

ANC Shareholder Preferences Should Continue Despite Executive Order Revoking Affirmative Action and DEI Initiatives in Federal Contracting

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Alaska Native Corporations have been legally permitted to preferentially hire their shareholders based on a 1992 amendment to a federal statute enacted in the Alaska Native Claims Settlement Act – Section 1626(g). In other words, ANCs can hire their shareholders over other non-shareholders without liability under Title VII of the Civil Rights Act of 1964. Many ANCs are examining how President Trump’s January 21, 2025 Executive Order Ending Illegal Discrimination and Restoring Merit-Based Opportunity purportedly ending affirmative action plans and Diversity, Equity, and Inclusion (DEI) initiatives for federal contractors and subcontractors will affect their shareholder hire preferences and federal contracts. The January 21 DEI EO came on the heels of President Trump’s January 20 Executive Order Ending Radical and Wasteful Government DEI Programs and Preferencing which set out a plan for terminating DEI programs in the federal government. As these EOs and other DEI-related changes emerge in the first days of the Trump Administration, ANCs should know that shareholder preference should remain protected under the existing statutory exception to Title VII set forth in ANCSA, a federal statute which cannot be overturned by executive order.

The Supremacy Clause, found in the United States Constitution Article VI, Clause 2, establishes the hierarchy of legal authorities. The Constitution and federal statutes are the highest legal authority. State statutes and executive actions hold lower legal authority. An executive order cannot override federal statute nor constitutional protections. However, an executive order has the power to revoke other executive orders, and can direct enforcement agencies to launch investigations and litigation.

President Trump’s January 21 DEI EO expressly revokes Executive Order 11246—Equal Employment Opportunity. Executive Order 11246, in place since 1965, had prohibited unlawful employment discrimination by federal contractors performing more than \$10,000 in government business and mandated that contractors adopt affirmative action programs. Under President Trump’s January 21 DEI EO, Executive Order 11246 is no longer in effect, and federal contractors and subcontractors are now directed to “not

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consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws" in "employment, procurement, and contracting practices."

However, ANCs' shareholder preference employment policies are—and remain—protected by federal statute, which trumps any form of executive action. Section 1626(g) of the Alaska Native Claims Settlement Act exempts ANCs from the definition of "employer" under Title VII. Therefore, ANCs and related first-tier partnerships, joint ventures, trusts, or affiliates in which an ANC owns not less than 25% of the equity are exempt from Title VII's definition of "employer."

Section 1626(g)'s express purpose is to allow ANCs to adopt shareholder hiring preferences without facing employment discrimination charges. The legislative history reflects this clearly. For example, the House Report on the amendment explained that ANCSA needed to "clarify that Native corporations can hire their own shareholders without discrimination." **As a federal statute, Section 1626(g) continues to provide protections for ANCs' shareholder preference employment policies that cannot be displaced by President Trump's January 21 DEI EO.**

Moreover, it remains well-settled in the courts that ANCs' shareholder preference is not race-based. Like tribal affiliation, courts have long held that ANC shareholder status with respect to employment preference is considered political rather than racial. Viewed as a political affiliation, shareholder status is beyond the reach of the EO's directives to federal contractors and subcontractors to "not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws."

Claims of discrimination may follow in light of the January 21 DEI EO, but ANCSA's federal statutory protection for ANCs' shareholder preference remains. (ANCs may still face claims under other federal, state, or local laws which do not expressly incorporate the Title VII exemption.)

Although the shareholder hire preference remains protected by federal statute, ANCs should be mindful that the January 21 DEI EO still represents a significant upheaval in federal government contracting practices. Many ANCs are federal contractors, and will likely see modifications to their federal contracts in the coming months to impose new, or delete old, contracting clauses, like FAR 52.222-26 (the "Equal Opportunity" clause that implements EO 11246). The EO strongly hints that federal investigations will be launched, particularly among federal contractors, and using potent tools like the False Claims Act—with its "treble" damages provisions. Many ANCs also benefit from set aside and preference programs, such as the SBA Section 8(a) program. The Section 8(a) program has already been the subject of attack, and ANCs should be particularly attuned to efforts to modify contracts or revise federal programs in ways that may disadvantage ANCs going forward. Further, given the vagueness and ambiguity of the January 21 DEI EO—we expect to see legal challenges to the EO in the future. Recall similar litigation challenging President Biden's directives that federal contractors maintain a vaccinated workforce during the COVID-19 pandemic and efforts to mandate minimum wages paid by federal contractors. Ironically, the same legal decisions that confined President

Biden's efforts to combat the pandemic and increase wages may now be deployed against President Trump's efforts to police how federal contractors—ANCs among them—use diversity and inclusion efforts within their business operations.

Finally, as the legal landscape continues to develop under President Trump's new term, ANCs should remain aware that any legal protections afforded to the Title VII exemption for ANCs could still be modified by federal statute. We recommend that ANCs pay careful attention to congressional proposals that could affect shareholder preferences.