What Employers Need to Know About Recent Changes to Affirmative Action Policies in the Workplace

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On January 21, 2025, President Trump signed an Executive Order titled, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" ("Order"). The Order is mainly aimed at rescinding Executive Order 11246, which was issued by President Johnson in 1965. President Johnson's Executive Order 11246 ("E.O. 11246") had put in place affirmative action requirements for Federal contractors. Under Johnson's E.O. 11246, some of the requirements were filing an annual report with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") showing a demographic breakdown of the contractor's workforce by race or sex, having non-segregated facilities, non-discrimination for workers in protected categories, and the creating and support of affirmative action programs to analyze a company's hiring and promotion practices.

While it is difficult to anticipate all the downstream effects that the Order will have, there are two main areas it is being aimed at:

. The elimination of many affirmative action programs; and

1. A requirement that asks contractors to certify they will not operate any diversity, equity, and inclusion ("DEI") programs.

Looking at the portion of the Order that deals with Diversity, Equity, and Inclusion ("DEI"), the Order targets DEI programs in the private sector by encouraging companies to "end illegal discrimination and preferences," which, according to the Order, violate federal civil rights laws. The Order will require contractors to use a clause in any government contract by which the contractor certifies that it does not operate any DEI program that violates Federal anti-discrimination laws. With this new addition to government contracts, a federal contractor is potentially on the hook for civil and criminal liability under the False Claims Act ("FCA") should the contractor be found to have a noncompliant DEI program. Additionally, other private sector employers should review policies and programs relating to DEI to reform or eliminate any aspects of such policies or programs that might be deemed unlawful. Federal contractors have 90 days in which to make the necessary changes in order to comply with the Order.

The Order also strips the OFCCP of the power to investigate and enforce upon federal contractors and subcontractors affirmative action requirements. The OFCCP can no longer encourage or require contractors to diversify their workforces in regard to protected classes such as race, color, sex, religion, and national origin. At the very least, contractors will no longer have to track and report about their employment practices regarding diversity.

However, employers should still be careful about employment practices as they relate to protected class, since E.O. 11246 was not, of course, the only source of such regulations. Title VII is still law, and employment decisions should continue to comply with Title VII, meaning that they should continue to be made without consideration of race, color, religion, sex, or national origin, along with other protections provided by federal, state, or local law. Additionally, Congressional legislation, like the Rehabilitation Act of 1973[1] and the Vietnam Era Veterans' Readjustment Act of 1973[2] remain in effect, so employers need to make sure they are in compliance with this new Order and the still-existing laws that provide protection against discriminatory employment practices.

There is still much uncertainty as to how the Order will intersect with or overlap with other laws like Title VII, or with state law regarding DEI and employment protections. At the moment, employers should be in consultation with employment attorneys to stay updated on the latest developments, especially as we see how and what steps will be taken to enforce the Order. In the meantime, it is advisable for employers, whether federal contactors or not, to take time and review any DEI programs or internal practices that otherwise consider criteria regarding diversity in hiring or promotion practices, perhaps taking short term steps like ensuring non-preferential treatment and making previously mandatory programs optional while the Order and its effects become clearer as time goes on.

If you have questions about ensuring compliance or navigating changes made by the current administration, please contact Laura L. Spring (lspring@lippes.com) or any member of our Employment Practice Team.

[1] 29 U.S.C.A. § 793 and 41 C.F.R. § 60–741.43.
[2] 38 U.S.C.A. § 4212 and 41 C.F.R. § 60–300.40.