September 2, 2025

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200 Constitution Avenue NW
Washington, DC 20210

Submitted via Federal Rulemaking Portal: www.regulations.gov

Re: RIN 1250–AA17, "Rescission of Executive Order 11246 Implementing Regulations"

Dear Ms. Eschbach,

The undersigned organizations and former Department of Labor ("DOL") officials write to express our views on RIN 1250–AA17, "Rescission of Executive Order 11246 Implementing Regulations" (hereinafter "Proposed Rule").[1] As organizations and individuals committed to workers' rights, gender and racial justice, and equal employment opportunity for all workers, we strongly oppose the Proposed Rule.

For 60 years, Executive Order ("EO") 11246 - Equal Employment Opportunity (as amended), and the DOL's implementing regulations, provided core civil rights protections for workers employed by federal contractors—approximately one–fifth of the entire U.S. labor force[2]—by prohibiting discrimination on the basis of race, national origin, religion, sex, sexual orientation, or gender identity. EO 11246 and the implementing regulations also helped ensure all workers had a fair chance to compete for good jobs with federal contractors by requiring contractors to undertake proactive measures to identify and address barriers and prevent discrimination. As outlined in our comments below, this framework has been critical to ensuring that businesses who have the privilege of contracting with the federal government do not use taxpayer dollars to unlawfully discriminate against working people.

On January 21, 2025, President Trump issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which, among other provisions, revoked EO 11246.[3] With this Proposed Rule, the Office of Federal Contract Compliance Programs ("OFCCP") within the DOL now seeks to fully dismantle the framework that

[1] 90 Fed. Reg. 28472 (proposed July 1, 2025).
[2] *See History of Executive Order 11246*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (on file with author).
[3] Executive Order 14173 of January 21, 2025, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 31, 2025).

implemented EO 11246.[4] Our comments below outline key provisions of this longstanding regulatory framework, the significant impact these regulations have had in opening the doors to opportunity for workers of all backgrounds, and the harm that will result from their rescission. Our comments also respond to the DOL's additional justifications for rescinding the regulations, which rely on mischaracterizations of the regulations and of the legal frameworks that govern practices to ensure equal employment opportunity. For the reasons outlined below, we strongly oppose the Proposed Rule and urge OFCCP to withdraw it.

1. **EO 11246 and the implementing regulations open the doors to equal opportunity by requiring nondiscrimination and proactive measures to ensure fair workplaces.**

In 1965, President Lyndon B. Johnson signed EO 11246, prohibiting discrimination by federal contractors on the basis of "race, creed, color, or national origin" – later expanded to include sex, religion, sexual orientation, and gender identity.[5] Congress had just passed the Civil Rights Act of 1964, and President Johnson wanted to be certain that these new legal protections would in fact expand economic opportunity.[6] By signing EO 11246, President Johnson created new structures and incentives to encourage companies who do business with the federal government to access a broader array of talent and increase access to jobs for all Americans, expanding approaches developed during World War II and afterwards.[7]

Over the next 60 years, between 1965 and 2025, every President, whether a Republican or a Democrat, carried out EO 11246's protections, including the first Trump Administration.[8] Past Administrations have made changes to EO 11246's text, its regulations, and its enforcement program to reflect Presidential policy priorities, often to expand protections. In doing so, they all upheld the basic principle that U.S. taxpayer dollars should not subsidize racial segregation, sexual harassment, religious discrimination, unequal pay, and other illegal practices. Recognizing that simply asking companies not to discriminate in order to secure the privilege of

[4] The Proposed Rule would rescind all of the EO 11246 implementing regulations with the exception of the administrative enforcement proceeding procedures under 41 C.F.R. § 60-30. For those provisions, which also apply to Section 503 of the Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), the DOL proposes to modify the regulations to remove references to EO 11246. The DOL is pursuing separate rulemakings to move the remaining language into the regulations governing Section 503 and VEVRAA, and if those rules take effect, it would then rescind 41 C.F.R. § 60-30. 90 Fed. Reg. at 28474.
[5] Jane Farrell, *The Promise of Executive Order 11246: "Equality As A Fact and Equality As A Result"*, 13 DEPAUL J. FOR SOC. JUST. 1, 5 (2020).
[6] *See* Heather Timmons, *Why LBJ Signed Executive Order 11246 that Trump Rescinded*, REUTERS (Jan. 23, 2025) https://www.reuters.com/world/us/why-president-johnson-signed-executive-order-1965-that-trump-rescinded-2025-01-23/.
[7] *See History of Executive Order 11246*, *supra* note 2.
[8] *See, e.g.*, *U.S. Department of Labor Announces Best Year for Compliance Assistance by Office of Federal Contract Compliance Programs*, U.S. DEP'T OF LABOR (Oct.19, 2020), https://www.dol.gov/newsroom/releases/ofccp/ofccp20201019-0#:~:text=WASHINGTON%2C%20DC%20%E2%80%93%20The%20U.S.%20Department%20of%20Labor,for%20monetary%20settlements%20for%20fiscal%20year%20%28FY%29%202020.

federal contracting would not be enough, these Presidents enforced requirements that contractors proactively review their workplace practices for potential discrimination and address any problems they found.

While there continue to be areas for improvement, this regulatory framework has been critically important for the federal contractor workforce. The decision to rescind EO 11246, and now to rescind its implementing regulations, is unprecedented and undermines equal employment opportunity. While federal, state, and local civil rights laws, including Title VII of the Civil Rights Act of 1964, continue to protect the U.S. workforce, eliminating EO 11246's proactive enforcement program leaves employees who work for federal contractors more vulnerable to discrimination.

Below, we outline key provisions of the implementing regulations that the Proposed Rule would rescind and explain how these requirements worked to prevent discrimination and promote equal opportunity.

a. Affirmative action provisions for construction and non-construction contractors.

The Proposed Rule would rescind all existing regulations requiring supply and service contractors and construction contractors to take "affirmative action" measures, meaning proactive steps to ensure fair workplaces. The regulations themselves make clear that the phrase "affirmative action" means good faith efforts to ensure equal opportunity through fair procedures and processes, not through obtaining specific outcomes. Indeed, they specifically forbid contractors from establishing any quota or set-aside or providing preferential treatment for any group.[9] Under the regulations, federal supply and service contractors must develop written Affirmative Action Programs ("AAP"), which involve reviewing the racial and gender makeup of groups of similar jobs, and then evaluating whether there is any evidence that employees of a particular demographic group did not have a fair chance to compete for those jobs.[10]

[9] 41 C.F.R. § 60-2.16(e) states: "In establishing placement goals, the following principles also apply:
(1) Placement goals **may not be rigid and inflexible quotas**, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. **Quotas are expressly forbidden**.
(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. **Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.**
(3) Placement goals do not create set-asides for specific groups, **nor are they intended to achieve proportional representation or equal results**.
(4) **Placement goals may not be used to supersede merit selection principles.** Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one." (Emphasis added).

[10] 41 C.F.R. Part 60-2.

Developing these AAPs would typically involve comparing representation in the job groups to an aspirational goal based on the qualified and available labor force in that area. Under a fair and open process, qualified individuals of all backgrounds would be expected to apply and be selected. If there is instead a significant pattern that favors one group over the others, the regulations require contractors to examine hiring, promotion or other practices to see if there were any unnecessary hurdles excluding qualified workers. If so, contractors should increase outreach, or evaluate testing or interview practices to see if changes are warranted.[11] The regulations make clear there is no sanction for failing to meet a goal - the only requirement is to identify gaps between availability and utilization, and take steps to understand any barriers causing those gaps.[12] And those regulations, as well as the agency's own compliance assistance documents for supply and service contractors, emphasize that goal-setting may not be used to favor anyone based on race or gender, and should not be used to achieve proportional representation or other specific results.[13]

Federal construction contractors have different but aligned obligations under these regulations to make sure their hiring and other practices provide equal opportunity. Rather than creating written plans and doing their own analysis and goal setting, construction contractors use aspirational goals set by the agency as a point of comparison to the actual participation rates for women and for minority workers on federally-funded construction contracts.[14] There are some specific action steps identified in the regulations to show good faith efforts towards meeting those aspirational participation rates, such as broad outreach and recruiting, examining data, addressing and preventing harassment, and providing on the job training.[15] Addressing barriers to fair and equal participation is entirely consistent with non-discriminatory hiring and other employment

[11] Such outreach as a strategy for ensuring fair and open competition is not an illegal or discriminatory practice. *See Shuford v. Ala. State Bd. of Educ.*, 897 F. Supp. 1535, 1551-52 (M.D. Ala. 1995) (holding that inclusive action that seeks to ensure that "as many qualified candidates as possible make it to the selection process" was not subject to strict scrutiny); *Peightal v. Metro Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (recruitment of minorities and women at high schools and colleges was race-neutral).

[12] In an analogous context, a federal court rejected a challenge to affirmative action program regulations that used comparable language to require good faith efforts to meet a specific aspirational goal for employees with disabilities, regulations that are the subject of a parallel rescission proposal. In that case, the Court explained that "the utilization goal is not a quota" because there was no sanction for failing to meet it. As the Court explained, "any contractor that engages in significant affirmative-action efforts, but falls short of 7% because it is faced with too few qualified applicants with disabilities could arguably have complied with the Rule. No contractor is required to hire any unqualified individual and all that occurs if the benchmark is not met is that the contractor must examine its hiring practices to determine if they are excluding qualified individuals with disabilities." *Associated Builders & Contractors, Inc. v. Shiu,* 30 F. Supp. 3d 25 , 46 (D.D.C. 2014), *aff'd* 773 F. 3d 257 (D.C. Cir. 2014).

[13] Supply and Service Contractors OFCCP Technical Assistance Guide at 46 (November 2020) (on file with the authors).

[14] 41 C.F.R. § 60-4.6.

[15] 41 C.F.R. § 60-4.3.

practices.[16] Again, there is no sanction for failing to meet participation rates; the regulations require good faith efforts and action steps, not quotas or preferential treatment.[17]

The regulations also require contractors to collect and maintain data, and conduct proactive analyses of hiring, promotion, termination and pay, looking for any evidence that race, gender or other improper discrimination was affecting these outcomes.[18] Critically, these requirements apply to <u>everyone.</u> The government enforces these regulations to address unfair pay for women and for men, and unequal hiring for workers of all races, including white workers.[19]

The Proposed Rule wildly mischaracterizes the affirmative action requirements when it asserts:

> The regulatory requirements to take affirmative actions are also imposed without any showing that discriminatory practices towards women and minorities do in fact exist at the employer. The premise that the mere existence of statistical disparities is evidence of underutilization of women and minorities is based on the fundamentally flawed assumption that each and every federal contractor's workforce may harbor discrimination if it does not mirror the available labor pool for women or minorities.[20]

The regulatory requirements are not intended to be a remedy for proven discrimination. The regulatory framework presumes that contractors are making good faith efforts to ensure fair workplaces. However, the regulations require contractors to test that assumption, in exchange for the privilege of federal contracting. The framework of goals and utilization analysis makes no assumption about whether any contractor's workforce is "harboring discrimination." To the contrary, the regulations specifically state that "a determination under § 60-2.15 that a placement goal is required constitutes neither a finding nor an admission of discrimination."[21] As explained above, a gap between utilization and the qualified available labor force merely triggers an inquiry into whether there is an explanation for that gap, and whether any improvements in policies and practices could increase equal opportunity.

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[16] *See e.g. Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F. 2d 159, 173 (3rd. Cir. 1971) (finding that utilization goals in the "Philadelphia Plan" did not require construction contractors to displace any existing employees or to make hiring decisions in a discriminatory way).

[17] CONSTRUCTION CONTRACTORS TECHNICAL ASSISTANCE, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS 18 (2019), available at https://policygroupontradeswomen.org/wp-content/uploads/2020/10/OFCCP-Construction-Technical-Assistance-Guide-2019.pdf (reaffirming that "[t]hese goals are not quotas that must be met…Rather, the construction goals under Executive Order 11246 are minimum targets for the participation of women and minorities that should be reasonably attainable by acting in good faith to take the 16 affirmative action steps prescribed by OFCCP. The standard of compliance is good faith.").

[18] 41 C.F.R. §§ 60-1.12, 60-2.17.

[19] *See, e.g.*, *U.S. Department of Labor Files Complaint Against ABM Janitorial Services Alleging Systemic Racial Discrimination at Maryland, Virginia Offices*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (Sept. 17, 2021), https://www.dol.gov/newsroom/releases/ofccp/ofccp20210917.

[20] 90 Fed. Reg. 28475.

[21] 41 C.F.R. § 2.16(b).

Further, the agency's own enforcement practices show that enforcement actions for potential discrimination violations are not based on the goals or the utilization analysis and are entirely independent of the affirmative action analysis. Notices of violation for discrimination are based on OFCCP's analysis of actual applicant and hire data, or actual wage data, not a comparison of utilization to availability.[22] Notably any enforcement efforts by OFCCP related to AAPs are not discrimination enforcement actions. Instead they are pursued as potential "technical" violations - meaning failure to abide by the procedural requirements of the regulations, such as failing to take an action step to identify or address potential barriers to equal opportunity.[23]

In sum, these AAPs and other requirements serve a vital compliance and risk management function by ensuring contractors undertake proactive, regular analysis of workplace policies and practices to make their workplaces fairer. These regulations promote merit in hiring, compensation, and promotion by forcing contractors to examine their practices and address subjective and arbitrary decision-making, unnecessary job requirements that screen out qualified workers, and unequal pay practices. They also ensure federal contractors comply with basic civil rights and fair workplace standards. Courts have repeatedly held that these practices are not discriminatory and advance the goals of Title VII and other workplace civil rights laws.[24] Eliminating these proactive requirements would undermine the federal government's commitment to equal opportunity and fair employment. Even if these regulations are ultimately

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[22] *See* OFCCP FEDERAL CONTRACT COMPLIANCE MANUAL (FCCM) (2020) (on file with authors) (explaining the types of information the agency requests and analyzes before determining whether there may be a violation of the nondiscrimination requirements). A review of the EO 11246 conciliation agreements posted by OFCCP pursuant to FOIA shows that the agency is enforcing non-discrimination requirements by review of applicant and hire data, wage data, and other records of employment decisions (financial agreements), not by reviewing utilization or availability analysis for an AAP (which are resolved through non-financial agreements). *Conciliation Agreements*, Office of Federal Contract Compliance Programs, https://www.dol.gov/agencies/ofccp/foia/library/conciliation-agreements (last visited Aug. 13, 2025).

[23] *Conciliation Agreements*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/foia/library/conciliation-agreements (last visited Aug. 13, 2025). ("Conciliation Agreements…identify violations and require the contractor to implement specific remedies. The financial conciliation agreements posted address compliance evaluations that resulted in discrimination with make-whole relief to employees or job seekers. The technical conciliation agreements address administrative issues (e.g., record keeping, outreach, etc.) but do not involve discrimination or back pay and make-whole relief.").

[24] The Supreme Court has recognized that a key purpose of Title VII is to encourage employers to proactively address inequality and remedy discrimination. *See Internat'l Broth. of Teamsters v. United States,* 431 U.S. 324, 348 (1977); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (noting that "[Title VII's] 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm"); *Vance v. Ball State University,* 570 U.S. 421 (2013). Lower courts have repeatedly rejected claims that the kinds of actions required under these regulations constituted discrimination or were otherwise unlawful or inappropriate. *Christensen v. Equitable Life Assur. Soc. of US*, 767 F. 2d 340, 344 (7th Cir. 1985) (fact that employer had adopted goals for recruiting Black employees into executive positions not evidence of discrimination where there was no evidence it affected the decisions about plaintiff); *Reed v. Agilent Technologies, Inc.*, 174 F. Supp. 2d 176, 186 (D. Del. 2001) (finding that "the mere existence of a policy promoting diversity awareness is not evidence of discrimination. Merely producing evidence regarding the aspirational purpose of an employer's diversity policy, and its intent to ameliorate any underutilization of certain groups, is not sufficient."); *Lutes v. Goldin*, 62 F. Supp. 2d 118, 131 (D.D.C.1999) (finding that concern for ensuring equal opportunity and removing barriers does not support a claim of discrimination when there is no evidence of any preference for one group over the other).

rescinded, they should continue to serve as a model for all employers practicing equal opportunity.

b. Nondiscrimination obligations for federal contractors.

The Proposed Rule would also rescind the nondiscrimination provisions in the implementing regulations, which reaffirm federal contractors' nondiscrimination obligations and outline baseline, commonsense guidelines aimed at preventing and addressing employment discrimination. Although federal contractors are covered by Title VII's prohibition on discrimination, the regulations send a clear message to federal contractors about their obligations and outline specific practices that constitute unlawful discrimination. Further, OFCCP's regular practice of neutrally scheduling compliance evaluations enables the agency to uncover and redress hidden discrimination that workers may not be aware of – or acts of discrimination that employees are afraid or unable to challenge themselves. Rescinding these regulations and eliminating OFCCP's nondiscrimination enforcement role would make it more difficult to identify and combat discrimination by federal contractors.

These nondiscrimination regulations include 41 C.F.R. § 60-1.4, which requires contractors to include equal opportunity language in their job postings that informs prospective applicants that they will receive consideration for employment without regard to their race, color, religion, sex, or other protected characteristics.[25] This nondiscrimination language signals to prospective applicants that they will be fairly considered on the basis of their skills and experience, which we understand is the stated goal of the Department. Unfortunately, we know that some job applicants, including applicants for jobs with federal contractors, continue to face unlawful discrimination in the hiring process.[26] This required language helps ensure that contractors receive as many applications from qualified individuals as possible, and that no one is deterred from applying for a job because they believe they won't be considered on account of their identity. This regulation also benefits contractors by providing them with specific equal opportunity language to use in their job postings to ensure they are complying with federal anti-discrimination law, rather than forcing them to interpret these laws and generate such language without any guidance.

[25] 41 C.F.R. § 60-1.4.

[26] *See, e.g.*, *Pitney Bowes to Pay Nearly $1.6M to Resolve Race-Based Hiring Discrimination Allegations at Five Locations*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (Oct. 12, 2023), https://www.dol.gov/newsroom/releases/ofccp/ofccp20231012-2; *US Foods Agrees to Pay $721K to Resolve Gender-Based Hiring Discrimination Allegations at Five Locations*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (Oct. 13, 2023), https://www.dol.gov/newsroom/releases/ofccp/ofccp20231013; *US Department of Labor Resolves Alleged Hiring Discrimination Found in Routine Evaluation of National Research Center Hiring Practices*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (Oct. 2, 2023), https://www.dol.gov/newsroom/releases/ofccp/ofccp20231002.

The regulations also reaffirm the nondiscrimination provisions of EO 11246 and outline examples of discriminatory employment practices based on specific protected characteristics. For example, they make clear that the EO's prohibition on sex-based discrimination includes discrimination based on "pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping."[27] The regulations provide specific examples of discriminatory treatment based on sex, such as "[d]enying women with children an employment opportunity that is available to men with children" or "[s]teering women into lower-paying or less desirable jobs on the basis of sex."[28] They also identify policies or practices that constitute unlawful disparate impact discrimination, such as unnecessary height or weight requirements that have a disparate negative impact for women.[29] Further, they outline examples of discriminatory compensation practices; discrimination on the basis of pregnancy, childbirth, or related medical conditions; employment decisions made on the basis of sex-based stereotypes; and prohibited sex-based harassment.[30] Although federal contractors remain covered by Title VII's prohibitions on sex-based discrimination, including sex-based harassment, rescinding these regulations would eliminate this critically important guidance about employment practices that constitute unlawful sex-based discrimination.

The implementing regulations also reaffirm EO 11246's prohibitions on discrimination based on religion and national origin, which continue to impact workers of many different faiths and national origins,[31] and provide guidelines on how to meet their obligations. For example, the regulations provide contractors with guidance on their obligation to make reasonable accommodations for employees' religious observances and practices, such as the observance of their Sabbath.[32] Freedom from religious discrimination is a foundational value of our nation, and Title VII of the Civil Rights Act codified this value in the context of employment.[33] The implementing regulations provide contractors with critical guidance on how to balance their business obligations with their duty to provide religious accommodations where possible and help ensure workers do not face religious discrimination.

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[27] 41 C.F.R. Part 60-20.
[28] 41 C.F.R. § 60-20.2(b).
[29] 41 C.F.R. § 60-20.2(c).
[30] 41 C.F.R. §§ 60-20.4–60-20.8.
[31] *See, e.g.*, *J.B. Hunt Transportation Settles EEOC Religious Discrimination Charge for $260,000*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Nov. 15, 2026), https://www.eeoc.gov/newsroom/jb-hunt-transport-settles-eeoc-religious-discrimination-charge-260000; *EEOC Sues Logic Staffing for Religious Discrimination and Retaliation*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Oct. 3, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-logic-staffing-religious-discrimination-and-retaliation; *Center One and Capital Management Services to Pay $60,000 in EEOC Religious Accommodation Suit*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Oct. 24, 2024), https://www.eeoc.gov/newsroom/center-one-and-capital-management-services-pay-60000-eeoc-religious-accommodation-suit; *LeoPalace Resort to Pay Over $1.4 Million in EEOC National Origin Discrimination Lawsuit*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Feb. 18, 2025), https://www.eeoc.gov/newsroom/leopalace-resort-pay-over-14-million-eeoc-national-origin-discrimination-lawsuit.
[32] 41 C.F.R. Part 60-50.
[33] 42 U.S.C. § 2000e-2.

Finally, the Proposed Rule would also rescind 41 CFR 60-1.8, which requires contractors to prevent segregation in employee facilities like work areas, eating areas, drinking fountains, and restrooms.[34] This regulation is critical to ensuring that there is active enforcement to address this particularly egregious form of discrimination.[35]

c. Prohibition on adverse employment action for discussing or disclosing compensation.

EO 11246 and the implementing regulations also prohibit federal contractors from discharging or discriminating against any employee or applicant for inquiring about, discussing, or disclosing the compensation of the employee or applicant or another employee or applicant. President Obama amended EO 11246 to add these protections in 2013, pursuant to his authority under the Federal Property and Administrative Services Act,[36] and the implementing regulations were updated accordingly.[37]

This amendment strengthened protections against pay discrimination included in federal law, including the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, by providing explicit protections against retaliation for discussing pay.[38] The National Labor Relations Act (NLRA) also protects some workers from retaliation when they engage in "concerted activity," including discussing their pay; however, this law does not protect all categories of workers, and it does not protect supervisors.[39] It also may not always protect employees when they ask about their own pay.[40] While the Paycheck Fairness Act, currently pending in Congress, would codify explicit

[34] 41 C.F.R. § 60-1.8.
[35] *See, e.g.*, Claire Voon, *Dep't of Labor Sues B&H Photo Over Discriminatory Practices*, HYPERALLERGIC (Feb. 26, 2016), https://hyperallergic.com/278663/department-of-labor-sues-bh-photo-over-discriminatory-practices/ (describing a lawsuit OFCCP filed against B&H Photo Video, alleging that restroom facilities at the company's warehouse were segregated).
[36] Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, 79 Fed. Reg. 20749 (Apr. 8, 2014); 40 U.S.C. § 101 et seq.
[37] 41 C.F.R. § 60-1.4 (2015).
[38] Equal Pay Act of 1963, 29 U.S.C. 206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e). These laws protect workers from retaliation when they raise concerns about pay discrimination. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#f._Inquiries. However, they have not been interpreted to protect workers against retaliation when they learn of pay discrimination unintentionally. NAT'L WOMEN'S LAW CTR, COMBATING PUNITIVE PAY SECRECY POLICIES (2019), https://nwlc.org/wp-content/uploads/2019/02/Combating-Punitive-Pay-Secrecy-Policies.pdf.
[39] Several categories of workers are not protected by the NLRA, including federal, state, and local government workers, agricultural workers, domestic workers, independent contractors, and workers whose employers are subject to the Railway Labor Act, such as interstate railroads and airlines. Additionally, supervisors are not protected by the NLRA, although supervisors who have been discriminated against for refusing to violate the NLRA may be protected. *Employee Rights*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights.
[40] *See* Udochi Onwubikwo, *The Gender Wage Gap Widened For the First Time in Two Decades, and Trump Responds by Rolling Back Protections that Help Workers Discover Discriminatory Pay,* NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (Mar. 4, 2025) https://nationalpartnership.org/gender-wage-gap-widened-first-time-in-two-decades-trump-responds-rolling-back-protections/. The NLRA does protect workers who make joint requests to their employer concerning their pay, as that would be concerted activity.

protections for all workers if passed, EO 11246 and the implementing regulations provided these critical protections to millions of workers employed by federal contractors.

When employees fear retaliation, including termination, for inquiring about or discussing their wages, it creates an environment ripe for discrimination and exploitation, and prevents workers from discovering and challenging pay discrimination.[41] Employers may also implement affirmative company policies that prohibit their employees from inquiring about their compensation or discussing it with other employees.[42] Take the example of Lilly Ledbetter. Lilly was a supervisor at Goodyear Tire, which had a policy against discussing or disclosing wages.[43] Lilly was underpaid compared to her male counterparts for over twenty years, but she was kept in the dark about the pay disparity for much of her career as a result of pay secrecy, and she only learned she was being paid unfairly after receiving an anonymous note.[44] Had the policy not existed, Lilly might have learned about her unfair and discriminatory pay much sooner. The protections under EO 11246 help ensure that all federal contract workers can talk to their employers and coworkers about their pay, so that workers like Lilly Ledbetter have the opportunity to discover pay discrimination and demand fair compensation.[45]

These protections under EO 11246 have been in place for a decade, and the government has not shown any undue burden on federal contractors in maintaining such a rule. During that time, OFCCP has enforced these protections to hold employers accountable, obtain compensation for workers who faced retaliation for inquiring about or discussing their pay, and ensure that employers do not have policies that penalize employees for disclosing or inquiring about pay.[46] Given the persistence of racial and gender wage gaps, enforcing these protections against pay

[41] Noreen Farrell, *How Trump's Federal Contractor Executive Order Will Strip Workplace Protections from Millions of Women Workers*, EQUAL RIGHTS ADVOCATES (Jan. 30, 2025), https://www.equalrights.org/news/how-trumps-federal-contractor-executive-order-will-strip-workplace-protections-from-millions-of-women-workers/; NAT'L WOMEN'S LAW CTR, COMBATING PUNITIVE PAY SECRECY POLICIES, *supra* note 38.
[42] QUICK FIGURES: PAY SECRECY AND WAGE DISCRIMINATION (2014), https://iwpr.org/wp-content/uploads/2020/09/Q016.pdf.
[43] NAT'L WOMEN'S LAW CTR, COMBATING PUNITIVE PAY SECRECY POLICIES, *supra* note 38.
[44] Lilly Ledbetter & Deborah J. Vagins, *The Future of Pay Equity, 15 Years After Lilly Ledbetter Fair Pay Act*, MS. MAGAZINE (Jan. 29, 2024), https://msmagazine.com/2024/01/29/equal-pay-equity-lilly-ledbetter-fair-pay-act/.
[45] Shengwei Sun, *Beyond 'Leaning In': New Study on Pay Secrecy Points to the Limits of Existing Anti-Secrecy Laws in Addressing Gender Disparity*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (Feb. 1, 2021), https://iwpr.org/beyond-leaning-in-new-study-on-pay-secrecy-points-to-the-limits-of-existing-anti-secrecy-laws-in-addressing-gender-disparity/; Onwubikwo, *supra* note 40.
[46] *See, e.g.*, Hospitality Logistics International, LLC d/b/a HLI Government Services, OFCCP Complaint No. I00214614 (2022), https://www.dol.gov/sites/dolgov/files/OFCCP/foia/files/2022-10-04_HospitalityInternational_CA_214614_MW_Redacted.pdf; Conciliation Agreement Between the U.S. Department of Labor Office of Federal Contract Compliance Programs and Colonna's Shipyard, Inc. (2022), https://www.dol.gov/sites/dolgov/files/OFCCP/foia/files/2022-03-10_ColonnasShipyard_CA_I00301603_MA_Redacted.pdf.

discrimination and retaliation remains critically important.[47] Rescinding this provision would leave many workers more vulnerable to pay discrimination and retaliation.[48]

d. Uniform Guidelines on Employee Selection Procedures.

The Proposed Rule would eliminate OFCCP regulations incorporating the Uniform Guidelines on Employee Selection Procedures ("UGESP").[49] These well-established standards govern how to determine when a selection process like hiring or promotion, or any aspect of it (including interview practices, written tests, or other requirements), complies with equal opportunity requirements.[50] Publishing one standard set of uniform procedures creates certainty and consistency for purposes of compliance as well as enforcement. These guidelines make it easier for employers to understand and apply the law in reviewing their own practices.

Although the UGESP currently remains in effect under other areas of federal enforcement, and the DOL disclaims any intent to change how other federal civil rights agencies apply them, rescinding the OFCCP regulations regarding UGESP creates further disruption and confusion for federal contractors seeking to ensure their practices fully comply with anti-discrimination law. Incorporating UGESP into these regulations bolsters the proactive and preventative strategy that ensures federal contractors regularly review their practices for potential discrimination. These Guidelines provide a clear and consistent standard for this review. And because OFCCP would conduct regular compliance evaluations applying these guidelines to selection procedures, contractors had a strong incentive to do their own self-analysis.

So while it remains a best practice for employers to use the UGESP to evaluate their selection procedures, and while the UGESP remains relevant to federal enforcement more broadly, the Proposed Rule would result in losing the broader enforcement and technical assistance structure applicable to federal contractors under the OFCCP regulations. This increases the risk that federal contractors may pull back on their robust self-assessment practices, which in turn could compromise equal opportunity compliance in the contractor workforce.

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[47] ASHIR COILLBERG, NAT'L WOMEN'S LAW CTR, A WINDOW INTO THE WAGE GAP: WHAT'S BEHIND IT AND HOW TO CLOSE IT (2025), https://nwlc.org/wp-content/uploads/2025/02/2025-Window-Into-the-Wage-Gap-Factsheet.pdf; Alexandria Olson & Claire Savage, *What's Behind the Widening Gender Wage Gap in the U.S.?*, ASSOCIATED PRESS (Oct. 16, 2024 at 2:40 PM PDT), https://apnews.com/article/gender-wage-gap-women-pay-latina-work-dce2d7cf2c004dfe5322fffaf5fdbbcf.

[48] Shengwei Sun, Jake Rosenfeld & Patrick Denice, *On the Books, Off the Record: Examining the Effectiveness of Pay Secrecy Laws in the U.S.*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (Jan. 2021) https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf.

[49] *See* 41 C.F.R. Part 60-3.

[50] 29 C.F.R. Part 1607.

2. EO 11246 and the implementing regulations have helped break down barriers to opportunity and allowed all workers to access good jobs with federal contractors.

Over the past 60 years, EO 11246 and the implementing regulations have helped break down barriers to equal opportunity and ensure taxpayer dollars are not used to fund discrimination by federal contractors. In this time, OFCCP has promoted equal employment for women and for men, for employees of all racial identities including white workers, for LGBTQ+ employees, for veterans, for employees with disabilities, and for employees of all religious backgrounds.

Through its compliance reviews and enforcement of EO 11246, OFCCP has helped workers who experienced discrimination obtain compensation as well as salary adjustments and job opportunities that had been denied to them. For example, between FY 2014-2024, OFCCP obtained $260.8 million in monetary relief for 250,900 employees and job seekers who were discriminated against, as well as over 22,600 job opportunities and salary adjustments for impacted individuals.[51] In 2024 alone, OFCCP recovered $12.1 million from federal contractors for alleged race- and/or gender-based hiring and compensation discrimination.[52] OFCCP has been especially successful in rooting out discriminatory pay practices, which can be difficult to detect because workers often do not know they are being paid unfairly.[53]

OFCCP's compliance evaluations provide a unique mechanism that complements the work of other federal enforcement agencies including the EEOC. Most federal civil rights enforcement is based on workers filing discrimination complaints, and even voluntary compliance activities may be driven by whether employees have filed internal complaints. But employees may be deterred from bringing complaints internally or to federal agencies because they are afraid of retaliation, because of the cost and challenge of finding legal assistance, or because they do not think anyone will address their concern.[54] Federal contractors must maintain data on hiring, pay and other practices, and provide it to the agency during scheduled reviews, so OFCCP often uncovers hidden patterns of discrimination that workers are unaware of – or are afraid to or unable to raise.

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[51] *OFCCP by the Numbers*, U.S. DEP'T OF LABOR (on file with the author). This financial relief is for settlements of discrimination violations, and almost all of it is to settle violations of Executive Order 11246.

[52] *LBJ's Executive Order 11246 Revoked, Ending Decadeslong Race and Gender Affirmative Action Obligations for Federal Contractors and Subcontractors*, DUANE MORRIS (Jan. 22, 2025), https://www.duanemorris.com/alerts/lbjs_executive_order_11246_revoked_ending_decadeslong_race_gender_affirmative_action_0125.html.

[53] *See, e.g.*, Farrell, *The Promise of Executive Order 11246, supra* note 5, at 12 (noting that "between 2015 and 2019, OFCCP provided an annual average of $19.5 million dollars in relief to a total of over 100,000 class members" in systemic pay discrimination cases).

[54] Donald Tomaskovic-Devey and Carly McCann, *Who Files Discrimination Charges*, UNIVERSITY OF MASSACHUSETTS AMHERST CENTER FOR EMPLOYMENT EQUITY 8, 12 (2025), https://www.umass.edu/employmentequity/sites/default/files/2025-01/Who%20Files%20Discrimination%20Charges_0.pdf?1741217588.

OFCCP also sends investigators to workplaces during onsite reviews, where they are able to speak with workers and conduct visual inspections of the workplace. As one example, OFCCP successfully resolved claims of sexual harassment against women working on a construction site after an onsite visit documented a hostile work environment and a lack of adequate restroom facilities for women, in addition to denial of work hours.[55] In that case, women who complained were subject to retaliation, making it much less likely the workers could have resolved this without the agency's involvement.

In addition to workers directly impacted by OFCCP reviews and enforcement actions, employees at many other federal contractors have benefitted from Executive Order 11246 and its implementing regulations. The agency regularly conducted outreach to workers to help them know about their rights and spent many hours providing technical assistance to contractors through trainings, written guidance, and one-on-one conversations.[56] This work further encouraged contractors to conduct due diligence, strengthen their human resources functions, and understand and apply best practices to build fair and inclusive workplaces. Indeed, research suggests that companies who are subject to OFCCP's requirements because of federal contracts have increased employment opportunities for workers who have historically faced barriers to equal opportunity, particularly Black workers.[57]

EO 11246 and the implementing regulations have also been particularly important in the construction industry, an industry that can provide access to high-paying jobs and benefits.[58] In recent years, there has been slow but steady growth in the number of women and people of color working in the industry, but they remain significantly underrepresented due to persistent systemic barriers.[59] This regulatory framework provides the structure, incentive, and support to

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[55] *Puerto Rico Construction Contractor Settles Sexual Harassment and Discrimination Case with US Department of Labor*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (Apr. 2, 2014), https://www.dol.gov/newsroom/releases/ofccp/ofccp20140402.

[56] *See, e.g.*, Statement of Jenny R. Yang, Director of Federal Contract Compliance Programs, U.S. Dep't of Labor, Before the Subcommittee on Civil Rights and Human Services Committee on Education and Labor, U.S. House of Representatives 12-13 (Apr. 27, 2022), https://edworkforce.house.gov/uploadedfiles/dol_ofccp_director_yang_testimony_final_4.27_ed__labor_civil_rights_subcommittee_hearing.pdf.

[57] *See generally* Fidan A. Krtulus, *The Impact of Affirmative Action on the Employment of Minorities and Women: A Longitudinal Analysis Using Three Decades of EEO-1 Filings*, 35 J. POLICY ANALYSIS AND MANAGEMENT 34 (2016) (finding that during periods when OFCCP is more actively enforcing EO 11246, federal contractors have more diverse workforces and higher representation of Black employees than non-contractor companies). Even if companies are only temporarily subject to EO 11246 requirements while a contract is in effect, there is a lasting positive effect on hiring of Black workers, likely because of the work done to ensure fairness in hiring practices. *Id.* at 36-37; Conrad Miller, *The Persistent Effect of Temporary Affirmative Action*, AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS (2017) https://conrad-miller.github.io/app.20160121.pdf.

[58] *See* ARIANE HEGEWISCH & EVE MEFFERD, INSTITUTE FOR WOMEN'S POLICY RESEARCH, A FUTURE WORTH BUILDING: WHAT TRADESWOMEN SAY ABOUT THE CHANGE THEY NEED IN THE CONSTRUCTION INDUSTRY (2021), https://iwpr.org/wp-content/uploads/2022/02/A-Future-Worth-Building_What-Tradeswomen-Say_FINAL.pdf.

[59] *See, e.g.*, INSTITUTE FOR WOMEN'S POLICY RESEARCH, NUMBERS MATTER: WOMEN WORKING IN CONSTRUCTION (July 2023), https://iwpr.org/wp-content/uploads/2023/07/Quick-Figure-construction-July-2023.pdf ("In 2022, the number of women working in the trades reached the highest level ever. Almost 354,000 worked in construction and

help contractors address barriers to opportunity that can produce disparities. Research suggests that affirmative action measures and OFCCP engagement have helped drive increased representation for women and people of color in the industry. For example, one study found that after the American Recovery and Reinvestment Act increased the proportion of the construction sector covered by EO 11246, the proportion of construction jobs held by women and people of color also increased due to the affirmative action requirements and increased OFCCP engagement.[60] Moreover, since federally funded construction projects offer job opportunities where women and people of color can demonstrate their skills and reliability, those jobs can also lead to other, non-federally funded construction jobs, allowing women and people of color the opportunity to make a career in the construction industry.

EO 11246 also provided the framework to create the Mega Construction Project Program model, which sought to provide opportunities for workers from underrepresented communities to access good jobs on large federally funded projects, and enabled community engagement and monitoring of and engagement of workforce placements through an EEO committee, to better ensure equitable access to jobs.[61] This model has been successfully adapted to various public worksites across the country, yielding increased racial and gender diversity on these projects.[62]

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extraction occupations. In the five years since 2017, the number of tradeswomen increased by more than 100,000, growth of 47.3 percent."); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, BUILDING FOR THE FUTURE: ADVANCING EQUAL EMPLOYMENT OPPORTUNITY IN THE CONSTRUCTION INDUSTRY (2023), available at https://web.archive.org/web/20250102194354/https:/www.eeoc.gov/building-future-advancing-equal-employment-opportunity-construction-industry (noting that in 2022, Black workers made up 6.7% of the construction industry workforce and Asian workers made up 2.1% of the construction industry workforce).

[60] Jeanette Wicks-Lim, *A Stimulus for Affirmative Action? The Impact of the American Recovery and Reinvestment Act on Women and Minority Workers in Construction*, UNIVERSITY OF MASSACHUSETTS POLITICAL ECONOMY RESEARCH INST. (Working Paper No. 311) (2013), https://peri.umass.edu/wp-content/uploads/2025/01/5-3Wickslim.pdf. Other data also supports this link between federal affirmative action requirements and increased presence of women in the trades. For example, a report from the Institute for Women's Policy Research found that 88.6% of non-union construction apprenticeship programs were all-male, while only 25.3% of union-affiliated programs were all-male. ARIANE HEGESWISCH, INSTITUTE FOR WOMEN'S POLICY RESEARCH, AS APPRENTICESHIPS EXPAND, BREAKING DOWN OCCUPATIONAL SEGREGATION IS KEY TO WOMEN'S ECONOMIC SUCCESS (2024), https://iwpr.org/wp-content/uploads/2024/03/IWPR-Apprenticeship-Report-March-2024.pdf. Union construction typically has a higher density on publicly managed projects that may include federal funding subject to EO 11246 and other federal affirmative action requirements. *See* Russell Ormiston, *Institute for Construction Employment Research*, ICERES ANNUAL REPORT: UNION MEMBERSHIP IN THE SKILLED CONSTRUCTION TRADES, 2013-22, https://iceres.org/wp-content/uploads/2024/01/ICERES-Report-on-Construction-Union-Membership-FINAL.pdf.

[61] *Biden-Harris Administration Launches Initiative to Promote Equal Opportunity*, *Expand Workforce for Federally Funded Jobs in Large Infrastructure Projects*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (Mar. 14, 2023), https://www.dol.gov/newsroom/releases/ofccp/ofccp20230314; FY 2013 Congressional Budget Justification, Office of Federal Contract Compliance Programs 20-21, https://www.dol.gov/sites/dolgov/files/general/budget/2013/CBJ-2013-V2-10.pdf.

[62] *See, e.g.*, PEG BARRINGER, BUILT TO LAST: BEST PRACTICES FOR DIVERSITY IN THE CONSTRUCTION INDUSTRY (June 2019), https://policygroupontradeswomen.org/wp-content/uploads/2020/05/built-to-last-best-practices-for-diversity-in-the-construction-industry.pdf (describing how the the Massachusetts Gaming Commission adopted this model by establishing workforce hiring goals for women, minorities and veterans on their casino development projects, and incorporating an Access and Opportunity Committee to review and support progress. Two of the three projects that were reviewed exceed their hiring goals in all three categories.).

The experience of Chicago Women in Trades (CWIT) provides just one example of how EO 11246 and its regulatory framework have created pathways to opportunity in the trades. For this organization, which works primarily in Northern Illinois to improve women's economic equity by increasing their participation in high-wage, blue-collar occupations traditionally held by men, EO 11246 is the ground upon which all their other work was built. For CWIT's co-founder, EO 11246 opened the doors for her to get hired as an elevator constructor at Chicago's Housing Authority, a position that nearly tripled her salary and provided access to training and benefits.[63] The existence of EO 11246 gave the organization and others like it a seat at the table when contractors, trade unions, and project owners were approaching federally-assisted projects, providing credibility and weight to their efforts to have women hired for these jobs. It has also empowered CWIT's local public partners, including state and local agencies that manage federally-assisted contracts on transit and road projects in Illinois, to engage in oversight and tracking of diverse hiring, increase transparency of the workforce demographics on these sites, and provide some level of accountability and mandate from the owners to their contractors to provide equal access to opportunity.[64]

It is the experience of many women and people of color in the construction industry that without the pathways created by EO 11246, they would have been denied access to federally funded construction projects, closing off opportunities to build careers in this field.[65] Eliminating this regulatory framework would roll back the progress that has been made to expand access to good jobs in construction.

3. The DOL's justifications for rescinding the EO 11246 implementing regulations are not supported by the law or evidence.

In addition to President Trump's rescission of EO 11246, the DOL provides several additional reasons why it believes the implementing regulations should be rescinded, including that the regulations are "vulnerable to legal challenge"; the rescission of the regulations will "improve the efficiency of the Federal contracting process"; and the rescission will promote regulatory certainty. As outlined below, these justifications rely on inaccurate statements of the law and are not supported by evidence.

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[63] *Response to the End of Affirmative Action (Executive Order 11246)*, CHICAGO WOMEN IN TRADES (Jan. 24, 2025), https://cwit.org/response-to-the-end-of-executive-order-11246/.
[64] *See Workforce*, CHICAGO TRANSIT AUTHORITY, https://www.transitchicago.com/rle/workforce/ (last visited Aug. 11, 2025).
[65] *See, e.g.*, Andrea Hsu, *With Trump's Crackdown on DEI, Some Women Fear a Path to Good-Paying Jobs Will Close*, NPR (Mar. 20, 2025), https://www.npr.org/2025/03/20/nx-s1-5332213/jobs-women-trump-dei-civil-rights; Ariel Gilreath, *More Women are Landing Construction Jobs. Trump's War on DEI Could Change That*, HECHINGER REPORT (May 14, 2025), https://hechingerreport.org/more-women-are-landing-construction-jobs-trumps-war-on-dei-could-change-that/.

a. The DOL's assertion that the implementing regulations are "vulnerable to legal challenge" is inaccurate and does not constitute a justification for rescission.

The DOL argues that the EO 11246 regulations should be rescinded because they are "vulnerable to legal challenge as unlawful." It claims that following the Supreme Court's decision in *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll*, any program that "place[s] a finger on the scale for an applicant based on their race or sex" is vulnerable to an Equal Protection Clause challenge. It also argues that the regulations must be rescinded because they "induce or incentivize disparate treatment in employment decisions" and therefore violate the Equal Protection Clause.[66] The DOL's characterization of the Supreme Court's holding in *Students for Fair Admissions* and its application to the regulations is inaccurate and unsupported, and it does not constitute a viable reason for rescission.

The Supreme Court's decision in *Students for Fair Admissions* applied specifically to race-based processes adopted by higher education institutions. This case involved admissions programs adopted by Harvard and the University of North Carolina, in which race was considered as one factor in admissions decisions. The Court held that these specific admissions programs did not satisfy the strict scrutiny standard because they were not narrowly tailored to achieve a compelling governmental interest.[67] The Court recognized that race-based action may be permissible in certain circumstances,[68] and it did not prohibit the consideration of race in higher education admissions entirely, ruling that universities can still consider an applicant's discussion of how race impacted their life.[69]

The Supreme Court's decision in *Students for Fair Admissions* is narrow and does not apply outside the context of race-based admissions programs in higher education. The Court did not address the use of race-based processes in other contexts outside higher education admissions, nor did it overturn existing precedent governing employment or contracting. The decision also only addressed race-based programs and did not address practices that take into account gender or other protected characteristics.

This decision has no bearing on the affirmative action programs adopted by federal contractors under EO 11246 and its implementing regulations, which are clearly distinguishable from the race-based admissions programs in that case. Although the implementing regulations require certain contractors to establish placement goals for certain job groups where women and people of color are underrepresented, these goals are aspirational.[70] As explained above, a contractor's determination that a placement goal is needed is a mechanism to evaluate *whether* there are any

[66] 90 Fed. Reg. at 28475-76 (citing *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181 at 230).
[67] *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll*, 600 U.S. 181, 214-16 (2023).
[68] *See id.* at 207.
[69] *Id.* at 230.
[70] 41 C.F.R. § 60-2.16(e)(1).

discriminatory barriers that should be addressed, and does not require or allow any preferential treatment or reflect a requirement to achieve proportional representation.[71] Failure to meet a goal cannot be used by the agency as evidence of discrimination.[72]

Unlike the programs at issue in *Students for Fair Admissions*, the regulations expressly prohibit contractors from giving preferences based on any protected class in order to meet these goals.[73] The regulations also explicitly prohibit contractors from making employment decisions in a discriminatory manner, as the DOL acknowledges.[74] Rather, contractors must make "good faith efforts" to "remove identified barriers, expand employment opportunities, and produce measurable results" through race- and gender-neutral practices, such as broadening recruitment efforts.[75] Nothing in the Supreme Court's decision in *Students for Fair Admissions* prohibits such efforts by federal contractors. Indeed, in the wake of the decision, OFCCP itself recognized that "[t]here continue to be lawful and appropriate ways to foster equitable and inclusive work environments and recruit qualified workers of all backgrounds. OFCCP's affirmative action requirements enable employers to reduce the risk of discrimination in their workforces and recruit and retain diverse talent."[76]

The DOL also suggests, without any supporting citation or evidence, that EO 11246 and the regulations may cause employers to engage in disparate treatment based on race or gender, in violation of Title VII.[77] Title VII prohibits discrimination based on race, sex, and other protected classes in the terms and conditions of employment.[78] As explained above, and as the DOL acknowledges in the Proposed Rule, the regulations expressly prohibit employers from extending any preference based on protected characteristics and require contractors to make selections in a "nondiscriminatory manner."[79] Yet the DOL attempts to justify rescission of the regulations by arguing that contractors "may have" made unlawful race- and sex-based employment decisions in an attempt to avoid audits or penalties.[80] The DOL has failed to provide any evidence or examples of how these regulations have actually led employers to engage in unlawful

[71] *See infra* Section 1.a.
[72] 41 C.F.R. § 60-2.16(b); *infra* Section 1.a.
[73] 41 C.F.R. § 60-2.16(e)
[74] 41 C.F.R. § 60-2.16(e)(2); 90 Fed. Reg. at 28475.
[75] 41 C.F.R. § 60-2.17(c).
[76] NAACP LEGAL DEFENSE FUND, THE ECONOMIC IMPERATIVE TO ENSURE EQUAL OPPORTUNITY: GUIDANCE FOR EMPLOYERS, BUSINESSES, AND FUNDERS 12 (2024), https://www.naacpldf.org/wp-content/uploads/2024-02-01-Aff-Axn-Economic-Guidance-2.pdf (citing U.S. Dep't of Labor Off. Fed. Contract Compliance Programs, Affirmative Action Frequently Asked Questions (Aug. 30, 2023), https://www.dol.gov/agencies/ofccp/faqs/AAFAQs).
[77] 90 Fed. Reg. at 28475.
[78] Under Title VII, employers may take race or gender into account in employment decisions when needed to remedy the effects of past discrimination. *See, e.g.*, *Johnson v. Transp. Agency*, 480 U.S. 616, 628–29 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).
[79] 41 CFR § 60-2.16(e)(2) ("Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.").
[80] 90 Fed. Reg. at 28475.

discrimination, providing only hypothetical scenarios.[81] To the extent that any such discrimination may occur, the contractor would be acting in violation of both the program regulations and Title VII, and any employee who faces such discrimination would have the option to pursue relief in court. Therefore, DOL's assertion that EO 11246 and the regulations must be rescinded because they may induce unlawful discrimination has no merit.

Finally, the DOL argues that the EO 11246 implementing regulations violate Title VII because they only require placement goals and action-oriented steps for women and people of color. The DOL cites the Supreme Court's decision in *Ames v. Ohio Department of Youth*, which held that the standard for unlawful discrimination under Title VII is the same for all plaintiffs bringing suits under Title VII, regardless of whether they are a member of a historically disadvantaged group.[82] Again, Title VII prohibits employers from engaging in discrimination by altering the terms of employment based on race, sex, or other protected characteristics. As discussed above, these regulations do not alter any terms of conditions of employment based on race or sex, nor do they allow employers to do so; in fact, they prohibit employers from making any discriminatory employment decisions. The regulations simply require employers to set aspirational goals and make good faith efforts to expand equal opportunity through fair processes. Title VII and *Ames* do not prohibit these regulations.

b. <u>The DOL falsely asserts that rescinding the EO 11246 implementing regulations will promote economy and efficiency.</u>

The DOL argues, without any supporting evidence, that "[r]escinding these regulations will also improve the efficiency of the Federal contracting process and decrease employer burden, as Federal contractors will no longer be required to undertake the E.O. 11246 requirements…."[83] This analysis applies the wrong standard to reach a tortured and absurd conclusion. The government's obligation has nothing to do with the contracting process or employer burden—it is to ensure economy and efficiency in the use of taxpayer dollars to procure goods and services.[84] In other words, the proper question is: will rescinding these regulations enhance the quality, availability, reliability, and cost of goods and services that meet the needs of federal agencies?[85] The answer is clearly no. For over 60 years, EO 11246 and its implementing regulations have

[81] *Id.*; *see also* David Cohen, *Open Letter to Contractors in Response to OFCCP's Info Request*, DCI CONSULTING (Jun. 30, 2025), https://blog.dciconsult.com/open-letter-2025-06 ("Since 2004, OFCCP has conducted 47,813 compliance evaluations, including four years under the first Trump administration, and has not cited a single contractor for using placement goals as quotas.").
[82] *Id.* (citing *Ames v. Ohio Department of Youth*, No. 23–1039, 05 U.S. __, (2025) (slip op.)).
[83] *Id.* at 28476.
[84] *See* 41 U.S.C § 1101(b)(2); *Amer. Federation of Labor v. Kahn,* 618 F. 2d 784 (D.C. Cir. 1979).
[85] *Kahn,* 618 F. 2d at 789 ("'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions.")

directly supported this standard by advancing equal opportunity for employees of federal contractors, as outlined below.[86]

EO 11246 and the regulations are critical mechanisms to give federal contractors access to a wider pool of talent and broaden the skills and experiences of their workforce by bringing in workers with perspectives and backgrounds that have been overlooked or underutilized.[87] Expanding outreach to build a more diverse workforce benefits federal contractors by driving improved productivity,[88] innovation,[89] improved decision-making,[90] and better retention, morale, and engagement.[91] For example, a 2022 survey of hundreds of construction and design firms by the U.S. General Services Administration found that firms that adopted more practices to increase diversity were more likely to experience benefits to their firms and projects, including better employee well-being, expanded perspectives for decision-making, improved communication, and an increased ability to recruit and retain skilled workers.[92] Expanding access to talent and strengthening culture in this way supports more timely production and improved quality and value of goods and services.

Moreover, by requiring federal contractors to identify and root out practices that create artificial barriers to employment, the regulations assist contractors in eliminating irrelevant and economically irrational factors in their employment practices, resulting in increased efficiency. Removing these barriers to merit-based selection makes it easier for federal contractor firms to source the highest quality talent most relevant to the contract requirements. These practices also reduce the risk that harmful behavior will lead to attrition or lower morale, and they strengthen supply chains by reducing the chances that labor shortages or attrition will disrupt contract

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[86] Farrell, *How Trump's Federal Contractor Executive Order Will Strip Workplace Protections*, *supra* note 41.
[87] Debra A. Millenson, *W(h)ither Affirmative Action: The Future Of Executive Order 11,246*, 29 UNIV. OF MEMPHIS L. REVIEW 679, 687 (1999).
[88] *See, e.g.,* Adam Galinsy, et al, *Maximizing the Gains and Minimizing the Pains of Diversity: A Policy Perspective*, 10(6) PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 642, 744 (2015), https://ideas.wharton.upenn.edu/wp-content/uploads/2018/07/Galinsky-et-al.-2015-Maximizing-the-gains-and-minimizing-the-pains.pdf; Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN (2014), http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/; Jose Rosa, *The Critical Importance of Diversity, Equity, and Inclusion (DEI) and the Detrimental Impact of Anti-DEI Policies* (Univ. of Miami, Working Paper).
[89] *See, e.g.,* Cristina Díaz-García et al., *Gender Diversity Within R&D Teams: Its Impact on Radicalness of Innovation,* INNOVATION: MANAGEMENT, POLICY & PRACTICE (2012) (study of R&D teams found a relationship between increased gender diversity and a greater likelihood of "radical innovation"); Sylvia Ann Hewlett, Melinda Marshall and Laura Sherbin, *How Diversity Can Drive Innovation,* HARVARD BUSINESS REVIEW (Dec. 2013), https://hbr.org/2013/12/how-diversity-can-drive-innovation.
[90] *See, e.g.,* Galinsy, et al., *supra* note 88, at 743; Vivian Hunt et al., *Why Diversity Matters*, MCKINSEY & CO. 3-7, 9-13 (Jan. 2015), https://www.mckinsey.com/~/media/mckinsey/business%20functions/people%20and%20organizational%20performance/our%20 insights/why%20diversity%20matters/diversity%20matters.pdf.
[91] *Results of New Survey Recommends Steps to Improve Diversity, Equity and Inclusion in Design and Construction Industry*, U.S. GENERAL SERVICES ADMINISTRATION (Nov. 9, 2022), https://www.gsa.gov/about-us/newsroom/news-releases/results-of-new-survey-recommends-steps-to-improve-diversity-equity-and-inclusion-in-design-and-construction-industry-11092022.
[92] *Id.*

fulfillment.[93] Collectively, these strong workplace practices contribute to the efficient, innovative, high-quality, and reliable delivery of goods and services the federal government needs.

These improvements to productivity, innovation, and workforce stability also benefit federal contractor firms by boosting their profitability and reducing their risks. Decades of research indicate that diversity increases a company's profitability and potential for economic growth,[94] a trend that can be seen across a variety of fields.[95] At the same time, the requirement to proactively assess workplace practices for discrimination and actively promote equal opportunity increases efficiency by reducing the risk of costly and disruptive litigation, and rolling back these efforts can increase the risk of liability.[96] Discrimination complaints also pose reputational risk to the contractor and by extension to the federal agency that contracted the work. And the benefit extends further to the government by ensuring that taxpayer funds are not underwriting discrimination by federal contractors.

Finally, these regulations benefit the federal contractor workforce by creating new pathways to good jobs for women, workers of color, and others who have historically been denied these opportunities.[97] Opening these doors to opportunity helps improve the economic security of these employees, their families and their communities, and helps grow the national economy—further promoting the government's interest.[98]

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[93] *See* Maria Johansson & Cathrine Norberg, *"Women and 'Ideal' Women": The Representation of Women in the Construction Industry*, 38 GENDER ISSUES 1, 2 (2020), https://link.springer.com/article/10.1007/s12147-020-09257-0 (noting that increasing employment of women in the construction industry is a key strategy to address labor shortages).

[94] *See, e.g.,* Rocio Lorenzo & Martin Reeves, *How and Where Diversity Drives Financial Performance*, HARVARD BUSINESS REVIEW (Jan. 30, 2018), https://wilbankspartners.com/wp-content/uploads/2020/12/Harvard-Business-Review-Diversity-Drives-Financial-Performance-January-2018.pdf; *Diversity Matters Even More*, MCKINSEY (2023), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-matters-even-more-the-case-for-holistic-impact#/ (finding that companies with the largest representation of women and the highest level of ethnic diversity in executive leadership were nearly 40% more likely to financially outperform compared with the companies with the lowest levels of diversity).

[95] *See, e.g.*, AS YOU SOW, WORKPLACE DIVERSITY AND FINANCIAL PERFORMANCE: AN ANALYSIS OF EQUAL EMPLOYMENT OPPORTUNITY (EEO-1) DATA 4 (2022), https://www.asyousow.org/report-page/workplace-diversity-and-financial-performance (analyzing workforce data from EEO-1 reports from 277 publicly traded companies and finding a positive association between diverse representation in management and better financial outcomes); David P. Daniels et al., *Do Investors Value Workforce Gender Diversity?*, 36 ORGANIZATION SCIENCE 313, 326-27 (2025), https://doi.org/10.1287/orsc.2022.17098 (finding that technology and financial firms with higher representation of women enjoyed statistically significant positive abnormal returns); MCKINSEY & COMPANY, DIVERSITY WINS, HOW INCLUSION MATTERS (2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters (finding that "companies in the top quartile for gender diversity on executive teams were 25 percent more likely to have above-average profitability than companies in the fourth quartile").

[96] *See, e.g.*, NAT'L INSTITUTE FOR WORKERS' RIGHTS, MAKING EQUAL OPPORTUNITY REAL: HOW DIVERSITY, EQUITY, AND INCLUSION EFFORTS COMBAT WORKPLACE DISCRIMINATION 10 (Apr. 2025), https://niwr.org/wp-content/uploads/2025/05/2025-NIWR-Policy-Brief-Making-Equal-Opportunity-Real.pdf.

[97] *See infra* Section 2.

[98] Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Market Growth*, 87 ECONOMETRICA 1439, 1441 (2019), https://web.stanford.edu/~chadj/HHJK.pdf; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE COUNCIL OF ECONOMIC ADVISERS, THE W-GDP INDEX: EMPOWERING WOMEN'S ECONOMIC ACTIVITY THROUGH

In sum, by ensuring workers from all backgrounds have a fair chance to access jobs with federal contractors, EO 11246 and the implementing regulations facilitate the adoption of workplace practices that help federal contractors recruit and retain talent, boost their profitability, and reduce their risk, all of which improves the quality and reliability of goods and services and facilitates the efficient and effective performance of government contracts.

c. The DOL falsely asserts that rescinding the EO 11246 implementing regulations creates regulatory certainty.

The DOL argues that "[r]escinding these regulations will also provide regulatory certainty to Federal contractors and other stakeholders by aligning the regulations with the most recent executive orders."[99] To the contrary, the rescission of Executive Order 11246 and the implementing regulations upends a regulatory scheme under which federal contractors have operated for decades and contributes to confusion about how contractors should seek to comply with ongoing legal obligations.

In the absence of these regulations, federal contractors are still required to comply with nondiscrimination obligations under Title VII and other federal, state, and local laws. No executive order or agency guidance can alter these existing statutory obligations. Taking voluntary steps to advance equal opportunity can help facilitate employer compliance with these anti-discrimination laws.[100] Courts have consistently recognized that no law bars employers from engaging in such voluntary efforts to advance equal opportunity.[101]

However, the DOL is now dismantling a regulatory scheme that has helped federal contractors proactively eliminate discrimination and ensure compliance with these nondiscrimination obligations. Moreover, the administration has sown chaos and confusion among the contractor community and created uncertainty about their ability to continue lawful and effective equal opportunity programs by intimidating and threatening contractors with enforcement actions based on vague and undefined terminology inconsistent with existing statutes and court decisions.[102] OFCCP has even threatened civil compliance investigations against contractors

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ADDRESSING LEGAL BARRIERS 2 (2020), https://www.govinfo.gov/content/pkg/GOVPUB-PREX6-PURL-gpo136109/pdf/GOVPUB-PREX6-PURL-gpo136109.pdf.

[99] 90 Fed. Reg. at 28476.

[100] *See generally*, NAT'L INSTITUTE FOR WORKERS' RIGHTS, MAKING EQUAL OPPORTUNITY REAL, *supra* note 96.

[101] *See, e.g.*, *Young v. Colorado Dep't of Corrections*, 94 F.4th 1242 (10th Cir. 2024); *Vavra v. Honeywell*, 106 F.4th 702 (7th Cir. 2024); *Miynczak v. Bodman*, 442 F.3d 1050 (7th Cir. 2006) (finding that U.S. Department of Energy's recruitment policy was intended to ensure "diversity in the applicant pool for positions at the agency" and was not evidence of discrimination because the efforts "were of the type that expand the pool of persons under consideration, which is permitted"); *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997) ("An employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination. . . . An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment.").

[102] *See* Memo from the Attorney General re Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination (July 29, 2025), https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=govdelivery.

based on their past efforts to comply with EO 11246 and related regulations.[103] Far from creating certainty for federal contractors, these actions put contractors in an untenable position where they must balance competing obligations and navigate unclear directives—contractors face liability if they fail to meet their nondiscrimination obligations under federal law, but they risk being targeted by the administration if they take steps to root out discrimination.

4. Conclusion

Thank you for the opportunity to comment on this Proposed Rule. For decades, EO 11246 and the implementing regulations have helped ensure everyone had a fair chance to access jobs created by taxpayer dollars. Dismantling this longstanding regulatory framework will make it harder to identify and break down barriers to equal employment opportunity, and it will make it more difficult for contractors to understand and comply with their nondiscrimination obligations. For the reasons outlined in our comments above, we strongly oppose the rescission of the EO 11246 implementing regulations. Please contact Katie Sandson at the National Women's Law Center (ksandson@nwlc.org) and Deborah J. Vagins at Equal Rights Advocates (dvagins@equalrights.org) with any questions.

Sincerely,

National Women's Law Center
Chicago Women in Trades
Equal Rights Advocates
Shriver Center on Poverty Law
The Sikh Coalition
A Better Balance
Access Ready Inc.
Advocates for Trans Equality
AFL-CIO
AFT Connecticut
Alabama Arise
American Association of People with Disabilities
American Association of University Women (AAUW)
American Civil Liberties Union
American Foundation for the Blind
Americans United for Separation of Church and State
ANEW
APALA (Asian Pacific American Labor Alliance - AFL-CIO)
Arkansas Advocates for Children and Families
Association of People Supporting Employment First (APSE)

[103] EO 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025); Jory Heckman, *Federal Contractor Watchdog Office seeks to 'Deter DEI' at Firms Working with Agencies*, FEDERAL NEWS NETWORK (March 25, 2025), https://federalnewsnetwork.com/contracting/2025/03/federal-contractor-watchdog-office-seeks-to-deter dei-at-firms-working-with-agencies/.

Association on Higher Education And Disability (AHEAD)
Autism Society of America
Autistic Self Advocacy Network (ASAN)
Autistic Women & Nonbinary Network
Bazelon Center for Mental Health Law
BlueGreen Alliance
Center for Accessible Technology
Center for American Progress
Center for Law and Social Policy
Center for Public Representation
CenterLink
Chicago Jobs Council
Clearinghouse on Women's Issues
Coalition on Human Needs
Connecticut Voices for Children
Council of Parent Attorneys and Advocates
Deaf Equality
Disability Belongs
Disability Rights Education and Defense Fund
Equal Pay Today
Equality California
Feminist Majority
Fund for Leadership, Equity, Access and Diversity (LEAD Fund)
Greater Boston Building Trades Unions
Health & Medicine Policy Research Group
Illinois Partners for Human Service
Institute for Women's Policy Research
Jenny R. Yang, Director, OFCCP, 2021-2023
Jobs to Move America
Justice for Migrant Women
Long Beach Alliance for Clean Energy
Maryland Center on Economic Policy
Massachusetts AFL-CIO
MomsRising
Movement Advancement Project
NAACP Legal Defense and Educational Fund, Inc. (LDF)
National Association for Rights Protection and Advocacy
National Center for Law and Economic Justice
National Council of Jewish Women
National Disability Rights Network (NDRN)
National Employment Law Project
National LGBTQ+ Bar Association
National Partnership for Women & Families
National Respite Coalition
NBJC
NETWORK Lobby for Catholic Social Justice

North Alabama Area Labor Council, AFL-CIO
Oasis Legal Services
Pamela Coukos, Senior Advisor, OFCCP, 2011-2016
Patrick O. Patterson, Deputy Director, OFCCP, 2014-2017
PowHer New York
Prevention. Action. Change.
Public Justice Center
Reproductive Freedom for All
Revolution Workshop
RI Women in the Trades
Rocky Mountain Equality
Service Employees International Union (SEIU)
Shirley J. Wilcher, Deputy Assistant Secretary for Federal Contract Compliance, 1994-2001
Silver State Equality
Survivors Know, NFP
The Advocacy Institute
The Arc of the US
The Partnership for Inclusive Disaster Strategies
Vermont Works for Women
William E. Morris Institute for Justice
Women Employed
Women's Law Project
WorkLife Law
Workplace Justice Project