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Executive Order Targets Federal Contractors' 'Racially Discriminatory DEI Activities'

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On March 26, 2026, President Donald Trump issued Executive Order No. 14398 (EO) targeting DEI activities by federal contractors and subcontractors. The EO, titled "Addressing DEI Discrimination by Federal Contractors," highlights the administration's belief that some entities, including federal contractors, continue their discriminatory practices through "diversity, equity, and inclusion" (DEI) activities that are sometimes concealed from public view.

To address this, the EO requires federal departments and agencies to add a new, DEI-specific clause to contracts and "contract-like instruments" through which contractors and subcontractors would pledge not to "engage in any racially discriminatory DEI activities" and would agree to "furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency … for purposes of ascertaining compliance with [the new] clause."

Notably, the EO focuses only on "racially discriminatory DEI," or disparate treatment based only on race and ethnicity, and it does not include other categories protected under federal law, such as sex or gender, which is a departure from the administration's January 21, 2025, Executive Order No. 14173, which was broader than race-based DEI. However, the EO's narrowed approach is consistent with the General Services Administration's recently proposed DEI certification requirement (GSA requirement) for federal financial assistance recipients, which directs recipients to certify compliance with laws prohibiting race and color discrimination, but notably omits sex and other protected categories. While ethnicity and color are two legally distinct protected characteristics, the EO and GSA requirement interestingly take differing approaches on whether to cover each such characteristic, while both address race.

On April 20, 2026, in *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 8:26-cv-01532, (D. Md. filed Apr. 20, 2026), five organizations composed of membership organizations and nonprofit trade associations challenged the EO in the US District Court for the District of Maryland. Among other things, the complaint alleges that the EO's requirement that federal contractors certify that they will not engage in "racially discriminatory DEI activities," regardless of whether those activities comply with federal antidiscrimination law or are discriminatory, violates the First Amendment. The plaintiffs seek an injunction enjoining enforcement and implementation of the EO, striking any contract language implementing the EO that has been inserted into any federal contract or contract-like instrument, and rescinding any agency implementation directives relating to the EO. While employers should track this and any other legal challenge to the EO, they should continue to prepare to comply with the order until a court rules otherwise.

Key details of the new clause

Under the new clause, contractors must expressly agree to:

- Refrain from engaging in any racially discriminatory DEI activities.
- Furnish information and reports, including providing access to books, records and accounts, to the extent required by the contracting agency so that it can ascertain the contractor's compliance with the clause.
- In the event of the contractor's or subcontractor's noncompliance with the clause, be subject to cancellation, termination or suspension of the contract, and be deemed ineligible for further government contracts.
- Report any subcontractor's "known or reasonably knowable conduct that may violate the clause" to the contracting department or agency, and take any remedial actions if directed by the contracting department or agency.
- Inform the contracting department or agency if a subcontractor sues the contractor if such suit implicates the validity of the clause.
- Recognize that compliance with the clause is material to the government's payment decisions for purpose of the False Claims

Act (FCA).

The EO defines certain terms, including defining "[r]acially discriminatory DEI activities" broadly 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." "Program participation" is also defined broadly to mean "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." This array of activities could include employee resource or affinity groups, mentorship programs and diverse recruiting efforts, if access to such activities is limited on the basis of race or ethnicity.

Although the EO does **not** define "disparate treatment" for EO purposes, disparate treatment is already unlawful under federal, state and/or local anti-discrimination law. Disparate treatment discrimination can occur when a contractor takes race or ethnicity (or any other characteristic protected under applicable law) into account when engaged in any of the activities identified above. For example, the Equal Employment Opportunity Commission's DEI-related guidance notes that consideration of a protected characteristic does not have to be the exclusive or sole reason for an employment action, or the "but-for" deciding factor for the action, to be unlawful under Title VII.

Penalties for failing to comply with the clause include full or partial cancellation, termination or suspension of the contract. In addition, contracting agencies are directed to "take appropriate action to suspend or debar" contractors or subcontractors for failing to comply. The clause's requirement that contractors certify materiality is designed to increase the risk of FCA liability by making it easier for the government or a qui tam relator to establish materiality in an FCA case.

Other EO requirements

To support enforcement of the new clause, the EO requires the head of each federal agency to review its implementation of the EO and report on its compliance to the assistant to the president for domestic policy by July 24, 2026. Such agency reviews are also expected to continue on a regular basis thereafter. In addition, the EO actively leverages the FCA by requiring the attorney general (in consultation with relevant contracting agencies) to "consider whether to bring actions under [the FCA] against contractors or subcontractors" for compliance violations, and to "ensure prompt review of civil actions brought by private persons under [the FCA] concerning Federal contracts or subcontracts."

Furthermore, the EO directs the Office of Management and Budget (in coordination with the attorney general, assistant to the president for domestic policy and chairman of the EEOC) to identify economic sectors that "pose a particular risk of [their] entities engaging in racially discriminatory DEI activities based on current or past conduct," and to issue "best practices" guidance to contracting agencies for compliance within such sectors.

Expected timing of rule changes and implementation

The EO directs federal agencies to ensure, within 30 days after the date of the EO (or by **April 25, 2026**) and "to the extent permitted by law," that contracts and contract-like instruments, specifically including first-tier subcontracts and lower-tier subcontracts, include the new contract clause.

In an aggressive push toward EO implementation, on April 17, 2026, the Federal Acquisition Regulatory (FAR) Council issued implementation guidance to federal agencies. The guidance supplies a new clause at FAR 52.222-90, "Addressing DEI Discrimination by Federal Contractors (APR 2026) (DEVIATION APR 2026)" for inclusion in new or currently open solicitations (along with the resulting contracts), **beginning on April 24, 2026**, and in existing contracts that are valued over the micro-purchase threshold, including those for commercial products and commercial services, and for which the place of delivery or performance is in the United States.

In relation to existing contracts, the guidance directs agency contracting officers to "make every effort" to bilaterally modify existing contracts **by July 24, 2026**, and, if a contractor were to refuse the bilateral modification, the agency contracting officer "should consider, whether, absent the modification, the contract no longer meets the agency's needs and should therefore be terminated for convenience." The guidance also notes that contracts with a final expiration on or before December 31, 2026, are to be modified at the agency contracting officer's discretion.

Formal amendment of the FAR to add the new clause to governmentwide regulation is subject to formal rulemaking under the Administrative Procedures Act, including publication in the Federal Register and review by the Office of Information and Regulatory Affairs.

Next steps for federal contractors and subcontractors

At this time, federal contractors and subcontractors should evaluate their existing DEI-related programs, policies and practices to assess whether any DEI activities could be construed as involving disparate treatment based on race or ethnicity (or any other protected characteristic), including incorporating proxies for such protected characteristics. For example, the DOJ cited the use of "unlawful proxies" as one way a DEI program or policy may violate federal anti-discrimination law, in its July 30, 2025, guidance to federal funding recipients. The guidance defined the term as the intentional use of "neutral criteria that function as substitutes for explicit consideration" of protected characteristics like race.

The significant enforcement risk under the FCA was underscored recently by a settlement with IBM Corporation for more than $17 million, the first resolution under the Department of Justice's Civil Rights Fraud Initiative launched in 2025. The settlement resolved allegations that IBM violated the FCA by failing to comply with anti-discrimination requirements in its federal contracts due to practices the government alleged discriminated against employees and applicants by race, color, national origin and sex. The government alleged, among other things, that IBM took these protected classes into account when making employment decisions, including by using a "diversity modifier that tied bonus compensation to achieving demographic targets," altering interview criteria though the use of "diverse interview slates,"[1] developing "race and sex demographic goals for business units," and offering "certain training, partnerships, mentoring, leadership development programs and educational opportunities only to certain employees, with eligibility, participation, access or admission limited on the basis of race or sex."

Contractors should also review their subcontractor oversight processes to ensure they can satisfy the EO's reporting obligations with respect to subcontractor conduct that may violate the clause. Given the clause's express acknowledgment of materiality under the FCA, and in light of the DOJ's recent settlement, contractors should ensure they also have robust internal complaint reporting mechanisms. Contractors and subcontractors should prepare for the inclusion of the clause in their contracts imminently, including ensuring relevant stakeholders overseeing government contracts are aware of the new requirements. Finally, contractors and subcontractors should monitor forthcoming guidance, as well as individual agency implementation efforts, and keep a close eye on legal challenges filed against the EO.

Note

1. Not all challenges to "diverse slate" policies will succeed, as outcomes will depend on the specific factual circumstances. In *Vaughn v. CBS Broadcasting, Inc. et al.*, No. 2:24-cv-05570-HDV-RAO (C.D. Cal.), for example, the court recently granted summary judgment for the employer, finding that CBS's diverse slate policy did not support an inference of pretext where the undisputed evidence established that the employer maintained no numerical goals, mandates, targets or quotas for the relevant position, and the policy applied only to interviewing – not hiring – decisions and expressly required selection of the most qualified candidate. Citing *Armstrong v. WB Studio Enterprises, Inc.*, 2025 WL 3002614, at *1 (9th Cir. Oct. 27, 2025) (unpublished), the court held that the slate policy "did not constitute a race-based reason for hiring other candidates because [it] did not contain any specific instructions or directive on whom to hire," and that promoting diversity in the interview process alone was "insufficient to create a disputed issue of fact showing that [plaintiff's] termination was a mere pretext for anti-white racial discrimination."

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