

## **How to Secure Compliance with Eliminating Illegal DEI in a Cost-Effective Manner -- Implementing a Government-Approved Voluntary Compliance Program**

### **Executive Summary**

#### **Pros for the Administration**

- Promotes compliance with EO 14173
- Ensures merit-based employment practices
- Allows the Administration to prepare and publish a list of contractors that are not engaging in illegal DEI
- Leverages limited government resources—the enforcement agencies cannot investigate all contractors for illegal DEI
- The list will allow for a “pre-award” clearance for procurement officers of federal agencies
- Provides a streamlined and efficient manner to determine compliance and certification

#### **Pros for the Contractor**

- Provides certainty and clarity on how to certify for illegal DEI and compliance with federal anti-discrimination laws
- Provides for a voluntary safe harbor with limited burden and a good-faith standard for certification
- Provides for a safe harbor from False Claims Act enforcement and EEOC litigation
- Efficient manner for certification – one-stop certification for a contractor’s procurement representatives

## **How to Secure Compliance with Eliminating Illegal DEI in a Cost-Effective Manner -- Implementing a Government-Approved Voluntary Compliance Program**

### **Overview**

- President Trump’s Executive Order 14173 prohibits illegal DEI and imposes new obligations on federal contractors and the procurement agencies.
  - Federal contractors must certify compliance, subject to potential penalties under the False Claims Act.
  - Procurement agencies are seeking compliance certifications for the federal contracts they award and administer, often resulting in multiple requests to the same contractor.
- A voluntary compliance program that provides certainty for federal contractors on the steps for assessing illegal DEI will promote compliance in a manner that is consistent with the Administration’s goals.
  - Without compliance criteria, the contractor community is uncertain as to what programs and good faith efforts will meet the new certification standards.
- The procurement agencies can also benefit by utilizing a central registration point, such as SAM, for Federal contractors that opt to fall under the compliance program.
  - A central certification by a company that the voluntary compliance program has been satisfied will enable all contracting agencies to efficiently determine that company’s eligibility for federal contracts based on compliance with the DEI certification requirements.
  - The federal government can publicize a list of all contractors that have agreed to conduct annual self-assessments to ensure they use merit-based policies and procedures and do not use illegal DEI that discriminates in violation of federal laws.
- A voluntary compliance program benefits all stakeholders.
  - There is increased government efficiency for awarding government contracts to qualified parties by using an efficient central eligibility database.
  - Federal contractors are incentivized by having greater certainty in implementing lawful workplace programs and not incurring liability for false certifications.
  - Individuals will be able to challenge DEI programs before the EEOC or under the False Claims Act, which provides additional safeguards for compliance.

### **General Concept for the Voluntary Compliance Program**

- General criteria for federal contractors to certify in “good faith” and ensure that their policies and practices do not violate federal anti-discrimination laws, and do not promote illegal DEI.
  - Annual proactive evaluation of employment policies, practices and decisions.
  - Determine if ANY employment practices may constitute “illegal DEI”

- The framework for determining whether there is Illegal DEI -- the three-step process.

Step 1: A review of the contractor's policies and practices to determine if they may violate federal law. Do any policies or practices:

- Require or suggest a quota system based on race/ethnicity or sex
- Require or suggest any preference based on race/ethnicity or sex
- Set aside any program or practice based on race/ethnicity or sex
- Limit the use of merit selection procedures
- Exclude applicants or employees from participating based on race/ethnicity or sex
- Constitutes harassment based on race/ethnicity or sex

Step 2: Conduct workforce analytics

- Determine if any employment policy, practice, or action has evidence of discriminatory intent, preference or exclusion, including pattern or practice disparate treatment.
- Employers may design and model those analytics in a way that best fits their organization.
- Any analytics will evaluate employment decisions for differential treatment based on all races (including whites) and sexes (including males).

Step 3: If the contractor identifies any policy or practice that may violate federal law as described above, in GOOD FAITH, it will:

- Determine that the identified practice is legal; or
- Remove and eliminate the employment practice that may have been discriminatory

### **What Does the Voluntary Compliance Program Provide for Employers and Federal Contractors**

For federal contractors that opt to use the voluntary compliance certification, there will be the following protections against claims by the government (although the government can challenge a certification that is not based on good faith compliance):

1. False Claims

If an employer complies in good faith with the voluntary program

- a. DOJ will not pursue an FCA claim against the contractor related to its certification under the EO; and
- b. DOJ will oppose any FCA relator claims related to the contractor's certification under the EO.

2. Additionally, it provides certainty and clarity

- a. Allows contractors to point to concrete examples of what they can and can't do
- b. Establishes a good-faith criterion to certify compliance in a manner that is consistent with the Administration's goals
- c. Expands employment opportunities by promoting merit-based and non-discriminatory workforces

- d. EEOC will not pursue litigation enforcement

#### **Why a Voluntary Compliance Program Is in the Best Interest of the Trump Administration and Advances EO 14173**

- Promotes compliance with the EEO laws and elimination of illegal DEI by more clearly advising contractors what can and cannot be done and promotes non-discriminatory workplace policies and practices that provide expanded employment opportunities based on individuals' merit.
- Leverages limited government resources—the enforcement agencies cannot investigate all contractors for illegal DEI. This allows the limited enforcement resources to be focused on those parties that opt not to participate in the voluntary program to assess whether their compliance certifications were accurate.
- It creates efficiency for Federal procurement by using a central certification database (e.g., SAM) that the agencies can rely on instead of obtaining certifications for individual contracts.
- Maintains the ability of individuals to challenge programs that they believe constitute illegal DEI.

#### **Implementation Steps**

- Fully coordinated approach by the White House, DOJ, EEOC, and DOL (if applicable)
- Appropriate amendment to the Federal Acquisition Regulations (FAR).
- Establish the central registry for federal contractors that voluntarily comply and certify: add a data field to the SAM and issue instructions to all procurement agencies.
- Completed roll out within 60 days.

# # #