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New EO Targets "Racially Discriminatory DEI Activities" by Federal Contractors and Subcontractors

Law and the Workplace on **March 30, 2026**

Quick Hit: On March 26, 2026, President Trump signed an Executive Order titled "Addressing DEI Discrimination by Federal Contractors" (the "Order") which mandates the inclusion of a new clause (the "Clause") in all covered federal contracts and contract-like instruments prohibiting federal contractors from engaging in "racially discriminatory DEI activities." The Order directs agencies to enforce the Clause's requirements through contract cancellation, termination, or suspension, as well as debarment, and calls on the Attorney General to prioritize False Claims Act ("FCA") suits against noncompliant contractors.

As the Administration's Fact Sheet regarding the Order notes, the Order is the latest in a series of actions the Trump Administration has taken to curtail what it views as illegal diversity, equity and inclusion ("DEI") initiatives.

Key Takeaways: At first blush, the Order appears to do little more than formalize previous efforts to address contractors' DEI activities, primarily Executive Order 14173 ("EO 14173"). EO 14173 provides that federal contractors and grantees are required to certify that they did "not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws," and to "agree that … compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of" the FCA.

However, as detailed below, while the Order mirrors the concepts in EO 14173 and operationalizes and standardizes what seemed to be an inconsistent and uneven implementation effort regarding EO 14173, it also builds upon and increases the risks for federal government contractors who maintain race or ethnicity-related programs in several ways.

1. While the Order is narrower than EO 14173 in that applies only to race and ethnicity DEI programs (as opposed to all federally protected characteristics), EO 14173 did not define the term "DEI," leaving uncertainty as to what programs were covered. Further, EO 14173 only barred DEI programs that violated "Federal anti-discrimination laws" – a standard open to interpretation and largely limited to employment and, with respect to race, contracting activities. The Order, by defining prohibited "racially discriminatory DEI activities," does not carry forth this ambiguity, and it also expands the scope of activities that had been understood to be covered by EO 14173. The legality of the program is removed from the equation. All activities that treat individuals differently based on race or ethnicity are barred, and the prohibited activities extend beyond employment and contracting to include "program participation" and "allocation or deployment of an entity's resources."
2. The Order expands the scope of the DEI prohibition by implicating subcontractors, who were not addressed in EO 14173. While the Clause does not contain a "flow down" provision (though one may be added when the Clause is made part of the Federal Acquisition Regulation), it subjects contractors to obligations and consequences related to their subcontractors' activities. Specifically, contractors may lose contracts or be debarred for their subcontractors' "racially discriminatory DEI activities," are required to report any subcontractor violations of the Clause, and must inform the Government if a subcontractor sues the contractor over actions related to the Clause.
3. While EO 14173 focused on FCA liability, the Order expands the consequences for contractors. The Order makes clear that violations of the Clause can result in cancellation, suspension or termination of contracts, and contractor debarment – consequences not addressed in EO 14173. In addition, the Order instructs the Attorney General to prioritize consideration of FCA claims related to violations of the Clause.

So, while contractors were already subject to heightened risks regarding DEI initiatives prior to the Order, those risks, once they have contracts containing the Clause, will expand. As discussed below, contractors should take steps now to address the Order and the likelihood they will be subject to contracts with the Clause in the coming months.

Deeper Dive: The Order has two main components: (1) a new federal contract provision addressing "racially discriminatory DEI activities"; and (2) guidance regarding enforcement of the Clause.

The "Racially Discriminatory DEI Activities" Clause

The Order requires federal agencies, within 30 days of its issuance, to the extent permitted by law, to "ensure that contracts and contract-like instruments, including contractors' subcontracts and subcontractors' lower-tier subcontracts, include" a clause addressing "*racially discriminatory DEI activities*." "Racially discriminatory DEI activities" is defined as "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."

- **Limited to Race and Ethnicity.** Notably, as the term suggests, the activities regulated are limited to those based on race and ethnicity, and not other protected characteristics. Accordingly, DEI activities based on sex, gender identity and expression, national origin, and other protected characteristics that have been the focus of other Administration initiatives are not covered.
- **Limited to Disparate Treatment.** Further, consistent with the Administration's articulated view, the targeted activities are those involving "disparate treatment," and the Order does not address "disparate impact." In other words, the Order addresses programs that intentionally discriminate on the basis of race and ethnicity, and not those that may have an unintended race or ethnicity-based impact. Even so, contractors should be aware that the Administration has warned against using facially-neutral "proxies" to mask efforts aimed at race- or ethnicity-based decision-making.
- **Broad Scope of Covered Activities.** The activities covered extend beyond employment-related actions, such as hiring and promotions, to contracting, "program participation" and "allocation of resources." "Program participation" is defined as "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."

The Clause to be included in federal contracts is as follows:

"In connection with the performance of work under this contract, [the contractor/appropriate party (contractor)] agrees as follows:

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;"

    1. *This broad provision contemplates that agencies may seek information regarding compliance, which contractors will be contractually obligated to provide. Whether that becomes a common practice remains to be seen.*

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"

    1. *Items 3, 4 and 5 impose requirements and consequences on contractors for their subcontractors' violations of the clause. First, item 3 makes clear that the contractor can be held responsible for its subcontractors' DEI programs, and their prime contracts may be impacted as a result. Second, item 4 requires contractors to report to the Government any known or "reasonably knowable" conduct of subcontractors that may violate the Clause, as well as any efforts by subcontractors to bring legal action related to the Clause. Contractors who enter into contracts with the Clause must consider how to handle this provision, as it is unclear how the knowledge (or the "reasonably knowable") component of item 4 will be assessed – i.e., whose knowledge will be imputed to the contractor, or what will be considered "reasonably knowable."*

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)."

    1. *Item 6 adopts the same approach introduced in Executive Order 14173, making a clear statement intended to assist the Government or any qui tam relator bringing FCA claims based on a "racially discriminatory DEI activity." Accordingly, the potential consequences for violating the Clause include the FCA's treble damages, and individuals are incentivized to bring FCA claims on behalf of the government based on the Clause as qui tam relators. As discussed below, the Order contains a provision encouraging*

prompt consideration of qui tam actions by the Attorney General. For additional information about FCA liability in this context, please review our post: DEI and Government Contractors: A High-Stakes Shift.

The Federal Acquisition Regulatory Council ("FAR Council") is directed to amend the Federal Acquisition Regulation ("FAR") to include the Clause in federal procurement, solicitations, and contracts, and to remove any conflicting provisions in the FAR. The FAR Council is further directed to issue deviation and interim guidance within 60 days of the Order "regarding agency implementation of the" Clause prior to completion of the FAR amendments.

Enforcement

The Order, in its "Penalties" section, establishes a multi-layered enforcement framework for the Clause's requirements.

- The Director of the Office of Management and Budget ("OMB") is directed to issue guidance to contracting agencies to ensure compliance with the Order, which shall address the cancellation, termination, or suspension of contracts, and the taking of "appropriate action to suspend or debar contractors or subcontractors" for failure to comply with the Clause.
- The OMB Director is directed to "identify economic sectors that pose a particular risk of … engaging in racially discriminatory DEI activities based on current or past conduct, and issue additional guidance to contracting agencies regarding best practices to ensure compliance with [the Order] within such sectors."
- Each agency head must review the agency's implementation of the Clause within 120 days and report to the Assistant to the President for Domestic Policy regarding compliance. Agency heads must thereafter "regularly review and take appropriate measures to ensure such compliance."
- The Attorney General, in consultation with relevant contracting agencies, must "consider whether to bring actions under the False Claims Act against contractors or subcontractors that violate the clause," and to "ensure the prompt review of civil actions brought by private persons under 31 U.S.C. 3730(b)(1)" – the *qui tam* provision of the False Claims Act – "including by rendering a decision on whether to proceed with an action under 31 U.S.C. 3730(b)(4), to the maximum extent practicable, within the 60-day period described in 31 U.S.C. 3730(b)(2)."

As noted above, the Clause is drafted to facilitate and expedite FCA claims. This provision suggests that if a contractor is deemed to have violated the Clause the Attorney General must consider whether to initiate a claim under the FCA. Further, the Administration's Fact Sheet characterizes this provision as directing "the Attorney General to prioritize potential claims under the False Claims Act against contractors or subcontractors that are in violation" of the Clause.

What Should Federal Contractors Do Now?

As discussed above, while contractors have been subject to enhanced liability and risk regarding their DEI programs for over a year, the Order increases and expands these risks. While contractors will only be subject to these new requirements when they enter into contracts with the Clause, contractors must recognize that the Clause may not only be included in new contracts; it is possible that agencies could seek to modify existing contracts to add the Clause in the coming weeks and months.

Accordingly, contractors should be thinking about the Clause now and considering the following steps, in consultation with counsel to permit assertion of privilege to the greatest extent possible:

- **Review and assess DEI-related programs and policies, particularly those focused on race and ethnicity.** Federal contractors should promptly review (or re-review) their DEI-related policies, programs, training, mentoring, leadership development initiatives, and vendor relationships through the lens of the Order's definition of "disparate treatment based on race or ethnicity." The Clause implicates efforts that extend beyond what is commonly understood to be DEI. Contractors must consider the programs they participate in and how they allocate their resources in conducting this analysis.
- **Prepare for the new contract Clause.** Agencies are required to begin including the Clause in contracts within 30 days. Contractors should ensure that their employees involved in government contracting are aware of the Clause and identify contracts or contract modifications including the Clause *prior to* entering into such agreements.
- **Be aware of FCA exposure.** Contractors should be attuned to internal complaints about DEI efforts, as such complaints may constitute protected activity under the FCA's anti-retaliation provisions, creating additional liability risk.
- **Assess how to manage subcontractors and subcontractor reporting obligations.** As discussed above, the Clause does not contain a flow down

provision (though the new FAR implementing the Clause may add one) but imposes requirements and liability on contractors for the actions of their subcontractors. Contractors must consider what to include in their subcontracts to manage this new reality, and what internal processes are necessary to address contractor reporting requirements regarding subcontractor actions. The requirement to report a subcontractor's "known or reasonably knowable" violations adds an ambiguous due diligence dimension that must be carefully considered.

- **Monitor forthcoming guidance.** The forthcoming OMB guidance, the identification of high-risk economic sectors, the FAR Council's interim guidance (expected within 60 days), and the eventual FAR amendments will be critical in defining the contours of compliance.

We will continue to monitor this Executive Order and related developments.

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