

March 14, 2025 webinar recording link:

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**Best Practices and Legal
Considerations for DEI
Programs - An Exclusive
Webinar for Feeding America
Members**



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Agenda

- Introduction
- Important Developments Related to DEI in President Trump's Second Term
- What's the Difference? — *“DEI,” “illegal DEI,” “equal employment opportunity,” and “affirmative action”*
- Action Items for all Employers
- Action Items for Federal Contractors and Subcontractors



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Presenters



Craig Leen

Partner

Washington D.C.

+1.202.778.9232

Craig.Leen@klgates.com



Leann Walsh

Partner

Raleigh

+1.919.743.7319

Leann.Walsh@klgates.com



Ferry Lopez

Partner

Los Angeles

+1.310.552.5075

Ferry.Lopez@klgates.com



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Important Developments Related to DEI in President Trump's Second Term

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Executive Orders (EO)

- ❖ Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferences*
- ❖ Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*
- ❖ Executive Order 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*
- ❖ Executive Order 14029, *Initial Rescissions of Harmful Executive Orders and Actions*

Rescinding

Initial Rescissions of Harmful Executive Orders and Actions

Ending

Ending Radical and Wasteful Government DEI Programs and Preferencing

Defending

Defending Women from Gender Ideology Extremism and Restoring Biological Truth

Ending

Ending Illegal Discrimination and Restoring Merit-Based Opportunity

EO: Initial Rescissions of Harmful Executive Orders and Actions

Purpose:

- “The injection of ‘diversity, equity, and inclusion’ (DEI) into our institutions has corrupted them by replacing hard work, merit, and equality with a divisive and dangerous preferential hierarchy.”
- Rescinds 78 President Biden-era executive orders and presidential memoranda, including several pertaining to federal DEI programs and LGBTQ+ issues.



EO: Ending Radical and Wasteful Government DEI Programs and Preferencing

By 20 May 2025, all federal agencies must:

- Terminate all:
 - DEI-related offices and positions.
 - Equity-related action plans, actions, initiatives, programs, grants, or contracts.
 - DEI-related performance requirements for employees, contractors, or grantees.
- Provide the Office of Management and Budget (OMB) director with lists of:
 - Federal contractors who provide DEI training or DEI training materials to federal agency or department employees (i.e., training vendors hired by government agencies to conduct DEI trainings).
 - All federal grantees who received federal funding to provide or advance DEI or environmental justice programs.



EO: Ending Radical and Wasteful Government DEI Programs and Preferencing

21 January 2025 Memo
from Office of Personnel
Management

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Directs agency heads to:

- Issue agency-wide notice to employees informing them that all diversity, equity, inclusion, and accessibility (DEIA) offices are closing and asking them “if they know of any efforts to disguise these programs by using coded or imprecise language.”
- Notify all employees of such DEIA offices that they are being placed on paid administrative leave effective immediately.
- Take down all outward-facing media (i.e., websites, social media accounts) of DEIA offices.

EO: Defending Women from Gender Ideology Extremism and Restoring Biological Truth

- Directs all federal agencies to define "sex" only as a binary biological classification determined at conception, and rejects "gender identity" in official documents and policy interpretations.
- Requires "single-sex" spaces (like restrooms) to be based on biological sex rather than gender identity in federal facilities and directs the attorney general to guide federal agencies to reverse any policies that allowed gender-based access to single-sex spaces.
- Requires government-issued identification (including passports) to reflect the biological sex assigned at birth.
- Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.



EO: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

Four Key Elements:

1. Revokes EO 11246, which imposed affirmative action obligations on federal government contractors and subcontractors to prevent discrimination against any employee or applicant because of certain protected characteristics.
2. Directs Office of Federal Contract Compliance Programs (OFCCP) to immediately cease DEI practices.
3. Requires federal contractors to “certify” that they do not operate programs promoting unlawful DEI.
4. Discourages DEI in the private sector through civil compliance investigations.

Note: Does not apply to lawful federal or private-sector employment and contracting preferences for veterans of the US armed forces or persons protected by the Randolph-Sheppard Act, 20 U.S.C. 107 et seq.



EO: Ending Illegal Discrimination

OFCCP Directives	Directs OFCCP to “immediately cease”			
	“Promoting diversity”	Holding federal contractors and subcontractors responsible for taking “affirmative action”	Allowing or encouraging federal contractors and subcontractors to engage in “workforce balancing”	“All investigative and enforcement activity” conducted under EO 11246

EO: Ending Illegal Discrimination

Requires all federal contracts and grants to contain the following terms:

1. The contractor/grantee “does not operate any programs promoting DEI that violate any applicable Federal antidiscrimination laws.”
2. That compliance with all applicable federal anti-discrimination laws is “material” to government payment decisions for purposes of the False Claims Act, 31 U.S.C. 3729(b)(4).

Certification
Requirements
on Federal
Contractors
and Grantees

EO: Ending Illegal Discrimination

By 21 May 2025, the US attorney general, along with heads of agencies and director of OMB, must propose enforcement actions and other appropriate measures against companies that engage in “illegal discrimination or preferences, including DEI” and submit a report containing recommendations for enforcing civil rights and discouraging DEI programming and practices. The report will identify:

- Key sectors of concern within each agency’s jurisdiction.
- The “most egregious” DEI practitioners in each sector of concern.
- A plan of specific steps or measures to deter DEI programming or principles—including by identifying up to nine potential civil compliance investigation targets per agency focused on large employers.
- Other strategies to encourage the private sector to end DEI policies and practices.
- Potentially appropriate federal lawsuits or intervention; and potential regulatory action.

Private Sector

Section 4: “Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences”

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Legal Challenges

Nat'l Assoc. of Diversity Officers in Higher Educ. v. Donald J. Trump

On 21 February 2025, the US District Court for the District of Maryland issued a nationwide preliminary injunction (the Maryland Order) enjoining the following directives in the DEI EO's:

1. the cancelling or freezing of any awards, contracts or obligations for government contractors engaging in illegal DEIA;
2. the requiring of contractors to make certifications with respect to illegal DEIA; and
3. the bringing of any False Claims Act enforcement action against federal contractors premised on any such certifications.

The court has subsequently denied a motion to stay the preliminary injunction pending an appeal that was filed to the Fourth Circuit and has clarified the order applies to all federal departments and agencies.

Case No. 1:25-cv-00333-ABA (D. Md. Filed Feb. 3, 2025).

Legal Challenges

Due to the separation of powers, the Maryland Order did not enjoin the attorney general from working with heads of federal agencies to prepare a report required by the DEI EOs which must contain recommendations for enforcing federal civil-rights laws, “encouraging the private sector to end illegal discrimination and preferences,” including DEI, and identifying up to nine potential civil compliance investigations per federal agency of private sector employer targets.

Other Legal Updates

- The attorney general will soon submit a report in collaboration with heads of federal agencies identifying for each agency up to nine potential civil compliance investigations of publicly traded corporations, large nonprofit corporations or associations, or foundations with assets of US\$500 million or more;
- The attorney general issued a memorandum on 5 February 2025, stating that the Department of Justice (DOJ) will begin investigating, prosecuting and penalizing illegal DEIA preferences, mandates, policies, programs and activities in the private sector that are based on race or gender; and
- The acting chair of the Equal Employment Opportunity Commission (EEOC) recently stated on 19 February 2025, that the EEOC will prioritize protecting Americans from “anti-American national origin discrimination” in EEOC compliance, investigations and litigation.



Interplay With Federal Law

- Discrimination under federal, state, and local laws in the United States remains unlawful, including Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Pregnant Workers Fairness Act (PWFA), the Genetic Information Nondiscrimination Act (GINA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Equal Pay Act (EPA), and Immigration Reform and Control Act (IRCA).
- *Bostock v. Clayton Cnty*, 590 U.S. 644 (2020)
 - US Supreme Court determined that “sex” as defined by Title VII includes “gender identity.”
 - Discrimination against transgender and nonbinary/gender-nonconforming people remains illegal under federal law.



Interplay With State and Local DEI Requirements

- Several state and local antidiscrimination laws include gender identity, sexual orientation, and gender expression as protected categories.
- Harassment and Discrimination Prevention Requirements
 - Sexual harassment training
- Pay Equity Considerations



State Anti-DEI Legislation

State	Active standing Laws	DEI Restriction(s)
Alabama	Senate Bill 129	Eliminating DEI practices in higher education (e.g., bans DEI programs).
Florida	Senate Bill 266 and House Bill 931	Eliminating DEI practices in higher education (e.g., prohibits funding the support of DEI programs).
Indiana	Executive Order 25-14	Banning all state agencies from using state funds and resources to support DEI positions, departments, activities, procedures or programs.
Iowa	Senate File 2435	Eliminating DEI practices in higher education (e.g., bans DEI offices).
Idaho	Senate Bill 1274	Eliminating DEI practices in higher education (e.g., bans diversity statements in hiring and admissions decisions).
Kansas	House Bill 2105	Eliminating DEI practices in higher education (e.g., bans DEI practices in hiring decisions).
North Dakota	Senate Bill 2247	Eliminating DEI practices in higher education (e.g., prohibits mandatory training that includes specified concepts like the belief that “an individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously”).
South Dakota	House Bill 1012	Eliminating DEI practices in higher education (e.g., prohibits mandatory training or orientation on divisive concepts).
Tennessee	House Bill 1376 ; Senate Bill 0102	Eliminating DEI practices in higher education (e.g., prohibits mandatory training or orientation on divisive concepts).
Texas	Senate Bill 17 / House Bill 5127	Eliminating DEI practices in higher education (e.g., bans diversity training for students and employees).
Utah	House Bill 261	Eliminating DEI practices in higher education (e.g., bans diversity training for students and employees).
West Virginia	Executive Order No. 3-25	Eliminating DEI practices in higher education (e.g., prohibits public universities from using state funds to support DEI programs, etc.).
North Carolina	Senate Bill 364	Eliminating DEI practices in higher education (e.g., bans diversity statements at the state's public institutions).

As of now, 13 states have passed laws restrictive of DEI.

However, nearly half of the states in the US have either proposed an Anti-DEI bill or appear to be in the process of doing so.



States Pro-DEI Proposed Laws and Guidance:

New York – On March 5, New York's attorney general issued guidance to K-12 schools, colleges, and universities outlining the benefits of DEIA policies and practices in education.

Illinois – No active laws or current Anti-DEI proposed bills. Illinois has a proposed House Bill (HR0077) in support of DEI.

Multistate Guidance – Issued by the attorneys general of 15 states addressing DEI employment initiatives.

- Takes the position that the DEI EOs do not prohibit lawful practices and policies that promote DEI in the private sector.
- Recommends that employers continue lawful DEI practices, including:
 - prioritizing widescale recruitment efforts to attract a larger pool of applicants;
 - setting standardized evaluation criteria to reduce the impact of biases on the interview process;
 - ensuring equal access to all aspects of professional development;
 - conducting training on topics such as unconscious bias, inclusive leadership, and disability awareness; and
 - establishing working groups to participate in creating strategies that support more inclusive behaviors and practices.

Brief Overview of Trend for State Anti-DEI Proposed Bills and Laws

Most of the state Anti-DEI laws that have passed and that have been introduced by state legislators have targeted eliminating DEI practices in the higher education sector (i.e., state universities and colleges).

Some states have chosen to take a broad approach with eliminating all DEI-related initiatives, while others have narrowly chosen certain practices to be banned such as prohibiting mandatory trainings on “divisive concepts” (e.g., related to race, sex, gender or religion).


Nevertheless, the trend thus far for these laws/proposed bills has been to target only state institutions and not the private sector; although, this may be forthcoming.

**What's the
Difference? --
“DEI,” “illegal
DEI,” “equal
employment
opportunity,”
and “affirmative
action”**

But Is “DEI” Illegal Now?

President Trump’s executive orders take aim, expressly, at “**Illegal DEI and DEIA policies**,” which are characterized as, “dangerous, demeaning, and immoral race- and sex-based preferences.”

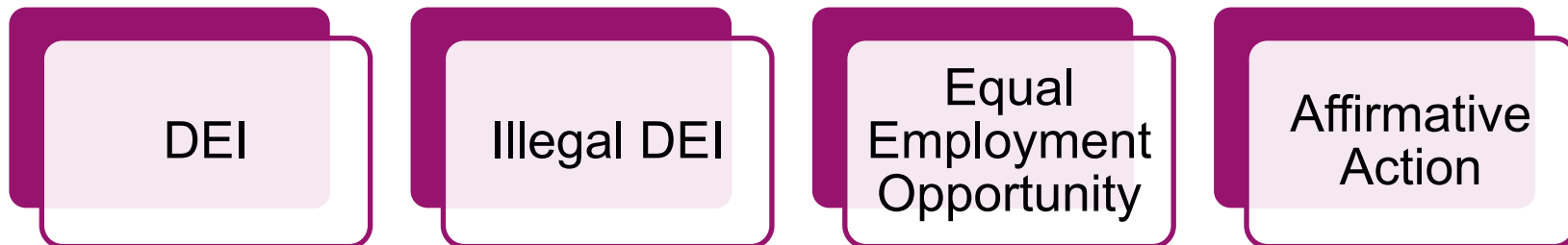
So, what is “**illegal DEI**”?



Making employment decisions impacting employees and applicants based on their membership in a protected class

Implementing a neutral policy or practice that unduly disadvantages individuals based on their protected class

What's the Difference?



Illegal DEI

- Most importantly, employment discrimination laws within the United States **prohibit plus-factors, preferences, quotas, or set-asides**. This means that employers cannot consider the membership of an employee or applicant in a protected class when making employment decisions. Examples:
 - When deciding between two qualified candidates for a job, an employer cannot select one candidate over another because it will improve the diversity of the team.
 - When making a promotion decision, an employer cannot select one candidate over another because it will improve the diversity of company leadership.
 - Employers cannot reserve a certain number of positions for members of a protected class.



Areas of High Risk for Illegal DEI

Diversity internship
or scholarship
programs

Employee resource
groups (ERGs)

Company diversity
“goals”

Tying executive
compensation or
performance criteria
to diversity metrics

Employment
benefits limited to
individuals in certain
protected groups

Diversity slate
practices

Illegal DEI vs. Legal DEI

- Memorandum by US Office of Personnel Management on 5 February 2025, “Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives.”
- Multistate Guidance issued on February 13, 2025, by the attorneys general of Massachusetts and Illinois, joined by the attorney generals of 13 other states addressing DEIA employment initiatives.



America First Legal Urges Department of Labor to Investigate Federal Contractors' DEI Programs

February 24, 2025

- Based on facts developed through litigation and its own independent investigations, America First Legal (AFL) identified in a letter last month eight high-profile federal contractors with DEI policies that AFL alleged may violate federal law and the DEI EOs and asked the Department of Labor and the OFCCP to examine the companies' DEI programs for compliance with federal civil rights laws.
- Contractors were flagged for, among other things:
 - Public statements and representations that allegedly indicated that the contractors implemented policies designed to alter or “balance” the race, color, sex and national origin of their workers.
 - Allegedly establishing discriminatory targets or goals by making it an objective to achieve a certain quantifiable amount of diversity of race or sex among their workforce, applicant pool, or board of directors.
 - Alleged diverse internship programs (some with allegedly express racial and ethnic criteria and others where AFL alleged that, in practice, the programs were being operated with such a criteria).
 - Allegedly investing in the development, retention and promotion of staff members only in certain protected groups.
 - Alleged supplier diversity programs.
 - Alleged mentoring circles limited to members of certain groups.

Action Items for ALL Employers

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What Does This Mean for DEI at My Company?



Employers should continue to **ensure equal employment opportunity (EEO)** in the workplace.



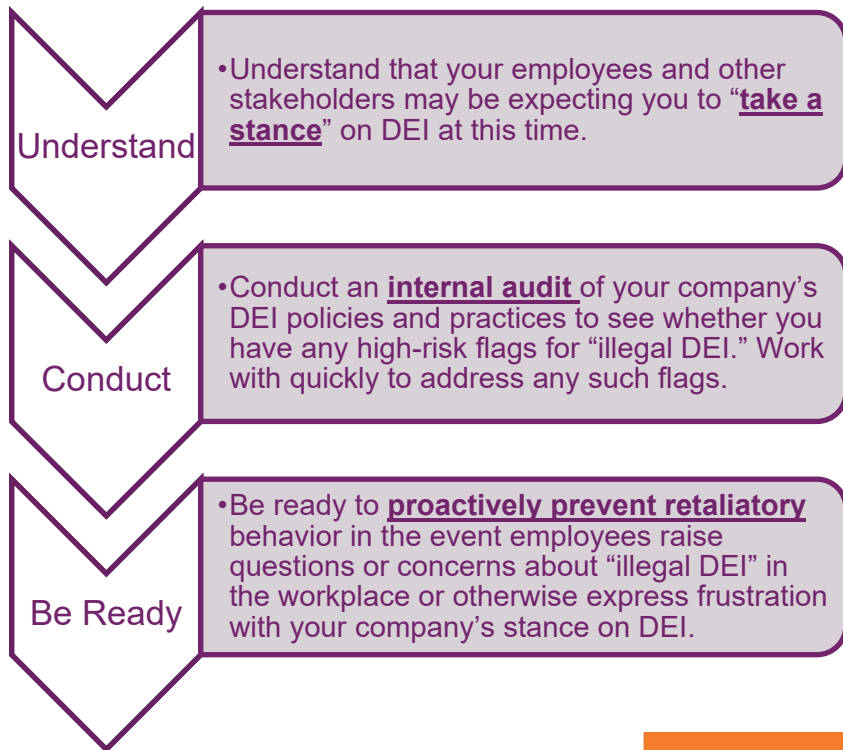
Employers must continue to maintain and enforce **policies** that prevent unlawful discrimination, harassment, and retaliation.



Employers must also continue to promptly, thoroughly, and impartially **investigate** allegations of unlawful employment discrimination.

What Should I Do?

- With the assistance of counsel and your PR team, you may wish to prepare internal and external messaging on this topic.
- Keep in mind any bold commitments and statements your company may have made not that long ago in response to things like the #metoo and #blacklivesmatter movements.



Areas for a DEI Audit

- ✓ Job postings
- ✓ Job applications
- ✓ Interview questions
- ✓ Candidate scoring criteria for positions of employment
- ✓ Internship and scholarship programs
- ✓ Workforce training programs on DEI-related topics
- ✓ Promotion frameworks
- ✓ Compensation frameworks
- ✓ Professional development programs
- ✓ Company benefit programs
- ✓ Company policies and training programs
- ✓ Company DEI and careers webpage messaging

What Can I Expect?

An uptick in “reverse discrimination” claims by employees and applicants, as well as in the focus of government investigations.

“Discrimination testing” by applicants.

Pressure from some employees and stakeholders to “hold firm” on DEI and counter-pressure from others to disband these programs and initiatives.

Potential targeting for a compliance investigation by the federal government. *Employers may want to review the scope of their current employment practices liability insurance and other insurance policy coverage.*

Increased claims relating to discrimination based on national origin or citizenship.

Challenges to gender-identity policies and practices, including “single-sex spaces” in the workplace, such as bathrooms and locker rooms, and policies about pronoun usage.

Increased social media activity by employees and complaints about that behavior.



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What Should I Keep Doing?

- Annual EEO training for the workforce
- Under privilege, an annual pay equity review
- Collecting EEO-1 demographic data, if you are required to do so
- Complying with other applicable state, local, and international legal obligations → **If these appear to conflict with US legal requirements, consult with counsel**
- Ensuring accessibility to applicants who seek positions of employment with your company and for employees who work for you
- Promptly and lawfully responding to legally protected leave or accommodation requests (e.g., related to disability, religion, or pregnancy)
- Disparate impact testing for employment actions that may implicate this issue (e.g., job qualifications, background check standards, layoffs)
- Reminding employees of your Employee Assistance Program (EAP) and other workplace well-being benefits
- Not tolerating harassment in the workplace and maintaining a healthy and inclusive workplace environment where employees treat each other with respect

Training

- Ensure that your internal HR team members are trained on how to properly respond to and investigate all allegations of unlawful discrimination, harassment, and retaliation, including “reverse discrimination” claims.
- Ensure that your talent acquisition team members and hiring managers are trained regarding lawful selection and interviewing criteria, as well as promotion criteria.
- Consider company-wide training to reaffirm the company’s commitment to equal employment opportunity and clarify what constitutes “illegal DEI.”
- Unconscious bias training likely remains permissible (as indicated by OFCCP in the first Trump administration relating to EO 13950), but ensure that training requirements are applied neutrally across the workforce and training covers unconscious bias from all angles.

A Note on Section 1981

- Section 1981 grants individuals in the United States the same rights to make and enforce contracts as “enjoyed by white citizens.” This has been interpreted to cover discrimination based on race, color, or ethnicity.
- This language has been interpreted by courts to cover the employment relationship.
- Section 1981 is also being used with more frequency by litigants to challenge things like:
 - Internship programs where criteria include membership in disadvantaged or historically underrepresented groups in a profession/industry.
 - Venture capital fund grants where the benefit is limited to companies with diverse ownership.
 - Scholarship or grant programs with diversity criteria.

Action Items for Federal Contractors

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Revoked EO 11246

- Finish any EO 11246 affirmative action programs in the 90-day window (do these under privilege now to the extent possible).
- Do not include placement goals.
- Consider not completing EO 11246 programs if you have not started yet or if it will take you outside the 90-day window.
- Check if you have state or local affirmative action program obligations and consult with counsel as to how to align federal, state, and local compliance.
- Stop asking for race and gender information for applicants.
- You should have received a closure letter from OFCCP for any EO 11246 components of ongoing audits.
- No Contractor Portal Certification as to EO 11246.

Section 503

- Continue Section 503 affirmative action programs (consider renaming), although it may be worth waiting a couple more weeks if you have not started to see if additional information is provided.
- Continue requesting voluntary self-identification of disability information.
- If OFCCP continues, expect Section 503 to become a primary focus with more audits, although likely to be focused reviews.
- Familiarize your compliance team with Section 503-focused review materials and seek to adopt best practices.
- Look to Office of Disability Employment Policy (ODEP) during this time, as there is significant guidance there on compliance with Section 503 and the ADA.
- Potential Contractor Portal Certification as to Section 503.

VEVRAA

- Continue VEVRAA affirmative action programs (consider renaming), although it may be worth waiting a couple more weeks if you have not started to see if additional information is provided.
- Continue requesting voluntary veteran self-identification information.
- If OFCCP continues, expect VEVRAA to become a primary focus with more audits, although likely to be focused reviews.
- Familiarize your compliance team with VEVRAA-focused review materials and seek to adopt best practices.
- Look to VETS during this time, as there is significant guidance there on compliance with nondiscrimination obligations and promoting veterans' employment.
- Consider participating in VETS Medallion Program.
- Potential Contractor Portal Certification as to VEVRAA.

Nondiscrimination Programs

- FAR clauses are likely forthcoming incorporating Title VII compliance and no unlawful DEI compliance.
- Contractor Portal may be used for no unlawful DEI certification.
- Open question whether OFCCP or another agency will enforce the no unlawful DEI measures for contractors.
- It is clear that False Claims Act liability is contemplated for these new FAR clauses/certifications, which involves the DOJ.
- May be worth continuing with a Nondiscrimination Program under privilege that could provide support for future FAR clause compliance.
- Nondiscrimination Programs would include a compensation review, adverse impact analyses, and workplace trainings.



Future of OFCCP

- Acting Secretary's order has frozen OFCCP activities for the time being.
- At maximum, OFCCP may have Section 503 and VEVRAA authority as well as authority to enforce Title VII and no unlawful DEI requirements.
- 25 February 2025, memorandum from acting director of the OFCCP to Acting Secretary of Labor Vincent Mincone said the OFCCP will shift from 55 offices to four, and reduce its 479 employees to 50.

Questions?

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Presenters



Craig Leen

Partner

Washington D.C.

+1.202.778.9232

Craig.Leen@klgates.com



Leann Walsh

Partner

Raleigh

+1.919.743.7319

Leann.Walsh@klgates.com



Ferry Lopez

Partner

Los Angeles

+1.310.552.5075

Ferry.Lopez@klgates.com



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