

The Next 80 Days in Affirmative Action and DEI:

What plans should private employers, especially federal
contractors, make for the potential End of Plans?



YOUR WORKPLACE IS OUR WORK.®

Presented by

Whitney R. Brown

Lehr Middlebrooks Vreeland & Thompson, P.C.

January 30, 2025

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About The Last Ten Days...



PRESIDENTIAL ACTIONS

ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT-BASED OPPORTUNITY

January 21, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. Longstanding Federal civil-rights laws protect individual Americans from discrimination based on race, color, religion, sex, or national origin. These civil-rights

This Order also abolishes any remnant of the Diversity, Equity and Inclusion (DEI)

Secretary's O
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Date: January

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Unfortunately, in recent years civilian and uniformed leadership alike have impie
Diversity, Equity, and Inclusion (DEI) programs and their attendant race and sex



Just the high notes...

Ending Illegal Discrimination...

Type/Date: Executive Order / Jan. 21, 2025

Scope: Immediate effect to federal departments/agencies; Immediate impact to federal K-ors; Information gathering for other private industry.

Key Points:

- Immediately revokes E.O. 11246 and E.O.s promoting diversity in federal hiring.
 - Fed. K-ors have 90 days where they “may” continue to follow AA.



Just the high notes...

Ending Illegal Discrimination...

Key Points:

- OFCCP to immediately cease:
 - Holding Fed. K-ors responsible for taking affirmative action;
 - Encouraging Title VII prot. status workforce balancing.
- Every agency head to include in contracts or grants:
 - Recipient/K-or certifies that it does not operate a DEI program violating any federal anti-discrimination laws, and Recipient/K-or agrees complying with federal anti-discrimination law is “material,” as defined by the False Claims Act.



Just the high notes...

Ending Illegal Discrimination...

Key Points:

- Within 120 days, A.G. to confer with agency heads and report to Presidential delegate on recommendations for enforcing civil rights laws and ending “illegal discrimination and preferences, including DEI.”



Just the high notes...

Ending Illegal Discrimination...

Key Points:

- A.G.'s report to include:
 - Key sectors of concern and “[t]he most egregious and discriminatory DEI practitioners in each sector of concern.”
 - Each agency must identify up to nine potential investigation subjects that are publicly traded, large non-profits, large (>\$500m in assets) foundations, State or local Bar or medical associations, or higher ed. institutes w/ endowments >\$1b.
 - Plan to discourage DEI programs or principles that constitute illegal discrimination.
 - Litigation appropriate for federal suit, intervention, or statement of interest.



Just the high notes...

To Cease and Desist All Investigative and Enforcement Activity Under Rescinded E.O. 11246

Type/Date: Secretary's Order [DOL] / Jan. 24, 2025

Scope: OFCCP, OALJ, ARB, with obvious impact to regulated organizations

Key Points:

- Agencies ordered to immediately cease and desist “all pending cases, conciliation agreements, investigations, complaints, and any other enforcement-related or investigative activity.”



Just the high notes...

To Cease and Desist All Investigative and Enforcement Activity Under Rescinded E.O. 11246

Key Points:

- By 1/31/2025, notify all entities with “open reviews or investigations” that the E.O. 11246 component has been closed.
 - Also, notify that **Sec. 503 (IWD) and VEVRAA components of reviews or investigations will be held in abeyance pending further guidance.**



Just the high notes...

Ending Radical and Wasteful Gov't DEI...

Type/Date: E.O. / Jan. 20, 2025

Scope: All federal workplaces

Key Points:

- Within 60 days, federal agency heads to take action to:
 - Terminate DEI or DEIA offices, positions, programs, grants, and contracts; and any performance evaluation based on DEI(A).
 - Identify all federal K-ors who have provided DEI training or materials to their employees.
 - Identify number of “new DEI hires” and costs of DEI initiatives in the agency.



Just the high notes...

Initial Guidance Regarding DEIA E.O.s

Type/Date: OPM Memorandum / Jan. 21, 2025

Scope: All federal workplaces

Key Points:

- Agency heads to have emailed all employees by 1/22/25 that DEIA offices to be closed and circulating an e-mail address, DEIATruth@opm.gov, where agency employees would be required to report attempts to disguise DEIA offices or circumvent the order.



Just the high notes...

Defending Women From Gender Ideology...

Type/Date: Executive Order / Jan. 20, 2025

Scope: Executive departments/agencies with flowdown to several different types of private sector entities, including employers covered by Title VII.

Key Points:

- Sets a general policy that **sex is immutable, determined at conception, and is either male or female.**
- Rejects term “gender identity” for “gender ideology,” which it rejects as an “ever-shifting concept of self-assessed gender identity.”



Just the high notes...

Defending Women From Gender Ideology...

Key Points:

- By 2/19/2025, Pres. Designee to present proposed bill text to President to codify these definitions.
- All fed. agency forms to reflect only two options for sex.
- Fed. agencies to take appropriate action [regulations, guidance to private business] to ensure that access to intimate spaces (e.g., employee changing rooms and bathrooms) is determined by sex, not identity.
- EEOC to prioritize investigation and litigation violating these principles.



Just the high notes...

FOR IMMEDIATE RELEASE

Jan. 28, 2025

Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace

WASHINGTON -- Today, U.S. Equal Employment Opportunity Commission (EEOC) Acting Chair Andrea Lucas announced that the agency is returning to its mission of protecting women from sexual harassment and sex-based discrimination in the workplace by rolling back the Biden administration's gender identity agenda.

One of President Trump's first executive orders was [Executive Order 14166](#), "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." Among other things, the executive order directed federal agencies to enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes, and to remove all statements, policies, regulations, forms, communications, or other internal and external messages promoting gender ideology.

Pursuant to Executive Order 14166, Acting Chair Lucas has taken the following actions to date:

- Announced that one of her [priorities](#)—for compliance, investigations, and litigation—is to defend the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work.
- Removed the agency's "pronoun app," a feature in employees' Microsoft 365 profiles, which allowed an employee to opt to identify pronouns, content which then appeared alongside the employee's display name across all Microsoft 365 platforms, including Outlook and Teams. This content was displayed both to internal and external parties with whom EEOC employees communicated.
- Ended the use of the "X" gender marker during the intake process for filing a charge of discrimination.
- Directed the modification of the charge of discrimination and related forms to remove "Mx." from the list of prefix options.
- Commenced review of the content of EEOC's "Know Your Rights" poster, which all covered employers are required by law to post in their workplaces.
- Removed materials promoting gender ideology on the Commission's internal and external websites and documents, including webpages, statements, social media platforms, forms, trainings, and others. The agency's review and removal of such materials remains ongoing. Where a publicly accessible item cannot be immediately removed or revised, a banner has been added to explain why the item has not yet been brought into compliance.

When issuing certain documents, the Commission acts by majority vote. Based on her existing



Just the high notes...

Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs

Type/Date: OMB Memorandum / Jan. 27, 2025

Scope: All federal agencies and non-individual recipients of grants, loans, etc.

Key Points:

- Instructs agencies to pause funding all programs for review of whether recipients comply with recent E.O.s. including *Ending Radical and Wasteful Gov't DEI...* and *Defending Women....*



Just the high notes...

Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs

Key Points:

- Agencies to report by 2/10/25 their review of paused programs.

Status:

- Dist. Ct. for D.C. administratively stayed (1/28/25) until 2/3/25.
- Rescinded by Administration on 1/29/25.



Just the high notes...

Restoring America's Fighting Force

Type/Date: Executive Order / Jan. 27, 2025

Scope: Department of Defense and Coast Guard

Key Points:

- Revives term “divisive concepts” from E.O. 13950 (Sept. 22, 2020; enjoined judicially then rescinded under Biden Administration).



Just the high notes...

“Divisive concepts” means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.



Just the high notes...

Restoring America's Fighting Force

Type/Date: Executive Order / Jan. 27, 2025

Scope: Department of Defense and Coast Guard

Key Points:

- Revives term “divisive concepts” from E.O. 13950 (Sept. 22, 2020; enjoined judicially then rescinded under Biden Administration).
- D.o.D. and Armed Forces may not (directly or through contractors/consultants) promote or teach divisive concepts or gender ideology, or that America's founding documents are racist or sexist.



Just the high notes...

Prioritizing Military Excellence...

Type/Date: Executive Order, Jan. 27, 2025

Scope: Armed Forces

Key Points:

- Appears to render any individual expressing a gender identity/ideology other than their sex unfit for service.
- Implication that (all) such individuals suffer from gender dysphoria.



Just the high notes...

Reforming the Federal Hiring Process

Type/Date: Executive Order / Jan. 20, 2025

Scope: Federal workforce

Key Points:

- Suggests discriminatory employment practices have occurred “under the guise of ‘equity,’” or “the invented concept of ‘gender identity’ over sex.”



What's Unchanged



What's Unchanged

Federal Acquisition Regulation, Subpart 22.8

Key Portions Without Direct Reference to EO 11246:

- Separate general statutory authority at 40 U.S.C. 121(c).
- 22.800: Scope: “This subpart prescribes policies and procedures pertaining to nondiscrimination in employment by contractors and subcontractors.”
- 22.804-1: Non-construction covered K-ors with 50 or more employees and a contract of \$50,000 or more must develop a written AAP for each establishment within 120 days from the commencement of first gov't K.



What's Unchanged

FAR, Subpart 22.8

Clauses that Could Survive E.O. 11246's rescission:

- 22.809: Contractors found to have violated “E.O. 11246, the regulations of the Sec’y of Labor, or the applicable contract clauses” may be punished...by OFCCP Deputy Secretary.
- 22.810: tells contracting officer when to use the clauses at 52.222-23—52.222-27. 52.222-26 (“Equal Opportunity”) is a predicate for the others.
 - 22.810(e): contracting officer must use 52.222-26 “unless the contract is exempt from all of the requirements of E.O. 11246 (see 22.807(a)).”



What's Unchanged

FAR, Subpart 22.8

Prognosis: Likely already invalidated.

- Depends on OFCCP for enforcement, but OFCCP can't proceed as a matter of internal policy.
- Sec. 22.801 defines “affirmative action program” as one consistent with DOL regs to provide EEO to women and minorities.
- Sec. 22.803(d): “In the event the applicability of E.O. 11246 and implementing regulations is questioned, the contracting officer shall forward the matter to the [OFCCP] Deputy Assistant Secretary, through agency channels, for resolution.”



What's Unchanged

FAR, Subpart 22.8

Prognosis: Likely already invalidated.

- The scope of regulations authorized under the Procurement Act was found to be more limited, and specific doubt was cast on its ability to support nondiscrimination measures in *Kentucky v. Biden* (6th Cir.), which enjoined a FAR memo that would've required the insertion of vaccine mandate language into existing contracts.



What's Unchanged

Uniform Guidelines on Employee Selection Procedures

Applies to:

- Title VII-covered employers.

Requires:

- Covered employers must track “tests and other selection procedures” for adverse impact by sex or race/ethnicity (using EEO-1 categories). If a selection procedure has an adverse impact, the EEOC considers it discriminatory unless it is validated.



What's Unchanged

UGESP

Key Definitions:

- “Tests and other selection procedures” – can encompass any filter/phase of hiring/promotion/retention, not just those resulting in a numerical score or quantifiable ranking. Includes but not limited to: (i) interviews; (ii) scored interviews; (iii) written tests; (iv) skills tests; (v) personality or job fit profiles/evaluations; (vi) physical or agility evaluations.
- “Adverse impact” -- EEOC recommends the 4/5ths rule.



What's Unchanged

UGESP

Key Definitions:

- “Validation” -- the employer must show that the test measures important work behavior (as opposed to arbitrary characteristics or skills easily learned in orientation) and that the test is a good predictor of those important work behaviors, as proved by validity study, ideally one based on internal and position-specific outcomes, and conforming to acceptable social science methodologies.



What's Unchanged

UGESP

Prognosis: Vulnerable.

- UGESP were not promulgated as true notice-and-comment regulations.
- The information required to comply exceeds the statutory authorization in 42 U.S.C. 2000e-8(c).
- The information UGESP requires would constitute an impact ratio analysis on steroids.
- No post-*Loper Bright Enterprises* UGESP decisions; however, cautious employers should note the Supreme Court accorded great deference to UGESP in *Griggs v. Duke Power Co.* (1971), and implied UGESP reflected mandatory recordkeeping in *Wards Cove Packing Co. v. Atonio* (1989).



What's Unchanged

EEO-1 Reporting Obligation

Applies to:

- Employers w/ 100+ employees; ~~most federal contractors and subcontractors.~~

Requires:

- Reporting employees in each EEOC Job Group by race and sex;
- Reporting applicants and selected individuals for apprenticeships and training programs.

Prognosis: Likely stable.

- EEOC enjoys an express grant of authority in Title VII to establish recordkeeping and require reporting that's reasonable, necessary, or appropriate to Title VII.



What's Unchanged

AAP Regs Under Sec. 503 & VEVRAA

Applies to:

- Section 503: 50 or more employees and a contract of \$50,000 or more.
- VEVRAA: 50 or more employees and a contract of \$150,000 or more.

Requires:

- Plans and recordkeeping.



What's Unchanged

AAP Regs Under Sec. 503 & VEVRAA

Prognosis:

- Sec. 503 – Questionable. The E.O. to dismantle DEIA federal programs suggests a willingness to openly support undermining policies that encourage the employment of IWDs. Sec. 503 investigations are suspended per Acting Secretary's memo.
- VEVRAA – Less Questionable. The *Ending Illegal Discrimination...* E.O. expressly preserves lawful veteran preferences. However, VEVRAA investigations are also suspended per Acting Secretary's memo.



What's Unchanged

Americans with Disabilities Act

Applies to:

- Employers with more than 15 employees.

Requires:

- Non-discrimination on account of actual disability, perceived disability, or history of disability.
- Reasonable accommodation of disability.
- Disability-related information to be kept confidential.



What's Unchanged

Americans with Disabilities Act

Why it matters:

- The *Prioritizing Military Excellence* E.O. suggests those who do not identify with their sex-at-conception have gender dysphoria, and implicitly groups such individuals with others who cannot serve in active duty due to psychiatric disorders.
- The justifications for removing such individuals from the fighting force are unique to military readiness and “austere conditions” where medication and treatment may not be available.



What's Unchanged

Bostock v. Clayton County

Applies to:

- Employers with more than 15 employees.

Decided:

- Title VII's prohibition against "discrimination because of ... sex" prohibited discrimination against homosexuals and transgender individuals, because such discrimination is inherently because of sex.



What's Unchanged

Bostock v. Clayton County

Decided:

“Take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”



What's Unchanged

Bostock v. Clayton County

Also of note:

- *Bostock* is consistent with a view of sex as an immutable characteristic, though it does not use those words.
- *Bostock* embraced sex stereotyping theory of sex discrimination:

“So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.”



What's Unchanged

Corporate First Amendment Rights

Applies to:

- Businesses.

Requires:

- The Supreme Court has recognized a corporation's right to political free speech (*Citizens United*, 2010, 5-4), religious expression (*Hobby Lobby*, 2014, 5-4), and to be free of being compelled to express a contrary belief (*303 Creative*, 2023, 6-3).



What's Unchanged

Corporate First Amendment Rights

Why it matters:

- Corporations are able to contribute to political causes or campaigns that would advance more aggressive affirmative action or seek to restore federal DEIA initiatives.
- Corporations can express policies or beliefs about diversity, outreach, etc., provided those statements don't constitute a direct violation of federal law.



What's Unchanged

SFFA v. Harvard, UNC

Applies to:

- Institutions of higher education.

Decided:

- Overturned limited use of race-conscious admissions as constitutional exercise of academic freedom.

Why it matters:

- Goldmine of reflection on an expansive view of “diversity.”



What Now?



What Now?

Q: Should federal K-ors complete E.O. 11246 Plans for Plan Years concluding before January 21, 2025?

A: I would strongly consider it, because it's an obligation that is still possible to complete (especially in the 90-day window), which was valid when agreed on. However, I would not lose sight of the low likelihood of enforcement.



What Now?

Q: Must federal K-ors complete E.O. 11246 Plans for Plan Years concluding after January 21, 2025?

A: All signs point to no.

Q: What will happen to the AAP Certification Portal?

A: I hope it will be deleted in its entirety.



What Now?

Q: My organization *wants* to continue or adopt a Plan-type process. Is that allowed?

A: Yes, with at least one tweak. Instead of asking the question of whether women or minorities are disadvantaged, ask whether the race and sex representation in each job group is consistent with the calculated availability analysis. Take equally urgent action even if Whites or men appear favored.



What Now?

Q: My organization *wants* to continue or adopt a Plan-type process. Is that allowed?

A: You should also consider having counsel prepare the Plan and certainly any cover letter analysis.



What Now?

Q: Is now the time to add a DEI policy to our handbook?

A: All signs point to no.



What Now?

Q: How should we revise our diversity or EEO plans?

A:

- Define diversity broadly. Read *SFFA* for inspiration.
- Consider a strong statement about what the Organization's commitment to diversity is not and never has been:
 - A quota system,
 - Racial or sex preference



What Now?

Q: Can our organization continue efforts to diversify our applicant pool?

A: Yes, but...

- Define diversity broadly. Read *SFFA* for inspiration.
- Don't evaluate recruiters or others on the race/sex diversity of candidates.
- Make sure every recruiter and decisionmaker knows the difference between diversity and discrimination.



QUESTIONS & ANSWERS





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Your Workplace is our Work®

www.lehrmiddlebrooks.com

Whitney R. Brown

wbrown@lehrmiddlebrooks.com

(205) 323-9274

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