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The Status of Affirmative Action and DEI Programs for Federal Contractors

On January 21, 2025, President Trump issued Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" ("EO" or "Order"), which significantly alters affirmative action obligations and requirements for federal contractors and grant recipients. The EO requires federal agencies and recipients of federal funds to terminate all Diversity, Equity, and Inclusion ("DEI") programs and policies and certify compliance with federal anti-discrimination laws.

The EO is currently subject to review in the federal courts. On February 21, 2025 the U.S. District Court for the District of Maryland issued a preliminary injunction blocking the enforcement of certain portions of the EO, finding them unconstitutionally vague and in violation of the First Amendment. That decision has been appealed to the U.S. Court of Appeals for the Fourth Circuit which, on March 14, 2025, stayed the district court's preliminary injunction while the appeal is pending and ordered an expedited briefing schedule for the full appeal. As a result, the Trump administration may enforce the EO while the litigation continues.

Key Provisions and Compliance Obligations

The EO revokes Executive Order 11246, titled "Equal Employment Opportunity," which was issued by President Johnson in 1965, and which required affirmative action and prohibited discrimination by federal contractors and subcontractors. President Trump's EO specifically states that it does not apply to federal or private-sector employment and contracting preferences for veterans or people with certain disabilities protected under the Randolph-Sheppard Act.

Under the new EO, federal contractors and subcontractors must eliminate their affirmative action programs no later than April 21, 2025. Additionally, the EO mandates that all federal contracts and grants include terms requiring all federal contractors and grant recipients to certify that (A) their "compliance in all respects with all applicable Federal anti-discrimination laws is material to" their receipt of money from the federal government, and (B) they do "not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." Failure to comply with the EO opens federal contractors to potential liability including, but not limited to, suspension or debarment from doing business with the federal government, civil penalties under the False Claims Act ("FCA"), and loss of federal funds.

The Legal Challenge

On February 3, 2025 the city of Baltimore and higher education groups filed a lawsuit in the U.S. District Court for the District of Maryland arguing the EO is vague and unconstitutional. On February 21, 2025 the district court entered a nationwide preliminary injunction blocking the enforcement of certain provisions of the EO aimed at DEI initiatives but leaving other provisions in place. Specifically, the court blocked enforcement of the provision that requires federal agencies to terminate "equity-related grants or contracts," the provision that requires federal contractors and subcontractors to certify that

they do not operate unlawful DEI programs, and a provision directing the Attorney General to make "recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI."

On March 14, 2025 the Fourth Circuit granted the government's motion to stay enforcement of the district court's injunction. This decision was based in part on the government's argument that the EO is "limited in scope" to conduct that violates "existing" anti-discrimination laws. As a result, the federal government is free to enforce the EO while the Fourth Circuit considers the full merits of the appeal. Appellate briefing is currently scheduled to be completed in early May.

Implications for Federal Contractors

Although the EO currently remains subject to litigation, federal contractors and grant recipients should thoroughly review their DEI programs to determine whether any aspects could be interpreted as violating federal anti-discrimination laws. In addition, any affirmative action programs, initiatives or decisions involving hiring, promotion, discipline or any other terms, conditions or benefits of employment based on characteristics protected by federal law may now be vulnerable to legal challenge.

Noncompliance with the EO also could expose federal contractors to liability under the FCA, which is expressly cited in the Order. The FCA creates liability for anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." Federal contractors and grant recipients that certify their compliance under the EO but are later found to operate or promote non-compliant DEI programs could face liability under the FCA.

Takeaways

Federal contractors should closely monitor the legal landscape and conduct a comprehensive audit of their DEI policies, training programs and practices relating to hiring, promotion and compensation to assess compliance with the EO and federal anti-discrimination laws. In addition, federal contractors who also have contracts with state or local governmental authorities should plan to continue to comply with those contracts' affirmative action requirements.

If you have questions about how the EO affects your organization, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.kutakrock.com.