveraging dependency on regulatory approvals and oversight and exerting economic pressure to achieve DEI concessions/retreats (FCC)
 - EO 14398 puts the contracts themselves directly in play
 - Burdensome information requests
 - Secured settlements with some large law firms based on mere issuance of an information request
 - EEOC subpoena enforcement actions

DESIGNED TO BE MAXIMALLY EFFECTIVE IN ACHIEVING DEI RETREAT (slide 2 of 2)

- Moves Away from Areas That Have Proved Most Challenging in Implementing the Administration's Anti-DEI Agenda
 - Vague definition of unlawful DEI
 - Has been poorly received by courts
 - May be reason why promulgation of EO 14173 FAR clauses have been held up
 - Limitations from reliance on False Claims Act and EEOC charge investigations
 - 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

DEPARTMENT OF JUSTICE SETTLEMENT WITH IBM

SUMMARY

- First settlement under the Department of Justice’s Civil Rights Fraud Initiative
- \$17 million settlement with IBM announced on April 10 ([DOJ press release](#)) ([Settlement Agreement](#))
- Allegations resolved:
 - IBM took race, color, national origin, or sex into account when making employment decisions, including by using a diversity modifier that tied bonus compensation to achieving demographic targets.
 - IBM altered interview criteria based on race or sex through the use of “diverse interview slates” and other related employment practices in connection with identifying “diverse” candidates for hiring, transfer, or promotion
 - IBM developed race and sex demographic goals for business units and took race and sex into account when making employment decisions to achieve progress towards those demographic goals.
 - IBM offered certain training, partnerships, mentoring, leadership development programs and educational opportunities only to certain employees, with eligibility, participation, access or admission limited on the basis of race or sex.
- [LinkedIn post](#)

CIVIL RIGHTS FRAUD INITIATIVE

- Established pursuant to section 4 of Executive Order 14173– the original January 21, 2025 anti-DEI Executive Order
- [Announced](#) on May 19, 2025
- Department of Justice [memo](#):
 - “The False Claims Act is the Justice Department's primary weapon against government fraud, waste, and abuse.”
 - “It is implicated when a federal contractor or recipient of federal funds knowingly violates civil rights laws- including but not limited to Title IV, Title VI, and Title IX, of the Civil Rights Act of 1964 and falsely certifies compliance with such laws.”
 - “The False Claims Act is also implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin.”
 - “This Initiative will 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.”

OBSERVATIONS (1 of 2)

- Types of allegations resolved by the settlement offers a lens into what type of DEI initiatives the DOJ will pursue
- The “false claim”:
 - Certifying compliance with EO 11246’s equal opportunity clause—FAR clause 52.222-26
 - EO 11246 was rescinded on January 21, 2025 by EO 14173
 - The General Services Administration issued a class deviation on February 15, 2025, which struck FAR clause 52.222.26
- What? But the settlement was pursuant to a DOJ initiative established under the very Executive Order that eliminated that contractual obligation? What about the removal of the clause in February?
 - To this day, the government hasn’t implemented the EO 14173 contract clauses into the Federal Acquisition Regulation
 - Neither IBM or any other contractor has ever made a certification related to EO 14173
 - IBM did certify compliance with the EO 11246’s equal opportunity clause prior to its rescission
 - “The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.” FAR 52.222-26(c)(1).
 - Thus, the alleged fraudulent claim is that by having discriminatory DEI initiatives IBM knowingly violated that clause

OBSERVATIONS (2 of 2)

- Only one settlement under the Civil Rights Fraud Initiative / False Claims Act so far
 - EO 14173 was issued in January 2025
 - The Civil Rights Fraud Initiative was established in May 2025
- Per The Washington Post:

“[Associate Attorney General] Woodward said he is hopeful the Justice Department will reach similar resolutions with other companies, noting that the department has more than a dozen ongoing DEI-related False Claims Act investigations.” (Perry Stein, “Justice Department settles with IBM over alleged DEI practices,” *The Washington Post*, April 16, 2026)

**PROPOSED SYSTEM FOR
AWARD MANAGEMENT
CERTIFICATION FOR
FEDERAL GRANT
RECIPIENTS**

PROPOSED SAM REGISTRATION DEI CERTIFICATION (1 OF 3)

- System for Award Management (SAM) – Registration with system to be eligible to be a recipient of federal financial assistance
- Proposed DEI-related certification requirement in SAM for entities wishing to be eligible for **federal financial assistance**
 - [Published in Federal Register](#) on January 28, 2026
 - Supporting statement [webpage](#) and [download](#)
 - Comments were accepted through March 30, 2026

PROPOSED SAM REGISTRATION DEI CERTIFICATION (2 OF 3)

Certification Language:

“Will comply with the U.S. Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs (See Titles VI and VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and 2 C.F.R. § 200.303 Internal controls). Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) programs. Entities that receive federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race or color.”

PROPOSED SAM REGISTRATION DEI CERTIFICATION (3 OF 3)

Examples of practices that may violate applicable Federal anti-discrimination laws include:

- (i) Granting **preferential treatment** based on race or color, such as race-based scholarships or programs, preferential hiring or promotion practices, or access to facilities or resources based on race or ethnicity, including through the use of “cultural competence” requirements, “overcoming obstacles” narratives, or “diversity statements;”
- (ii) Segregation based on race or color, such as **race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility;**
- (iii) Other unlawful use of race or color as criteria, such as **race-based “diverse slate” policies in hiring, race-based selection for contracts, or race-based program participation or resource allocation;**
- (iv) **Training programs that stereotype, exclude, or single out** individuals based on protected characteristics or **create a hostile environment;** or
- (v) **Retaliation** by taking adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to **opposing DEI practices** they reasonably believe violate federal antidiscrimination laws. Protected activities **include raising concerns or filing complaints** about, or **objecting to or refusing to participate in,** discriminatory programs, trainings, or policies;” (emphasis added)

PROPOSED INFORMATION COLLECTION – SAM REGISTRATION NONDISCRIMINATION AND DEI CERTIFICATION – OBSERVATIONS

- Certifications mention only “unlawful discrimination on the basis of race or color”
 - No mention of gender (note Administration’s positions on segregating bathrooms and intimate spaces by sex; also religious freedom)
- Language goes well beyond Executive Order 14173 certification language
- “This revision modifies the Financial Assistance General Representations and Certifications to align with updated executive branch guidance including **DOJ Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination** and executive order 14173 applicable to all entities receiving grants, cooperative agreements, and financial assistance such as loans, insurance, and direct appropriations.” (emphasis added)

STATUS OF VEVRAA AND SECTION 503

PROPOSED FY 2027 DEPARTMENT OF LABOR BUDGET

- VEVRAA (veterans) and Section 503 (individuals with a disability) compliance will move to a new Office of Civil Rights within the Department of Labor
 - Budget of \$22,400,000
 - FTE headcount of 49
- [LinkedIn post](#)
- New OFCCP Director: Kenneth Wolfe
 - Has been and continues to be Director of DOL Center of Faith

REQUESTS FOR EXTENSION OF EXISTING CONTRACTOR OBLIGATIONS FOR VETERANS AND INDIVIDUALS WITH DISABILITIES

- [Notices](#) published in the Federal Register on April 23, 2026 regarding three-year renewal of the existing information collections related to VEVRAA and Section 503.
- The existing three-year approval was expiring on April 30, 2026
- Renewal request includes extending existing affirmative action plan obligations for protected veterans and individuals with disabilities and renewing the DOL's self-identification form for individuals with disabilities
- Written comments being accepted through May 26, 2026
- Month-to-month extensions pending completion of review by the Office of Management and Budget

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**THANK
YOU**