



Workforce Development Challenges in Public Agencies and Projects

DEI, Executive Orders, and Compliance Issues

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NOT FOR DISTRIBUTION – CONTENTS OF POWERPOINT SLIDES ARE INTENDED FOR EDUCATIONAL AND INFORMATIONAL PURPOSES ONLY AND DO NOT CONSTITUTE LEGAL ADVICE

+ Overview of Executive Orders (EOs)

- Diversity, Equity, and Inclusion (DEI) / Diversity, Equity, Inclusion, and Accessibility (DEIA)

+ Compliance Requirements

- Under Federal Law
- Under State Law

+ Impact of Non-Compliance

+ Federal and State Guidance

- Compliance Best Practices



Overview of Executive Orders

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EXECUTIVE ORDER 14151 (January 20)

“Ending Radical and Wasteful Government DEI Programs and Preferencing”

Directs the Office of Management and Budget (OMB) Attorney General (AG) and Office of Personnel Management (OPM) to:

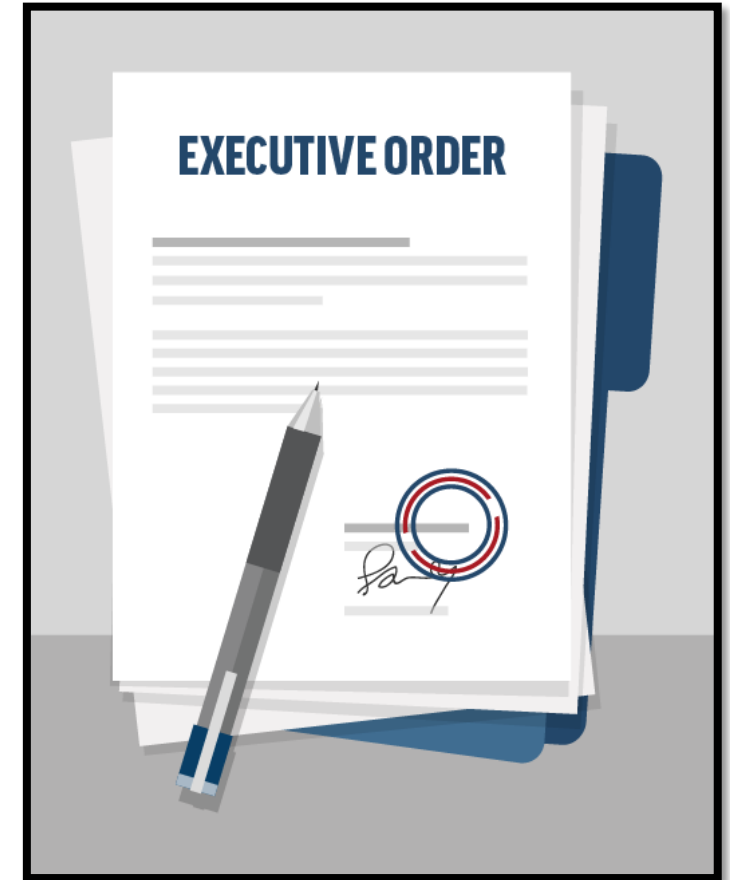
- Terminate “all discriminatory programs, including illegal DEI and DEIA mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear.”
- Focuses on Federal employment practices, union contracts, and training policies.
- Federal agencies, departments, or commissions were directed to:
 - Terminate DEI and DEIA positions, plans, programs, grants, and performance requirements for employees, contractors or grantees.
 - Terminate “equity-related” grants or contracts.
 - Identify Federal contractors that provided DEI training or DEI training materials to agency or department employees.
 - Identify Federal grantees who received Federal funding to provide or advance DEI, DEIA or environmental justice programs, services, or activities since 1/20/21.



EXECUTIVE ORDER 14168 (January 20)

“Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”:

- Defines “sex” as a biological classification as either male or female.
- Directs Federal agencies to enforce laws “governing sex-based rights, protections, opportunities and accommodations to protect men and women as biologically distinct sexes.”
- Directs the AG to issue guidance to agencies to correct “misapplication” of US Sup. Courts decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities.
- Instructs AG to issue guidance and assist agencies in protecting sex-based distinctions.
- Order also applicable to agency-imposed requirements on Federally funded entities, including contractors.





EXECUTIVE ORDER 14173 (January 21)

“Ending Illegal Discrimination and Restoring Merit-Based Opportunity”

- Discusses the termination of “Illegal DEI and DEIA policies that violate the text and spirit of our longstanding Federal civil-rights laws [specifically Civil Rights Act of 1964] at all levels of government, major corporations.
- The EO directs all executive departments and agencies to combat illegal “private-sector DEI preferences, mandates, policies, programs, and activities,” by terminating several executive actions, including EO 11246.
- Revokes EO 11246 (Equal Employment Opportunity) of Sept. 25, 1965, entered by President Lyndon Johnson which includes requirements for hiring and employment for federal contractors and recipients of construction-related federal funding, specifically:
 - Prohibition on discriminating against employees or applicants based on race, color, religion, sex, or national origin.
 - Requirement to take "affirmative action to ensure applicants are employed" without regard to their race, color, religion, sex, or national origin.
 - Requires contractor to file compliance reports with the contracting agency or DOL describing their employment policies and statistics.

REVOKING - EXECUTIVE ORDER 11246 (September 1965)

+ Impact

- EO 11246 mandated that contractors take certain steps to promote non-discrimination which included preparation of annual affirmative action plans, internal audits and reporting requirements, and evaluation of compensation practices.
- The goal of these steps were to help contractors identify whether their workforce demographics were different than others, to identify and implement outreach efforts to identify qualified candidates that might not otherwise have access to employment opportunities.





EXECUTIVE ORDER 14173 (January 21)

Seeks to streamline Federal contracting process and mandates that Federal contractors and subcontractors to comply with civil rights laws:

- Office of Federal Contract Compliance Programs within the Department of Labor (OFCCP) directed to cease to promote diversity.
- Federal contractors and subcontractors may no longer take “affirmative action.”
- OFCCP will no longer allow or encourage Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.
- Federal contractors and subcontractors shall not in their employment, procurement and contracting practices consider race, color, sex, sexual preference, religion or national origin in violation of Civil rights laws.

EXECUTIVE ORDERS ADDRESSING DEI

+ New requirements imposed on the Federal contracting process:

- Certification Provisions:
 - Federal contracts, grants, or awards shall include a term requiring the contractor to certify that it complies “in all respects with all applicable Federal anti-discrimination laws.”
 - Federal contractors and subcontractors must certify that “it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
 - Certification is pursuant to False Claims Act (31 U.S.C. 3729(b)) as it is framed as one that is material to the government’s payment decisions. If the Certification is false, then subject to liability under the Act.

+ Broader Scope of EO:

- Heads of agencies with assistance from AG must be tasked with submitting recommendations on how to encourage the private sector to comply with Federal civil rights laws and to end illegal discrimination and preferences including DEI.



Compliance Requirements

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COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

+ CIVIL RIGHTS ACT OF 1964, Title VII

- Prohibiting discrimination based on race, color, religion, sex, and national origin in hiring, promoting, firing, setting wages, testing, training, apprenticeship, and all other terms and conditions of employment and **EEO-1 Reporting under Title VII**.
- Annual affirmative action plans, internal audits and reporting requirements, and evaluation of compensation practices under EO 11246 no longer required and no enforcement activities under EO 11246 are permitted.





COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

+ **Congressional Acts (Federal Laws) that are enforced by the Office of Federal Contract Compliance Programs (OFCCP):**

- Section 503 of the Rehabilitation Act, 29 U.S.C. 793 of 1973 (“Section 503”) prohibiting federal contractors and subcontractors from discriminating against individuals with disabilities and requiring affirmative action for qualified individuals with disabilities in all aspects of employment.
- Vietnam Era Veterans’ Readjustment Assistance Act, 38 U.S.C. 4212 of 1974 (“VEVRAA”) prohibits discrimination against qualified disabled veterans and other categories of veterans and requires affirmative action for qualified disabled veterans and other categories of veterans and VETS-4212 Reporting Requirements.

+ **DOL website no longer provides information on these compliance programs, so there are likely to be updates (website is in the process of being updated).*

COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

+ Enforced by EEOC, applicable to Federal Contractors (Examples):

- **Age Discrimination in Employment Act (“ADEA”) of 1967 (and M.G.L. c. 151B)** prohibits age discrimination in employment against persons 40 years of age or older.
- **Equal Pay Act of 1963 (“EPA”) 29 USC 206(d) (Part of Fair Labor Standards Act of 1938):** Prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions.





COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

- + State and local affirmative action and reporting requirements – government contractors doing business in MA must still comply with applicable laws, regulations, as well as affirmative action and reporting requirements:**
- + Massachusetts Equal Pay Act (MEPA) of 2018 and the Act to Establish Pay Equity of 2024** prohibits unlawful wage discrimination, currently requires annual wage data reports (as a supplement to EEO-1 reporting) and will require certain pay range disclosures for job postings, existing employees, and/or applicants upon request.
- + Executive Order 592 of 10/22/20 (Gov. Baker): Advancing Workforce Diversity, Inclusion, Equal Opportunity, Non-Discrimination, and Affirmative Action:**
 - Non-discrimination, diversity, and equal opportunity shall be the policy of the Executive Branch of the Commonwealth of Massachusetts in all aspects of state employment, programs, services, policies, activities, and decisions.



COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

+ Executive Order 592 of 10/22/20 (Cont'd)

+ All Executive Branch contracts entered into after the effective date of this Order shall:

- contain provisions prohibiting contractors and subcontractors from engaging in discriminatory employment practices
- require contractors to certify that they are in compliance with all applicable state and federal laws, rules, and regulations governing fair labor and employment practices
- require contractors to commit to purchasing supplies and services from certified minority or women-owned businesses, small businesses, or businesses owned by socially or economically disadvantaged persons, veterans (including Vietnam-era veterans), persons with disabilities, or lesbian, gay, bisexual, or transgender persons.
- any breach shall be regarded as a material breach of the contract that may subject the contractor to sanctions up to and including termination of the contract.

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COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

- + State and local affirmative action and reporting requirements – government contractors doing business in MA must still comply with applicable laws, regulations, as well as affirmative action and reporting requirements (Cont'd):**
- + Executive Order 599 of 6/24/22 (Gov. Baker): Reaffirming Programs to Ensure Diversity, Equity, and Inclusion for Diverse and Small Massachusetts Businesses in State Procurement and Contracting:**
 - Supplier Diversity Office (“SDO”) to administer and oversee for all Executive Department agencies programs applicable to procurements and purchased of goods and services by such agencies to: promote equity of opportunity in the procurement and purchase of goods and services by Executive Department agencies for minority (“MBE”), women (“WBE”), veteran (“VBE”), service-disabled veteran (“SDVOBE”), disability (“DOBE”) and lesbian, gay, bisexual, and transgender (“LGBTBE”) owned businesses.

COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS



- + State and local affirmative action and reporting requirements – government contractors doing business in MA must still comply with applicable laws, regulations, as well as affirmative action and reporting requirements (Cont'd):
- + Executive Order 638 of 12/23/24 (Gov. Healey): Promoting the Equitable Participation of Women and Underrepresented Groups in Construction with Supplier Diversity Office (“SDO”) to administer and oversee for all Executive Department agencies programs applicable to procurements and purchased of goods and services by such agencies.

COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

+ Contractors and subcontractors engaged for construction projects to collect, and report at appropriate intervals, data on (Executive Order 638 Cont'd):

- Workforce needs, which may include the expected number of jobs, job hours, and job hours by occupation;
- Worker demographics (race, gender, zip code, and other workforce characteristics);
- Benefits and supportive services provided to workers;
- Hours worked by all employees, including women and people of color, by trade and position; and
- Apprenticeship participation and pre-apprenticeship program completion statistics. Anti-retaliation policies that clearly state that retaliation is prohibited.



COMPLIANCE WITH EXECUTIVE ORDERS – FEDERAL AND STATE REGULATIONS AND LAWS

+ Executive Department offices and agencies shall require their contractors and subcontractors engaged for construction projects to certify that they have policies that ensure and maintain safe worksites, free from harassment, including (Executive Order 638 Cont'd):

- Training policies that institute effective, routine workplace training programs, including safety and anti-harassment trainings;
- Designated reporting or ombudsman program policies that institute a process for reporting concerns and complaints;
- Disciplinary policies that provide a clear explanation of disciplinary and accountability measures; and
- Anti-retaliation policies that clearly state that retaliation is prohibited.





EXAMPLES OF EXECUTIVE ORDER ENFORCEMENT EFFORTS

DEI Policies: EO signed on 3/14/25 regarding Paul Weiss Rifkind Wharton & Garrison LLP citing DEI hiring practices (as well as taking part in Manhattan DA's investigation of President Trump) and directing federal agencies to terminate any government contracts involving the firm.

Order rescinded on 3/19/25 after the firm agrees to not adopt DEI hiring practices and to provide \$40M worth of pro bono services to support administration initiatives.

Contractor Certification Provision: In an Order dated 2/21/25 in *National Association of Diversity Officers in Higher Education v. Trump, et al.*, USDC for the District of Maryland issued a nationwide injunction against implementation of the EO regarding DEI, finding that:

- the Certification Provision violates the First Amendment as it constitutes a content-based restriction on the speech rights of federal contractors.
- the sole purpose of the Certification Provision is for federal contractors to "confirm under threat of perjury and False Claims Act liability that they do not operate any programs promoting DEI that the government might contend violate federal anti-discrimination laws," but found that "even the Government does not know what constitutes DEI-related speech that violates federal anti-discrimination laws."
- Prohibited Government from requiring any contractor "to make any 'certification' or other representation pursuant to the Certification Provision" and bringing any False Claims Act enforcement action, or threat thereof, "premised on any certification made pursuant to the Certification Provision."

Injunction lifted on 3/14/25 4th U.S. Circuit Court of Appeals wrote that Trump's anti-DEI push could eventually raise concerns about First Amendment rights but said the judge's sweeping block went too far.

COMPLIANCE WITH FEDERAL AND STATE REGULATIONS AND LAWS – MULTISTATE GUIDANCE

- + **MULTI-STATE GUIDANCE CONCERNING DIVERSITY, EQUITY, INCLUSSION AND ACCESSIBILITY EMPLOYMENT INITIATIVES (2/13/25)**
- + Coalition of 16 Attorneys Generals (co-led by MA AG Andrea Campbell) issued guidance:
 - illegal hiring or promotional preferences to individual based on protected characteristics is not the same as valid and legal programs and practices that support diversity, equity, inclusion and accessibility.
 - “Policies and practices that promote diversity, equity, inclusion, and accessibility are not the same as preferences in individual hiring and promotion decisions that have been found to be unlawful. The Executive Order cannot and does not prohibit these otherwise lawful practices and policies.”



COMPLIANCE WITH FEDERAL AND STATE REGULATIONS AND LAWS – MULTISTATE GUIDANCE

- + “Preferences based on protected characteristics in hiring and promotion have been found to be unlawful under federal law, except under narrow circumstances,” but these practices are labelled as DEI or DEIA under the Executive Order, “..creating confusion as to lawful practices and policies to promote diversity, equity, inclusion, and accessibility.”
- + DEI/DEIA Initiatives that are consistent with Federal and State Law to support all employees and remove barriers that unnecessarily limit opportunities for unrepresented groups will promote organizational success (best practices to help to ensure legal compliance are provided).
- + Contractors doing business with state or local governments must still comply with applicable state and local affirmative action and reporting requirements.
- + Compliance with Equal Pay and Pay Transparency Laws (Federal and local) and address any compensation disparities



Federal and State Guidance

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Best Practice Recommendations – Multistate Guidance

MULTI-STATE GUIDANCE CONCERNING DIVERSITY, EQUITY, INCLUSION AND ACCESSIBILITY EMPLOYMENT INITIATIVES (2/13/25)

+ Recruiting and Hiring

- Increase size and source of applicant pool.
- Conduct panel interviews.
- Standardize criteria for evaluating candidates and employees.
- Create accessible recruitment and hiring practices and protocols.

+ Professional Development and Retention

- Ensure equal access to all aspects of professional development, training, and mentorship programs.
- Create Employee Resource Groups (“ERGs”).
- Present on topics such as unconscious bias, inclusive leadership, and disability awareness.
- Ensure equal access to all aspects of employment.

MULTI-STATE GUIDANCE CONCERNING DIVERSITY, EQUITY, INCLUSSION AND ACCESSIBILITY EMPLOYMENT INITIATIVES (2/13/25)

+ Assessment and Integration

- Monitor the success of policies and practices in attracting and retaining qualified talent.
- Create clear protocols for reporting discrimination or harassment.
- Establish work groups to research, collaborate, pilot, and actively participate in crafting strategies that support more inclusive behaviors and practices.
- Integrate principles and practices promoting belonging.





EEOC AND JUSTICE DEPARTMENT GUIDANCE

March 19, 2025 – EEOC and DOJ released a technical assistance document, “What To Do If You Experience Discrimination Related to DEI at Work” and a Q&A Technical assistance document, “What You Should Know About DEI-Related Discrimination at Work.”

“What You Should Know About DEI – Related Discrimination at Work”

[Link: https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=#_edn16](https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=#_edn16)

“What To Do If You Experience Discrimination Related to DEI at Work”

https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=



EEOC AND JUSTICE DEPARTMENT GUIDANCE

- + “What You Should Know About DEI–Related Discrimination at Work” - Guidance regarding employee rights and employer responsibilities regarding unlawful DEI-related discrimination.
- + **Key Points:**
 - DEI is not defined under Title VII, but discriminatory actions based on protected characteristics (e.g., race, sex) remain unlawful.
 - DEI policies and programs may be unlawful if employer takes employment actions motivated by employee’s race, sex, or other protected characteristic.
 - Employees experiencing discrimination should:
 - **Private sector:** File a charge with EEOC before lawsuit can be brought.
 - **Federal employees:** Contact agency EEO counselor/EEOC.
- + Title VII applies to and protects all workers, applicants, and participants in training programs from discrimination (not to particular groups or categories), different treatment can be unlawful discrimination.
- + Title VII Applies to employers with 15+ employees, employment agencies, labor organizations, and entities providing job training.

“What You Should Know About DEI–Related Discrimination at Work” (Cont’d)

- DEI policy or program is unlawful under Title VII if it involves an employer or other covered entity taking an employment action based on race, sex, or other protected characteristic, as Title VII bars discrimination (“disparate treatment”) against applicants or employees in all aspects of employment, including:
 - Hiring & Firing
 - Promotion & Demotion
 - Compensation & Fringe Benefits
 - Access to Training & Mentorship
 - Internships and Fellowships
 - Interview Selection
 - Job Duties and Assignments

Note: In a claim for discrimination workers must demonstrate only "some injury" or "harm" affecting employment terms, conditions, or privileges to claim discrimination.



EEOC AND JUSTICE DEPARTMENT GUIDANCE

“What You Should Know About DEI–Related Discrimination at Work” (Cont’d)

DEI Practices and Title VII Compliance

Title VII prohibits employment actions as to employees/applicants that are motivated fully or partially by race, sex, or other protected characteristics. Key points include:

+ Employment opportunities (clubs or groups):

- Must not segregate or classify employees/applicants based on protected characteristics (race, sex, etc.).

+ DEI Programs Training and Mentorship Programs:

- Cannot segregate employees by limiting membership in workplace groups (i.e., ERGs, BRGs, affinity groups)..
- Trainings/workplace programming that segregate employees (even if separate groups receive same content/resources.
- Training/Mentoring should be inclusive, offering equal access to opportunities, skills, information for advancement.

“What You Should Know About DEI–Related Discrimination at Work” (Cont’d)

DEI Practices and Title VII Compliance

Title VII prohibits employment actions motivated fully or partially by race, sex, or other protected characteristics.

Key points include:

+ Employment Actions/Decisions:

- Illegal if based even partly on protected characteristics.
- Illegal if based on protected characteristics.
to serve business interest or necessity (client/co-worker preferences).

+ DEI Training:

- May constitute a hostile environment if discriminatory in content or context.

+ Employee Protection:

- Employees opposing unlawful DEI practices or trainings are protected from retaliation until Title VII.



“What To Do If You Experience Discrimination Related to DEI at Work”

Steps for Addressing DEI-Related Discrimination at Work

+ Who is Protected (Title VII)?

- Employees, applicants, interns, and trainees.

+ Actions to Take:

- Contact EEOC if discrimination is experienced.
- File an EEOC discrimination charge:
 - **Private employers:** EEOC investigates; files lawsuit under Title VII.
 - **State/local government:** DOJ may sue after EEOC investigation.

+ Recognizing DEI-Related Discrimination:

- DEI policies/actions motivated by race, sex, or protected traits are unlawful.
- Employers cannot "balance" workforce diversity based on protected traits.
- DEI discrimination includes all employment actions listed in EEOC technical assistance document.
- Includes workplace harassment and retaliation related to DEI activities or EEOC involvement.



Thank You



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