

April 2021

## A Shift in Federal Government Priorities for Diversity, Equity and Inclusion

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Immediately after his inauguration, President Biden stepped into the Oval Office and began signing executive orders—many of which were aimed at reversing the prior administration’s policies and practices. President Biden promptly revoked President Trump’s Executive Order (“E.O.”) 13950, which had imposed limitations on federal contractors’ diversity programming, and in its place set forth an “ambitious whole-of-government equity agenda” in a new order, E.O. 13985. See *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009 (Jan. 20, 2021). Although the “equity agenda” is addressed solely towards the federal government and *not* to private organizations, it has multiple provisions specifically targeting agency procurement and contracting opportunities. See *id.* at §§5(b), 7, 10(b). As a result, employers who are federal contractors or are looking to secure government contracts in the future should be aware of E.O. 13985 and its expected impact.

This month’s article provides historical context for President Biden’s new order by way of background information on President Trump’s now-revoked order governing federal contractors’ diversity, equity and inclusion (“DEI”) policies and trainings, presents an overview of E.O. 13985, including federal contracting provisions, and offers suggestions for employers to consider in aligning with E.O. 13985 and in continuously improving DEI goals and programs.

### Background

Last fall, then-President Trump issued E.O. 13950, prohibiting the United States Uniformed Services, federal agencies, and federal contractors from providing any workplace DEI training that “inculcate[d] in its employees” any blame-focused views which it characterized as divisive. *Combating Race and Sex Stereotyping*, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020). “Divisive concepts” was defined to include concepts such as: “the United States is fundamentally racist or sexist; ... an individual’s moral character is necessarily determined by his or her race or sex; ... 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;” and “any other form of race or sex stereotyping or any other form of race or sex scapegoating,” amongst others. *Id.*

Section 4 of the order provided that, on a go-forward basis, federal government contracts were required to include express language whereby the contractor agreed to comply with the workplace training restrictions during the performance of the federal contract and to include the same provisions in the

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contractor's subcontracts and purchase orders. *Id.* at 60685-86. The contracting language also stated that the contractor understood that noncompliance could result in cancellation of the contract or debarment of the contractor from participating in future government contracting opportunities. *Id.* at 60686.

On Dec. 22, 2020, Judge Beth Labson Freeman of the U.S. District Court for the Northern District of California entered a nationwide preliminary injunction forbidding the Office of Federal Contract Compliance Programs ("OFCCP") from enforcing §4 of E.O. 13950 against any recipient of federal funding by way of contract or subcontract, finding plaintiffs were likely to succeed on their claims challenging the order as an unconstitutional infringement on free speech and overly vague and a violation of due process. *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, No. 20-CV-07741-BLF, 2020 WL 7640460, at \*12-15 (N.D. Cal. Dec. 22, 2020). (The injunction also prohibited the government from enforcing E.O. 13950, §5, which directed agency heads to pinpoint grant programs for which the agencies could require, as a condition of receiving the grant, grantees to comply with similar restrictions on workplace diversity and inclusion training concepts. *Id.*) In response, the OFCCP issued a notice indicating it would shut down its E.O. 13950 hotline, discontinue pending noncompliance investigations, refrain from taking any enforcement actions related to the order, forgo publishing additional requests for information on violations, and cease enforcing any contract clauses which had already been included in any government contracts or subcontracts as required by E.O. 13950. [Notice Regarding Exec. Order 13950](#), OFCCP.

### Executive Order 13985

Despite the fact that the OFCCP already had ceased enforcement of E.O. 13950 by the time President Biden stepped into office, he quickly issued E.O. 13985, titled "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," on his first day in office. See 86 Fed. Reg. 7009. Section 10 of E.O. 13985 expressly revokes President Trump's E.O. 13950 and requires agency heads to "review and identify proposed and

existing agency actions related to or arising from Executive Order 13950" and to consider suspending or rescinding such actions, including the termination and restriction of federal contracts and grants. *Id.* at 7012.

In addition to identifying and reversing actions stemming from the prior order, E.O. 13985 imposes a number of requirements on the Office of Management Budget ("OMB") Director and executive departments and agencies to take proactive steps to diagnose and eliminate barriers to equal opportunity for underserved communities, including:

- Reviewing "methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals" (§4);
- Identifying specific agency programs and policies for review and assessing whether such programs are equally available to all eligible individuals, including members of communities that have been "systematically denied a full opportunity to participate in aspects of economic, social, and civil life" (§5);
- Studying strategies for allocating federal resources to address "the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals in those communities" (§6);
- Designing a plan to address barriers to "full and equal" participation in government programs and opportunities (§7); and
- Collaborating with members of historically underrepresented and underserved communities in developing such plans and strategies, as well as coordinating with civil rights and community-based organizations (§8).

*Id.* at 7010-11. Further, the order establishes an "Interagency Working Group on Equitable Data" which will study and develop recommendations to address inadequacies in federal data collection programs, including a lack of disaggregation in data collection on key demographic variables, such as race, ethnicity, gender, disability, income, veteran status, etc., which may be stymieing efforts to measure and improve equity. *Id.* at 7011.

“Equity” is defined in the order to mean “the consistent and systemic fair, just and impartial treatment of all individuals” including those belonging to “communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.” *Id.* at 7009.

### Implications for Federal Contracting

At first glance, this executive order may not appear relevant to private employers because it focuses on addressing inequities in federal government programs generally and has no explicit requirements for private organizations. However, E.O. 13985 is particularly concerned with how executive departments and federal agencies are distributing resources and benefits, including government contracting and procurement opportunities. 86 Fed. Reg. at 7009. Indeed, the order directs agency heads to make and report findings on “potential barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities” and whether new policies or guidance should be issued to advance equitable access to such opportunities. *Id.* at 7010. Thus, employers, and particularly government contractors, who interact with the federal government can expect these new policies and guidance to reflect the priorities of E.O. 13985—the upshot being new considerations in the distribution of contracting opportunities. By Jan. 20, 2022, each agency head must consult with the OMB Director and the Assistant to the President for Domestic Policy in developing a plan aimed at eliminating the barriers identified in federal contracting and procurement opportunities for members of underserved communities.

### Practice Tips

As a result of the revocation of E.O. 13950, we suggest that employers review their contracts with the federal government, as well as subcontracts with potential federal contractors, to identify any remnants

of the order, including limitations on DEI workplace trainings. While the OFCCP can no longer enforce the contractual language required by the order, amendments removing the provisions from contracts currently in effect may be appropriate. In particular, subcontractors with agreements containing clauses restricting workplace training content independently of the order should consult counsel to understand what contractual obligations, if any, remain since the repeal.

In light of the implementation of E.O. 13985, organizations that provide goods or services to federal agencies likely will begin to see the agencies more closely inquiring about their contractors’ DEI policies and data. In response, such organizations should prepare by reviewing and refreshing their DEI efforts, especially considering recent studies suggesting that workplace DEI programs have been unsuccessful. See, e.g., Vanessa Fuhrmans & Te-Ping Chen, [What’s Keeping Black Workers From Moving Up the Corporate Ladder?](#), Wall St. J. (Feb. 21, 2021). We recommend starting any reexamination by clarifying what exactly “diversity, equity, and inclusion” means for an organization and its goals. E.O. 13985’s definition of equity may be a helpful place to begin; that said, a copy-and-paste policy is unlikely to be very fruitful. Rather, organizations should thoughtfully craft their approaches, taking into account their unique internal cultures, dynamics, and configurations.

Next, organizations should institute measures targeted toward their updated DEI definitions and goals. While diversity and anti-bias training has long been the gold standard for addressing workplace inequities, other significant changes should be considered. See Alexandra Kalev & Frank Dobbin, [Companies Need To Think Bigger Than Diversity Training](#), Harv. Bus. Rev. (Oct. 20, 2020). For example, organizations should explore:

- Launching formal mentorship and sponsorship programs (Stephanie Bradley Smith, [How a Lack of Sponsorship Keeps Black Women Out of the C-Suite](#), Harv. Bus. Rev. (March 5, 2021));
- Adding DEI responsibilities and accountability metrics in management job descriptions (McKinsey & Co., [Winning Through Inclusion and Diversity](#);

[Taking Bold Action](#), in Diversity Wins: How Inclusion Matters 42 (May 2020));

- Introducing informal dispute resolution systems for discrimination and harassment grievances (Frank Dobbin & Alexandra Kalev, [Making Discrimination and Harassment Complaint Systems Better](#), in What Works?: Evidence-Based Ideas to Increase Diversity, Equity and Inclusion in the Workplace 24); and
- Developing an allyship guide with recommendations for employees (Patrick Thomas, [What Does Being an Ally Look Like?](#), Wall St. J. (July 12, 2021)).

Employers should seek to include mid-level managers, in addition to organization leadership, in the design and execution of new DEI efforts to establish sustainable, institutional change. Lori Nishiura Mackenzie & JoAnne Wehner, [Context Matters](#):

[Moving Beyond “Best Practices” to Creating Sustainable Change](#), in What Works?: Evidence-Based Ideas to Increase Diversity, Equity and Inclusion in the Workplace 45.

Finally, organizations should detail how they will measure progress towards DEI goals, both quantitatively and qualitatively. Any newly implemented programs and policies should be regularly evaluated to determine whether the efforts are achieving desired results.

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**Employer Update** is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, [www.weil.com](http://www.weil.com).

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