

New Executive Order Imposes DEI Certification Requirements on Federal Contractors and Subcontractors

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On March 26, 2026, President Trump signed an [Executive Order](#) directing agencies to incorporate a new contract clause in federal contracts—including those subject to the Federal Property and Administrative Services Act (FPASA)—prohibiting “racially discriminatory DEI activities,” and requiring contractors to certify compliance, report subcontractor violations, acknowledge potential False Claims Act liability, and make records available for inspection.

While the order is similar in structure to previous executive actions targeting DEI programs, it introduces new certification language and more specific definitions, likely designed to accelerate agency implementation of contract clauses and to strengthen the Order’s resilience against legal challenges. The Executive Order focuses exclusively on race and ethnicity—it does not address gender-based distinctions in DEI activities.

Rationale for the Executive Order

The Executive Order justifies its requirements under the FPASA, 40 U.S.C. 101 et seq., which grants the President authority to promote economy and efficiency in federal procurement. According to the order, DEI activities “impose artificial costs in hiring, promotion, and operations” and “create unnecessary costs by reducing the pool of available labor,” and these costs are “inevitably passed on to the Federal Government” through contracting relationships. By invoking the FPASA and characterizing DEI activities as inherently costly, the Executive Order frames DEI restrictions as procurement efficiency measures rather than purely anti-discrimination policy, presumably in an attempt to strengthen its ability to withstand legal challenge.

Key Definitions

Racially Discriminatory DEI Activities. The Order defines “racially discriminatory DEI activities” as “disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity’s resources.” This definition is more detailed than that in the Administration’s prior executive actions targeting DEI programs, evidently to insulate the Order against challenges for vagueness.

Program Participation. The Order further defines “program participation” as “membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor.”

New Mandatory Contract Clause

Within 30 days of the Executive Order (by April 25, 2026), executive departments and agencies must ensure that federal contracts, including subcontracts and lower-tier subcontracts, include a new mandatory clause. Under the clause, contractors must agree to the following:

- ***Prohibition on Discriminatory Activities.*** Contractors must agree not to engage in any “racially discriminatory DEI activities” as they are defined in the order.
- ***Information and Reporting Obligations.*** Contractors must furnish all information and reports, including access to books, records, and accounts, as required by the contracting agency for purposes of ascertaining compliance.
- ***Consequences for Noncompliance.*** In the event of noncompliance by the contractor or a subcontractor, the 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.
- ***Subcontractor Reporting Requirements.*** Contractors must report any subcontractor’s known or reasonably knowable conduct that may violate the clause to the contracting department or agency and take any appropriate remedial actions directed by the contracting agency.
- ***Litigation Notification.*** Contractors must inform the contracting department or agency if a subcontractor sues the contractor and the suit puts at issue, in any way, the validity of the clause.
- ***False Claims Act Materiality.*** Contractors must recognize that compliance with the clause’s requirements is material to the government’s payment decisions for purposes of the False Claims Act (31 U.S.C. § 3729(b)(4)).

Regulatory Implementation and Guidance

Although agencies are instructed to implement the new clause within 30 days, the Executive

Order also anticipates broader regulatory adoption of the clause. The Executive Order directs the Federal Acquisition Regulatory Council to amend the Federal Acquisition Regulation (FAR) to: (i) include the mandatory clause in federal procurement, solicitations, and contracts; and (ii) remove any provisions that conflict or are inconsistent with the clause. The Executive Order also instructs the FAR Council to issue a deviation pursuant to FAR Subpart 1.4 (i.e., a solicitation provision that is inconsistent with or modified from existing FAR language) and interim guidance within 60 days of the order (by May 25, 2026) to facilitate agency implementation before formal FAR amendments are completed.

Enforcement and Penalties

The Executive Order sets forth a robust enforcement framework with significant penalties for noncompliance:

Contract Remedies. Contracting agencies are directed to cancel, terminate, or suspend any contract or portion thereof for failure to comply with the mandatory clause, and to take appropriate action to suspend and debar noncompliant contractors or subcontractors.

OMB Guidance. The Director of the Office of Management and Budget (OMB), in coordination with the Attorney General, the Assistant to the President for Domestic Policy, and the Chair of the Equal Employment Opportunity Commission, is directed to identify economic sectors that pose a particular risk of entities engaging in racially discriminatory DEI activities and to issue “best practices” guidance to contracting agencies regarding compliance.

Agency Reviews. Each agency head must review its implementation of the contract clause requirements within 120 days (by July 24, 2026) and report to the Assistant to the President for Domestic Policy regarding compliance.

False Claims Act Liability. The Attorney General, in consultation with relevant contracting agencies, is directed to consider whether to bring False Claims Act actions against contractors or subcontractors that violate the new mandatory clause. The Order also directs the Attorney General to ensure prompt review of *qui tam* actions brought by private persons concerning federal contracts or subcontracts, including by rendering a decision on intervention “to the maximum extent practicable, within the 60-day period” provided by statute.

Analysis and Implications

This Executive Order reinforces the Administration’s efforts to curtail DEI programs by government contractors and subcontractors, directing agencies to impose binding contractual obligations with potentially serious consequences, establishing a new, more specific contract clause with a definition of prohibited DEI programs, and requiring cooperation with government information requests. Several aspects warrant particular attention:

Attention to Covered Contracts. The Executive Order does not list with specificity the federal contracts implicated, but states that it applies to federal contracts, *including* those subject to FPASA. At a minimum, any contracts subject to the FAR are within scope. Other types of agreements, such as other transaction agreements (OTAs), are also likely to be subject to the new clause. While the Order does not apply retroactively, the broad direction to ensure that

contracts include the clause means that agencies are likely to seek to implement the new clause in existing contracts upon renewal, option exercise, extension, or other modification.

Broad Scope of Covered Activities. The definition of “racially discriminatory DEI activities” is expansive, encompassing disparate treatment in recruitment, hiring, promotions, contracting, and program participation. Federal contractors should carefully review any programs that involve race or ethnicity as a factor—including mentorship programs, professional development initiatives, supplier diversity programs, and employee resource groups—to assess potential exposure.

Subcontractor Reporting. The order places affirmative obligations on prime contractors to report subcontractor conduct. This creates significant compliance challenges, as contractors may face liability for subcontractor conduct that they knew or reasonably should have known about.

False Claims Act Exposure. The explicit linkage between compliance and the False Claims Act—which appeared in the prior executive order on this topic as well—is significant. By deeming compliance with the clause “material” to government payment decisions, the order creates a framework for FCA liability—including treble damages and civil penalties—for contractors found to have engaged in prohibited activities. This also opens the door to *qui tam* suits by private relators, with the order directing expedited government review of such cases. This *qui tam* mechanism is designed to incentivize private enforcement of the Order’s requirements by contractor employees and others.

Litigation Risk. The order’s broad definitions and novel enforcement mechanisms will likely face legal challenge.

Recommended Actions. Federal contractors should consider taking the following actions, to the extent they have not already done so:

- Promptly review DEI programs, policies, and practices for potential disparate treatment based on race or ethnicity;
- Evaluate supplier diversity programs and subcontractor relationships for potential exposure;
- Establish administrable protocols for reporting subcontractor violations;
- Prepare for agency audits and information requests;
- Monitor OMB and FAR Council guidance for sector-specific requirements and implementation details; and
- Evaluate potential False Claims Act exposure.

Gibson Dunn's Workplace DEI Task Force aims to help our clients navigate the evolving legal and policy landscape following recent Executive Branch actions and the Supreme Court's decision in *SFFA v. Harvard*. Prior issues of our DEI Task Force Update can be found in our [DEI Resource Center](#).

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