

The New DEI Executive Order: What Federal Contractors Need to Know

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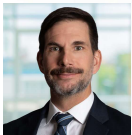
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1

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2

Roadmap for Today

- EO 14173 – what it did and what it didn't do
- EO 14398 – coverage, clause mechanics, and definitions
- Enforcement – records access, False Claims Act, debarment, sector focus
- Overcorrection traps
- Practical next steps

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3

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The EO 14173 Landscape

- Pivot from legacy OFCCP-centered models after repeal of Executive Order 11246
[T]he head of each agency "shall" include in every contract or grant award:

"A term requiring the contractual counterparty or grant recipient to agree that its **compliance in all respects with all applicable Federal anti-discrimination laws** is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code."

"A term requiring such counterparty or recipient to certify that it **does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.**"

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The EO 14173 Landscape (cont'd)

- Set the stage for a contract-enforcement model
- No definition of 'unlawful DEI'
- Did not provide implementation or timing information
- Directed creation of internal reports, which have not been made public
- Uneven implementation across agencies and SAM.gov grantee proposals

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EO 14398: Quick Hits

- On March 26, 2026, the President issued EO 14398, "Addressing DEI Discrimination by Federal Contractors"
 - Under FPASA authority to promote economy and efficiency in federal procurement
 - Seeks to prevent racially discriminatory DEI activities in the contractor workforce and supply chains
 - The companion fact sheet reiterates that all FPASA-subject contracts must include a clause prohibiting such activities and enabling termination or debarment for violations
- **Key Takeaway:** This is a more granular, mechanical approach, not just signaling

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EO 14398: What Does It Cover?

- At a minimum, FAR-covered procurement contracts are in scope
- Coverage of Other Transaction Agreements (OTAs), cooperative agreements, and grants remain unsettled
- DoD contracts likely included to the extent FAR applies
- Clause flow downs to subcontractors at all tiers
- **Key Takeaway:** The instrument type and statutory authority drive coverage

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EO 14398: New Requirements for Clauses in Federal Contracts

1. The contractor will not engage in any **racially discriminatory DEI activities**, as defined in section 2 of the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors);
2. The contractor will furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency pursuant to the Executive Order of March 26, 2026, for purposes of ascertaining compliance with this clause;
3. In the event of the contractor's or a subcontractor's noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor or subcontractor may be declared ineligible for further Government contracts;

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EO 14398: New Requirements for Clauses in Federal Contracts (cont'd)

4. The contractor will report any subcontractor's known or reasonably knowable conduct that may violate this clause to the contracting department or agency and take any appropriate remedial actions directed by the contracting department or agency;
5. The contractor will inform the contracting department or agency if a subcontractor sues the contractor and the suit puts at issue, in any way, the validity of this clause; and
6. The contractor recognizes that compliance with the requirements of this clause are material to the Government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code (False Claims Act)."

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EO 14398: Flowdown Requirements

- Agencies are directed to include the clause in contracts and “contract-like instruments”
- The clause must be flowed down to subcontracts and lower-tier subcontracts, extending monitoring and reporting duties through the supply chain
- Envisions significant prime contractor responsibility for subcontractor compliance, selection, and oversight processes
- Prime responsibility expands beyond simple flow-down
 - Diligence, monitoring cadence, and reporting protocol

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10

EO 14398: Flowdown Requirements (cont'd)

Prime contractor's responsibility expands beyond simple flow-down.

- Contractor must report subcontractor's **known or reasonable knowable conduct** that may violate clause to contracting department or agency
- Contractor must take appropriate remedial actions directed by the contracting department or agency
- Contractor must inform contracting department or agency if subcontractor sues the contract and puts at issue, in any way, the validity of the clause prohibiting racially discriminatory DEI activities

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EO 14398 Definitions: Racially Discriminatory DEI Activities

The order defines “racially discriminatory DEI activities” as disparate treatment based on **race or ethnicity** in **recruitment, employment decisions** such as hiring and promotions, **contracting** including vendor agreements, **program participation**, or the **allocation or deployment of an entity's resources**.

Key Takeaways:

- Goes beyond employment
- Goes beyond Title VII and Section 1981
- The EO uses a disparate treatment standard not expressly tethered to Title VII/§1981

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12

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Level Set: Disparate Treatment

- Disparate treatment = intentional differential treatment based on race/ethnicity
- Distinct from disparate impact - not covered by this EO
 - But don't be fooled by what this means
- DEI labels don't control
 - Substance of eligibility and access criteria does

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EO 14398 Definitions: Program Participation

The order defines "program participation" as "membership or participation in, or access to training, mentoring, or leadership development programs, educational opportunities, clubs, associations, or similar opportunities sponsored or established by the contractor or subcontractor."

- Could encompass employee resource groups, affinity networks, and mentorship programs depending on how access is structured
 - Mentoring cohorts open only to specific racial groups
 - ERG-exclusive leadership pipelines
 - Fellowships limited by race/ethnicity

Key Takeaway: Contractors and subcontractors will need to assess eligibility criteria and messaging for such programs to ensure they do not involve disparate treatment based on race or ethnicity

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14

EO 14398: Undefined Terminology

The order does not define "allocation or deployment of an entity's resources"

- This phrase expands evaluation beyond discrete employment or contracting decisions
- Potentially encompasses broader organizational decisions about funding, time, and internal investments in ways not typically policed by Title VII or Section 1981 frameworks
- May reach charitable giving, internal grants, sponsorships, and budget allocations if based on race/ethnicity

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EO 14398: Enforcement Architecture

- **Decentralized with central guidance and targeting**
- The order does not vest implementation in a single enforcement agency:
 - OMB is to issue guidance
 - The Attorney General and EEOC chair will coordinate with OMB to identify high-risk sectors and issue additional sector guidance, and individual contracting agencies will implement and enforce the clause
 - DOJ to “prioritize” FCA actions and ensure prompt qui tam review

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EO 14398: Access and Reporting

- Contractors must provide access to books, records, and accounts and furnish all information and reports as required by the contracting agency to ascertain compliance with the clause
- This signals robust audit and information-demand authority
- Contractors must also report known or reasonably knowable subcontractor violations and take any remedial actions directed by the agency, layering affirmative monitoring and communication obligations onto supply-chain management
- Appears to expand audit reach into commercial-item environments
- Plan for confidentiality, privilege and state privacy conflicts

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17

EO 14398 & the False Claims Act

- The clause’s express statement that compliance is material to payment for FCA purposes sets the factual foundation for FCA theories
- The Attorney General directed to consider bringing FCA actions and to ensure prompt review of qui tam suits, while the fact sheet states the Attorney General should prioritize such claims
- Increases risk of qui tam filings and DOJ investigations when contractors certify compliance in solicitations, awards, or invoices while maintaining programs or practices that fit within the order’s definitions
- Each payment request certifies compliance

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18

EO 14398: Beyond FCA – Penalties and Remedies and Monitoring

- Contracting agencies may cancel, terminate, or suspend a contract in whole or in part for violations and may suspend or debar contractors or subcontractors
- Debarment risk is real
 - Expect agency level discretion and variability
- These remedies sit alongside potential FCA liability, creating a multi-front enforcement risk potential
- Further, contractors must report known or reasonably knowable subcontractor violations and accept directed remedial actions
 - Primes may need enhanced diligence, contractual flow-downs, and monitoring and certification processes to identify and address potential issues in their supply chains

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19

EO 14398: Potential Compliance Challenges?

- FPASA scope - Does the economy-and-efficiency rationale support this breadth?
- Definitions broader than existing anti-discrimination law
- APA/rulemaking - New monitoring and audit obligations may require formal rulemaking
- First Amendment - Program participation may reach associational and philanthropic activities
- Records-access overbreadth - lacks procedural guardrails
- Litigation is likely but plan for compliance now
 - Agencies will enforce during litigation
 - EO includes a severability clause

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20

EO 14398: Timing

Date	Action
March 26, 2026	EO signed
April 25, 2026	Date by which agencies are directed to ensure covered contracts and contract-like instruments include the new clause
May 25, 2026	The FAR Council to issue deviation and interim guidance
July 24, 2026	Each agency head must review their agency's implementation and report on compliance to the Assistant to the President for Domestic Policy

30/60/120-day sequencing creates a 30-day gap before FAR guidance

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21

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From Policy to Contract: What Changed		
	EO 14173 (Jan. 2025)	EO 14398 (Mar. 2026)
What's prohibited	"Programs promoting DEI that violate any applicable Federal anti-discrimination laws" — undefined	"Racially discriminatory DEI activities" — standalone definition covering five domains: recruitment, employment, contracting, program participation, resource allocation
Legal benchmark	Tethered to Title VII, § 1981, existing law	The EO's own definition — not tethered to existing anti-discrimination law
Protected characteristics	All (race, sex, etc.)	Race and ethnicity only
Mechanism	Certification requirement embedded in contracts and grants	Mandatory six-part contract clause with prescribed text
Records access	Not addressed	Broad access to books, records, and accounts — notably few express limitations
Subcontractor obligations	Not addressed	Flow-down at all tiers; "known or reasonably knowable" reporting; litigation notification
FCA materiality	Referenced generally	Explicit clause element; DOJ directed to prioritize enforcement and expedite qui tam review within 60 days
Implementation	No timeline; uneven agency rollout	30-day clause insertion / 60-day FAR guidance / 120-day agency review

22

The Overcorrection Trap

Dismantling all programs with a "DEI" label

- The EO does not ban all DEI-related efforts
- Only targets race- or ethnicity-based differential treatment

Dismantling legally required compliance structures

- Section 503 (disability) and VEVRAA (veterans) remain in full effect
- Dismantling all compliance infrastructure including disability- and veteran-related processes create avoidable exposure that the EO does not require

Ceasing collection of workforce data

- EO prohibits disparate treatment — not data collection
- Measuring workforce demographics is analytically distinct from making decisions on the basis of race
- Privileged workforce analytics are needed to understand your compliance posture and FCA risk mitigation

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The Overcorrection Trap (cont'd)

Foregoing or short-circuiting analysis of programs and practices

- Stopping analysis to mitigate legal risk is a compliance failure
- Substance governs, not labels

Takeaway: Consider whether the program involves differential treatment on the basis of race or ethnicity?

- In access
- Eligibility
- Selection
- Funding
- Benefits

- If the answer is no, the program is outside the EO's scope regardless of what it is called

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Who Should Be Most Concerned? Sector-Specific Risk

- Higher Education
 - Already a target of administration civil rights enforcement actions
 - Extensive race-conscious programs across admissions-adjacent activities, faculty hiring, fellowships, student programming
 - Large federal contract and grant portfolios
 - Decentralized program structures that are difficult to audit centrally
- Technology
 - Among the most public in DEI commitments, including race-conscious hiring goals, ERGs, and supplier diversity
 - Public-facing statements may become exhibits in complaints or whistleblower allegations
 - Large federal contract portfolios in defense, cybersecurity, IT modernization
 - Complex supply chains amplifying subcontractor monitoring obligations

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Who Should Be Most Concerned? Sector-Specific Risk (cont'd)

- Healthcare
 - Race-conscious residency programs, pipeline initiatives, patient care protocols
 - Significant federal funding exposure
 - Broad reading of EO could extend to grant recipients and healthcare providers
- Professional Services
 - Visible DEI programs in workforce management, diversity recruitment targets, mentoring
 - People-intensive operations where recruitment, hiring, promotion, and mentoring are central
- Defense/Aerospace
 - High supply chain complexity amplifies flow-down exposure
 - Less visible public DEI programs may reduce complaint-driven triggers
- Financial Services
 - Race-conscious programs in lending and community reinvestment
 - "Allocation or deployment of resources" may reach community reinvestment activities

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Navigating the Gap: April 25 – May 25, 2026

- Before FAR Council guidance is issued, expect:
 - Agency-specific clause insertions that may not match the EO's verbatim text
 - Variations in contracting officer interpretation and expectations
 - Modifications to new awards, option exercises, and renewals before standardized language exists
 - Inconsistent flow-down and subcontractor requirements across agencies

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27

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Practical Next Steps

- Identify the team—which will likely involve, at least, Legal, HR, Procurement or Contracts, Philanthropic, and Sales or Operations
- **Review your contracts**
- Refresh privileged audit against EO 14398
- Train contracts/procurement/business professionals to flag and escalate clause
- Stand up subcontractor monitoring and reporting protocols
- Align invoices/certifications to FCA materiality
 - Add a compliance checkpoint
- Organize records
- Create an audit response playbook

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Practical Next Steps (cont'd)

- Accept the EO's verbatim clause language with caution
 - Ensure clause matches the EO text exactly
 - If it contains agency-specific additions or variations, seek clarification and document differences
- Do not refuse modifications solely because FAR Council guidance has not been issued
 - Refusal could itself create adverse consequences
- Document everything
- Track which contracts are modified, when, and what you certified
 - Build a contract modification tracking system now — you will need it
- Train your team to recognize the new clause, flag variations, and escalate to legal before accepting modifications

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29

Upcoming Programs

[The Heightened Risk of "Reverse" or Majority Discrimination Enforcement and Claims](#) - April 16, 2026, 2:00-3:00 p.m. EDT

[From Data to Defense: Preserving Attorney-Client Privilege in Workforce Analytics](#) - April 29, 2026, 2:00-3:00 p.m. EDT

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30

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Thank you!

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