LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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President Trump Signs Executive Order Targeting "Racially Discriminatory DEI Activities" by Federal Contractors

On March 26, 2026, President Trump signed Executive Order 14398 (the Order), which is titled "Addressing DEI Discrimination by Federal Contractors". The Order is the latest move in the Trump Administration's attempts to target and eliminate what it deems to be unlawful DEI programs, practices and initiatives across a wide array of U.S. businesses, including federal contractors.

The Order and accompanying Fact Sheet specifically prohibit "racially discriminatory DEI activities" by all federal contractors and subcontractors at any tier. The Order states that DEI activities are not only unethical and often illegal, but also create inefficiency, waste and abuse for those that engage in DEI practices by adding unnecessary costs, creating workforce turnover and jeopardizing employee collaboration and problem-solving. The Order conveys the Administration's perspective that while the federal government has made great strides in ending racial discrimination resulting from DEI activities, "some entities continue to engage in DEI activities and often attempt to conceal their efforts to do so."

The Order follows on the Trump Administration's anti-DEI Executive Orders issued in January 2025 that were aimed to curtail "illegal DEI," including Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." EO 14173 was challenged and scrutinized by various courts for its failure to define what constitutes "illegal DEI." That ambiguity left employers, higher education institutions and other organizations confused about their obligations and worried about the potential implications of crossing the line between what the Administration may interpret to be lawful and unlawful DEI practices.

Unlike the earlier Orders, this most recent Executive Order specifically defines the targeted conduct of "racially discriminatory DEI activities" 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." The Order further defines "program participation" 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." While these definitions provide some guidance for federal contractors, ambiguity still exists as to how the Order will be applied with respect to contractors' vendor agreements and the "allocation or deployment of an entity's resources." In addition, the Order does not make any reference to and is not tethered to any federal anti-discrimination laws.

Contractual Certification Requirements Under the Order

Under the Order, all Federal agencies are required, "to the extent permitted by law", to include specific contract provisions in all contracts and "contract-like instruments." The required standardized contract language, which is expected to appear in contracts as early as April 25, 2026, 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;

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)."

These provisions not only require contractors and subcontractors to certify that they will not engage in any "racially discriminatory DEI" activities, but they also place an affirmative obligation on prime contractors to monitor their subcontractors to ensure compliance with the Order and to report any potential violations. So, while the Order states that it is focused on preventing the inefficiencies of DEI practices, it imposes unusual flow-down obligations beyond the normal certification expectations with extensive monitoring and reporting duties to ensure that every subcontractor that they work with complies with the Order. Although the Order does not specify how contractors are expected to obtain this information, these policing mandates will likely lead to increased costs and risks for federal contractors.

Potential False Claims Act Liability and Other Penalties

The Order sets forth various penalties and enforcement mechanisms for contractors that engage in racially discriminatory DEI activities or otherwise fail to comply with Order. Federal contractors face cancellation, termination or suspension for noncompliance. The Order also authorizes suspension and even debarment for contractors that violate the Order.

Notably, violations of the Order may also place a contractor at risk of legal action from the Department of Justice (DOJ) through the False Claims Act (FCA), which carries the potential for significant financial damages. The Order expressly mentions that the contractual obligations are material to the government's payments, which is an attempt to create a foundation for the materiality element under the FCA. The Order calls on the DOJ to consider bringing FCA claims against contractors that violate the Order and to conduct a prompt review of civil actions brought by private citizens, known as qui tam claims, under the FCA.

What to Expect and Next Steps

The Order clearly signals continued federal scrutiny of entities' DEI programs and activities. Federal contractors will hopefully be gaining further guidance from the federal government regarding the Order's expectations. The Order directs the Office of Management and Budget (OMB) to issue guidance to agencies to ensure compliance with the Order. While the Director of the OMB, the AG, the Assistant to the President for Domestic Policy and the Chair of the EEOC are directed to issue guidance on best practices for compliance with the Order, the Order also directs these agencies to identify economic sectors that pose a particular risk of engaging in "racially discriminatory DEI activities" based on *current or past conduct*.

The Order also directs the Federal Acquisition Regulatory Council (FAR Council) to amend the Federal Acquisition Regulation (FAR) to include the contract provisions of the Order and remove any conflicting or

inconsistent terms in Federal procurement, solicitations and contracts subject to the Order. The FAR Council is also directed to, within 60 days, issue deviation and interim guidance regarding agency implementation of the Order's contractual provisions prior to its finalization of the amendments to the FAR.

While the breadth of applicability of the Order to "contract-like instruments" is unclear, the Administration has pursued parallel, yet distinct efforts to impose similar certification mandates upon all recipients of federal financial assistance through proposed amendments to the System for Award Management (SAM). The General Services Administration (GSA)'s proposed amendments would require entities seeking federal grants and contracts to certify compliance with prohibitions against "illegal DEI." Specifically, applicants utilizing the government's award system would have to agree to: "Comply with the US 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." The public comment period relative to those proposed changes closed on March 30. Once the Administration reviews and responds to that input, we may see new documents go into effect under the SAMS system.

Contractors should be aware of these requirements going forward and be prepared for the implementation of these new contractual provisions in future contracts. Additionally, it is yet to be seen what impact the provisions set forth in the Order will have on other obligations contractors may have under State contracts, such as requirements under the New York MWBE program. However, as previous Executive Orders targeting DEI have faced legal challenges, it is possible that this Order may face similar challenges.

Bond continues to follow these and related developments closely. Please contact Christa Cook, Gavin Gretsky, any attorney in Bond's labor and employment practice or the Bond attorney with whom you normally work, for questions, concerns and tailored consultation.