

# CLIENT ALERTS

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## Update on DEI Executive Orders' Impact on Federal Contractors and Grant Recipients

### Client Alert

2.26.2025

On January 21, 2025, President Trump signed Executive Order (EO) 14173, *"Ending Illegal Discrimination and Restoring Merit-Based Opportunity."* You can read more about it [here](#). EO 14173 targets "diversity, equity, and inclusion" (DEI) or "diversity, equity, inclusion, and accessibility" (DEIA) programs. It orders "all executive departments and agencies of the federal government to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements." As noted in a previous Butzel Client Alert, the impacts of EO 14173 on federal contractors and grant recipients are potentially significant.

Among other things, the order revokes EOs 11246 (1965 Equal Employment Opportunity), 12898 (1994 Environmental Justice), 13583 (2011 Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce), and 13672 (2014 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors). The EO also revokes the October 2016 Presidential Memorandum Promoting Diversity and Inclusion in the National Security Workforce. EO 14173 directs the Office of Federal Contract Compliance Programs (OFCCP), the agency tasked with enforcement of EO 11246, which required federal contractors to maintain affirmative action programs for women and minorities, to immediately cease: "(A) Promoting 'diversity'; (B) Holding Federal contractors and subcontractors responsible for taking 'affirmative action'; and (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin."

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## CLIENT ALERTS

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EO 14173 further required the head of each agency to include, in every contract or grant, a term requiring the contractor or recipient to agree that (1) its compliance with “Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code;” and (2) it will not “operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.” The former is particularly significant as it raises the potential for False Claims Act (FCA) liability for corporate DEI initiatives. The FCA imposes liability on those who defraud governmental programs.

Notably, EO 14173 did not restrict federal or private sector preferences for veterans of the U.S. armed forces or persons protected by the Randolph-Sheppard Act, 20 USC 107 et seq., which provides preferences for the blind to operate vending facilities on federal property. The EO also left intact the protections under Section 503 of the Rehabilitation Act, 29 U.S.C. 793 prohibiting employment discrimination on the basis of disability, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. 4212 prohibiting discrimination against return veterans.

At the time EO 14173 was issued, there were many details that remained to be answered. For example, what is the exact definition of a proscribed DEI program? If there are affirmative action clauses in an existing contract what happens to those clauses? What should a contractor do if there is a Federal Acquisition Regulation (FAR) clause in their contract that requires affirmative action reporting? How will OFCCP operate going forward? Under EO 14173, what type of actions would subject a contractor to potential FCA liability?

In the last few weeks, there have been some notable developments. First, on February 18, 2025, the U.S. General Services Administration (GSA) announced a class deviation from the (FAR), and ordered contracting officers not to include the following clauses in any new solicitations and contracts:

- 52.222-9, Apprentices and Trainees
- 52.222-21, Prohibition of Segregated Facilities
- 52.222-22, Previous Contracts and Compliance Reports
- 52.222-23, Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction
- 52.222-24, Preaward On-Site Equal Opportunity Compliance Evaluation
- 52.222-25, Affirmative Action Compliance
- 52.222-26, Equal Opportunity
- 52.222-27, Affirmative Action Compliance Requirements for Construction
- 52.222-29, Notification of Visa Denial

Further, the Class Deviation states as follows regarding GSA contracts: “As of February 15, 2025, FAR clauses and provisions covered under E.O. 11246, Equal Employment Opportunity, will no longer be enforced. Therefore, contractors and their subcontractors will not be held accountable for applying the FAR clauses or provisions outlined in FAR subpart 52.22.8 – Equal Employment Opportunity or the

## CLIENT ALERTS

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associated provisions and clauses prescribed at FAR 52.22.810.” Class Deviation CD 2025-04 Supplement 1 at 2. While this impacts only GSA contracts, other agencies are expected to follow suit.

In another development, on Thursday, February 21, 2025, the U.S. District Court for the District of Maryland, in *National Association of Diversity Officers in Higher Education, et al. v. Trump*, Case No. 1:25-cv-00333-ABA (D. Md. Feb. 21, 2025), granted a nationwide preliminary injunction, blocking, in part, EO 14172 and EO 14151, “*Ending Radical and Wasteful Government DEI Programs and Preferencing*.” The latter ordered agencies to terminate all “equity related” contracts and grants within 60 days. Notably, the Court observed that the Orders in question failed to define key, operative terms such as “DEI” leaving contractors, whose employees comprise “approximately 20% of nation’s labor work force,” with “no idea whether the administration will deem their contracts or grants, or work they are doing, or speech they are engaged in, to be ‘equity-related’.” And in issuing its injunction, the Court determined that the plaintiffs had demonstrated a likelihood of success on the merits in showing that the certification provision discussed above constitutes an impermissible content-based restriction under the First Amendment. The Judge also determined the termination provision of EO 14151 to be unconstitutionally vague.

Given the serious constitutional questions raised by the Court’s order, along with the extent to which the Trump administration has seemingly prioritized this issue, an appeal is anticipated. Thus, it may be some time before federal contractors and grant recipients get much needed clarity regarding the scope of their obligations under the DEI Executive Orders discussed here.

The Butzel Aerospace and Defense Industry Team will continue to monitor the developments as they progress. In the meantime, please reach out to the authors of this Client Alert or your Butzel attorney for further information.

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