

Implementing Executive Order 14173

The Institute for Workplace Equality

**How to Secure
Compliance with
Eliminating Illegal DEI
in a Cost-Effective
Manner --**

**Implementing a
Government-
Approved Voluntary
Compliance Program**

Pros for the Administration

Promotes compliance with EO 14173

Ensures **merit-based** employment practices

Allows the Administration to publish a list of contractors that are not engaging in illegal DEI

Leverages limited government resources

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

State Department Certification

CERTIFICATION REGARDING COMPLIANCE WITH APPLICABLE FEDERAL ANTI-DISCRIMINATION LAW

All Department of State contractors must certify that they do not operate any programs promoting DEI that violate any applicable anti-discrimination laws and agree that such certification is material for purposes of the government's payment decision and therefore subject to the False Claims Act. See 31 U.S.C. 3729(b)(4).

DIRECTIONS FOR CONTRACTORS and/or OFFERORS

1. Read the entire certification provided below.
2. After you have read the provisions, please check the appropriate boxes.
3. Upon completion of Step 2, fill out the representation below. *NOTE: This certification is made by a person with the authority to bind the contractor or offeror.*
4. Return completed form to the Contracting Officer/POC shown in the e-mail.

CERTIFICATION:

The Contractor or prospective offeror certifies they:

☐ are in compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 31 USC 3729(b)(4) (False Claims Act); and

☐ do not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws.

Contractor or Offeror Name (Printed or Typed): _____

Authorized Representative Name and Title: _____

Authorized Representative Signature and Date: _____



EO14173 Certification

Federal contractors and grant recipients will certify **annually** in a central database

The Institute is recommending that the administration utilize www.sam.gov for the certification

Proposed - Sam.gov Certification and Safe Harbor

- The Contractor, grant recipient, or prospective offeror certifies 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 (False Claims Act);

And, either certifies:

- ☐ It does not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws;

Or

- ☐ In good faith, it is opting into the Voluntary Compliance Program (VCP) and has conducted the three-step process under the VCP to determine that it is not operating any programs promoting Diversity, Equity and Inclusion that violate any applicable Federal anti-discrimination laws.

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

Minimally Burdensome and Efficient Safe Harbor Program

- General criteria for federal contractors to certify in “good faith” and ensure that “they do not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws”:
 - 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.

Simple 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 (NOT DISPARATE IMPACT)**.
 - 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 nondiscriminatory workforces
 - d) EEOC will not pursue litigation enforcement

Why a Voluntary Compliance Program Advances President Trump's EO 14173

- Promotes compliance with the EEO laws and elimination of illegal DEI by more clearly advising contractors what can and cannot be done.
- Leverages limited government resources.
- 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 rollout within 60 days.