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Legal Sidebar

Rescission of Executive Order 11246, "Equal Employment Opportunity": Legal Implications

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On January 21, 2025, President Trump signed Executive Order 14173, entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." The executive order (EO) states as one of its purposes to enforce federal civil rights laws "for the benefit of all Americans." As part of the President's directive to "streamline[]" federal contracting and "require Federal contractors and subcontractors to comply with our civil-rights laws," EO 14173 revokes Executive Order 11246, entitled "Equal Employment Opportunity." EO 11246 is a long-standing executive order establishing antidiscrimination requirements for federal contractors and subcontractors and in the administration of federally assisted construction contracts. The recission of EO 11246 alters both the legal protections for employees of federal contractors and the mechanisms available to the federal government to enforce antidiscrimination law. This Legal Sidebar reviews the legal implications of the President's revocation of EO 11246.

Background on EO 11246 and Implementing Regulations

EO 11246 generally prohibited federal contractors from engaging in certain employment discrimination. Though first promulgated by President Lyndon B. Johnson in 1965, EO 11246's origins date back to EOs prohibiting employment discrimination in some sectors as early as 1941. As authority for EO 11246, courts have identified the Federal Property and Administrative Services Act (FPASA), which establishes a system for the federal acquisition of goods and services and authorizes the President to "prescribe policies and directives that the President considers necessary to carry out [the act]." Some courts have also stated or suggested that Congress has implicitly ratified EO 11246. EO 11246 was continuously in effect (as amended) until rescinded by President Trump in 2025.

As amended, and subject to some exceptions, EO 11246 required government contracting agencies to include antidiscrimination provisions in government contracts. Contractors were additionally to include those provisions in their subcontracts. The order applied similar requirements to all construction contracts paid for, in whole or in part, with federal funds or backed by federal credit. (Because EO 11246 imposes substantially similar obligations on federal contractors, subcontractors, and under federally supported

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construction contracts, this Sidebar generally refers to affected parties as "federal contractors" except where otherwise specified.) Specifically, these contract provisions required federal contractors to

- not discriminate against employees or applicants on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin;
- "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to" those protected characteristics;
- not take adverse actions against employees or applicants for discussing employee compensation;
- post specific notices of nondiscrimination and include statements of nondiscrimination in job advertisements;
- notify labor unions working with the contractor of the contractor's nondiscrimination obligations; and
- provide the Department of Labor (DOL) with information and access to investigate compliance with EO 11246.

EO 11246 also required covered federal contractors to file reports on their compliance with the order.

The order largely assigned enforcement and implementation to DOL. The agency has carried out those responsibilities through its Office of Federal Contract Compliance Programs (OFCCP). OFCCP has promulgated regulations interpreting EO 11246 and setting forth enforcement procedures. To enforce EO 11246, DOL both responded to complaints and undertook proactive compliance evaluations.

The Federal Acquisition Regulatory Council (FAR Council) also has implemented regulations, codified as subpart 22.8 of the Federal Acquisition Regulation (FAR), governing contracting agency responsibilities under EO 11246. Under FAR subpart 22.8, contracting agencies have had to incorporate relevant clauses in covered contracts and cooperate with DOL investigations and enforcement. These contract clauses, among other things, have required contractors to provide DOL access to their premises and records to conduct compliance investigations and to accept DOL sanctions for noncompliance. Sanctions have included contract termination and debarment from future federal contracts and awards. Additionally, a contractor's failure to comply with its EO 11246 responsibilities could have made it difficult for it to get future federal contracts.

Prior to entering into most procurement contracts, the FAR requires procuring agencies to "make[] an affirmative determination . . . that the prospective contractor is responsible." The FAR provides that procuring agencies must determine that a contractor is "nonresponsible" unless there is "information clearly indicating that the prospective contractor is responsible." Agencies have determined that contractors were nonresponsible and therefore ineligible to receive a contract award for failing to meet their equal employment responsibilities under FAR subpart 22.8.

EO 14173

In EO 14173, President Trump rescinded EO 11246 in its entirety and ordered DOL to cease "[p]romoting diversity"; requiring federal contractors and subcontractors to engage in affirmative action; and "[a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin." EO 14173 requires federal contracts to include terms requiring "compliance in all respects with all applicable Federal anti-discrimination laws" and certifying that the contractor "does not operate any programs promoting DEI [diversity, equity, and inclusion] that violate any applicable Federal anti-discrimination laws." EO 14173 states that "Federal contractors may continue to comply with the regulatory scheme in effect" under EO 11246 for 90 days, or until April 20, 2025.

In response to EO 14173, the Acting Secretary of Labor issued an order directing OFCCP and all other DOL employees "[t]o immediately cease and desist all investigative and enforcement activity" under EO 11246 and its regulations. DOL further ordered staff to inform affected entities by January 31, 2025, that previously open EO 11246 investigations or reviews are now closed. (The order notes, however, that open investigations and reviews involving disability protections under Section 503 of the Rehabilitation Act and veteran protections under the Vietnam Era Veterans' Readjustment Assistance Act "are being held in abeyance pending further guidance.")

As of this Sidebar's publication date, at least one lawsuit has been filed challenging the constitutionality of EO 14173 on a number of grounds and seeking to enjoin agencies from enforcing it.

Effects of Rescinding EO 11246 on Employee Rights

The rescission of EO 11246 alters protections from employment discrimination available to employees of federal contractors, but for the most part it does not eliminate them. Title VII of the Civil Rights Act of 1964 (Title VII), enforced by the Equal Employment Opportunity Commission (EEOC), remains in effect and generally prohibits employment discrimination on the basis of race, color, religion, sex, or national origin—largely the same bases addressed in EO 11246. (Sexual orientation and gender identity are further addressed below.) EO 11246 specifically prohibited discrimination in "upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship." Title VII likely would cover the vast majority of such actions, except a transfer that did not result in any harm to the employee. While Title VII does not require the specific notices set forth in EO 11246, it does require employers to post a notice approved by the EEOC setting forth employees' rights. Further, Title VII applies to labor unions directly, while EO 11246 required federal contractors to take actions to encourage labor unions to follow the order.

The revocation of EO 11246 changes the legal landscape for federal contractor employees in several ways. Title VII applies only to employers with at least 15 employees. There is no generally applicable federal law that prohibits race, color, sex, religious, or national origin discrimination by smaller employers. Some state antidiscrimination laws, such as those in New York and Michigan, cover employers of all sizes. Some federal contractors may also be covered by narrower federal civil rights laws, such as Title VI of the Civil Rights Act of 1964 (Title VI) (prohibiting race, color, and national origin discrimination in federally funded programs) and Title IX of the Education Amendments of 1972 (Title IX) (prohibiting sex discrimination in federally funded education programs). Federal contractors are not automatically covered by these laws; in many instances, participating in federal contracting does not mean that a contractor is covered by Title VI and Title IX. Similarly, employment discrimination is rarely covered by these laws: it is only covered by Title VI in narrow factual circumstances, and courts are divided over whether Title IX applies to employment discrimination. With the rescission of EO 11246, employees of some smaller federal contractors may be protected only by the antidiscrimination provisions required by EO 14173 and no other federal antidiscrimination law.

As noted above, Title VII prohibits discrimination based on sex, while EO 11246 prohibited discrimination based on sex, sexual orientation, and gender identity. In *Bostock v. Clayton County*, the Supreme Court ruled that, in prohibiting sex discrimination, Title VII also prohibits sexual orientation and gender identity discrimination. Under *Bostock*, an employer discriminates on the basis of sex when it takes an adverse action against an employee because of that person's sexual orientation or gender identity status. *Bostock* makes clear that firing people because they are gay or transgender violates Title VII, for example. The Court did not address whether Title VII prohibits other types actions that some parties view as gender identity discrimination, such as prohibiting transgender people from accessing sex-separated spaces that align with their gender identities; refusing to use employees' preferred pronouns; or limiting coverage of gender-affirming care in employer-sponsored health care policies. The Court has not

definitively determined whether these and other potential forms of gender identity discrimination are unlawful sex discrimination under Title VII. EO 11246 may have protected employees from a broader range of allegedly discriminatory conduct than Title VII does by expressly prohibiting gender identity and sexual orientation discrimination without requiring employees to explain how such acts were a form of sex discrimination. OFCCP regulations, for example, expressly prohibited federal contractors from denying transgender employees access to facilities aligning with their gender identities.

EO 11246 prohibited contractors from taking adverse actions against employees or applicants because they "inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant." The National Labor Relations Board (NLRB) has at times interpreted the National Labor Relations Act (NLRA) to protect employees who discuss their pay in certain contexts. The application of the NLRA to conduct prohibited by EO 11246 may depend on the facts of the situation and the prevailing interpretation by the NLRB.

EO 14173 particularly highlights EO 11246's affirmative action requirements. EO 11246's affirmative action language dates from a predecessor executive order promulgated by President Kennedy in 1961. OFCCP regulations spelled out the affirmative action requirements. (OFCCP's regulations are somewhat different for employers working on federally assisted construction contracts.) The regulations required contractors above a certain size holding contracts of particular types or valued above certain monetary thresholds to maintain and implement written affirmative action plans. The premise of an affirmative action plan, according to OFCCP, was that, "absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects." The regulations thus set forth how contractors were to map the employment of women and minorities in their organization; determine the availability of women and minorities in the contractor's labor pool; establish "placement goals" to bring the contractor's workforce in line, demographically, with the labor pools; and take action to achieve those goals. OFCCP emphasized that the placement goals were not "quotas"—quotas were expressly forbidden—and that contractors could not use preferences based on protected characteristics, such as race or sex, to achieve their goals. OFCCP also did not require contractors to deviate from "merit selection principles." OFCCP evaluated contractors on their "good faith" efforts to reach their goals, not on whether they achieved their goals.

Title VII does not require employers to maintain formal affirmative action programs. Title VII does, however, prohibit disparate impact discrimination. Illegal disparate impact discrimination occurs when an employer's practices cause a disproportionate, adverse effect on a protected group and that practice is not "job related for the position in question and consistent with business necessity." While Title VII does not require employers to set specific targets for employing women and minorities and actively work toward those targets, an employer may be liable if its practices result in the underrepresentation of certain groups absent an adequate business justification. As a number of scholars have noted, however, disparate impact cases are difficult to prove, and courts often defer to employers' business justifications. The rescission of EO 11246 may therefore result in some employers taking a less active approach to recruiting members of certain groups and maintaining or furthering their employment.

Effects of Rescinding EO 11246 on Federal Contracting

EO 14173 does not expressly direct the FAR Council to repeal or amend the equal employment provisions codified at subpart 22.8 of the FAR or to take any other steps to implement EO 14173. Many provisions of subpart 22.8, however, cross-reference and incorporate the requirements of the now-rescinded EO 11246. As a result, contracting agencies will likely expect the FAR Council to provide guidance on how to comply with EO 14173 and whether contractors will need to comply with FAR subpart 22.8 in future contracting actions.

With DOL no longer enforcing EO 11246 or its implementing regulations under FAR subpart 22.8, it is unclear whether contracting agencies will be able to establish a factual background to consider equal employment compliance as part of their responsibility determinations. Even in instances in which procuring agencies have EO 11246 compliance evaluations for a particular contractor, it is unclear whether agencies will continue to use that information as part of future responsibility determinations.

While EO 14173 relieves federal contractors of a certain amount of oversight from DOL, they are still subject to Title VII's oversight and enforcement mechanisms. EEOC primarily initiates investigations in response to private complaints, although EEOC commissioners can initiate complaints and investigations on their own authority. Federal contractors formerly subject to OFCCP's requirements on recordkeeping, reporting, and agency access are still subject to substantially overlapping requirements from Title VII and the EEOC. Title VII, unlike EO 11246, is also enforceable in court by private parties.

The effect of EO 14173's provision allowing federal contractors to comply with the terms of EO 11246 for 90 days is unclear. The EO does not expressly state that compliance with EO 11246 thereafter is illegal, and indeed, as recounted above, much of what EO 11246 requires is also required by Title VII. Courts have also upheld EO 11246 against challenges to its lawfulness. Courts in the 1970s, for example, affirmed EO 11246's affirmative action requirements as valid exercises of the President's authority and rejected arguments that they required illegal race- or sex-based quotas or "reverse discrimination." Under current law, Title VII even permits employers to make decisions based on an employee's or applicant's protected characteristics in narrow circumstances: addressing racial preferences in *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, the Supreme Court ruled that the law allows employers to take "race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories." How the current Administration applies EO 14173 after the 90-day period, and how it interprets the new contract terms EO 14173 requires, remains to be seen.

Considerations for Congress

Congress has imposed many of EO 11246's policies on private employers through Title VII. Congress could also choose to limit the President's policymaking discretion over federal contractors. For example, Congress could codify part or all of EO 11246. Conversely, Congress could prevent a President from reinstating EO 11246 or the policies therein by passing a statute prohibiting such an order.

If it codifies EO 11246, Congress may pay particular attention to EO 11246's affirmative action requirements. In general, the federal government cannot require, as a condition of participating in federal contracting, that parties engage in discrimination that would be unconstitutional if done by the government itself. Given that federal courts have held a number of race-based and sex-based preferences in government programs unconstitutional, requirements that federal contractors rely on such preferences are at risk of being struck down in court. As explained above, OFCCP regulations under EO 11246 banned preferences based on protected traits but required contractors to maintain concrete plans to increase minority and female participation and advancement in the federal contractor workforce. Formally race- or sex-neutral possibilities for such plans could include, for example, increased outreach to certain populations; regular review of and changes to employer practices that adversely impact particular groups; or employer mentorship and training programs open to all employees. Some Supreme Court precedent suggests, however, that the Court may not consider all such actions to be fully "neutral," and several Supreme Court Justices, echoing a concurring opinion by former Justice Scalia, have expressed interest in reconsidering the constitutionality of formally neutral government actions taken with the intent to increase racial diversity.

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