



WENA PROPOSED “EQUITY NOW!” EXECUTIVE ORDER

REAFFIRMING WASHINGTON’S COMMITMENT TO DIVERSITY, EQUITY AND INCLUSION, AFFIRMATIVE ACTION AND PROHIBITING DISCRIMINATION IN PUBLIC EDUCATION, PUBLIC EMPLOYMENT AND PUBLIC CONTRACTING

EXECUTIVE ORDER 21-___

RESCINDING GOVERNOR’S DIRECTIVE No. 98-01 and SUPERSCEDING EXECUTIVE ORDER No.12-02

WHEREAS, the unprecedented State of Emergency created by the COVID-19 global pandemic has publicly exposed the discriminatory educational, employment, economic, health, housing, criminal justice and other disparities which have long plagued Black Indigenous People of Color (BIPOC), seniors, women, persons with mental and physical disabilities, members of the LGBTQIA+ community, military veterans, and other vulnerable urban and rural communities in Washington state; and

WHEREAS on July 8, 2020, the Washington State Board of Health joined King, Pierce, Snohomish, Jefferson, Whatcom and Spokane counties by publicly declaring that “Racism Is a Public Health Crisis”, and making clear that dismantling systemic racism in every sector of state government is long-overdue, and must be a priority for all agencies; and

WHEREAS in 1998, Initiative 200 (I-200) proponents clearly stated in the Washington State Voters Pamphlet, General Election 14 (Nov. 3, 1998) (Statement For I-200) that I-200 **does not end all affirmative action programs**, and that I-200 prohibits only those programs which use race and gender to select a lesser qualified applicant over a more deserving applicant for a public job, contract or admission to a state college or university; and

WHEREAS then Washington state Attorney General Christine Gregoire’s official I-200 ballot explanatory statement explained: *“The measure does not define the term ‘preferential treatment,’ and does not specify how continued implementation or enforcement of existing laws would be affected if this measure were approved. The effect of the proposed measure would thus depend on how its provisions are interpreted and applied.”*

WHEREAS since 1998, Washington state has wrongly interpreted and administered Initiative 200 (I-200), now codified as RCW 49.60.400, by implementing Governor’s Directive Number 98-01 which erroneously stated that neither race nor sex could be used as factors in the final selection of candidates for a public contract, public employment or admissions to public college or university;

WHEREAS in 2003, the Washington State Supreme Court in **Parents Involved in Community Schools v. Seattle School District No.1**, interpreted RCW 49.60.400 to only prohibit preferential treatment where government uses race or gender to select a less qualified applicant over a more qualified applicant; and

WHEREAS in 2017, after nearly 20 years of state and local governments misinterpreting I-200 and abandoning many Affirmative Action programs, Washington Attorney General Robert Ferguson issued Attorney General Opinion 2017, No. 2 which concluded: 1) RCW 49.60.400 allows Affirmative Action programs as long as neither race nor gender are used to select a less qualified contractor over a more qualified contractor; and 2) Evidence of discrimination in state contracting which race-or sex-neutral measures fail to remedy, may justify a race- or sex-conscious preference to remedy that disparity.

WHEREAS in 2017, the Washington State Department of Transportation (WSDOT) Disparity Study found evidence that women and contractors of color suffer discriminatory barriers to full and fair access to federal and state-funded construction contracts across Washington's transportation industry; and

WHEREAS in January, 2018, the Director of the Office of Minority and Women Business Enterprises (OMWBE) publicly testified that since the 1998 passage of I-200, Washington's small, minority and women owned businesses had lost an estimated \$3.9 billion in state public contracting opportunities;

WHEREAS in 2019, the Office of Minority and Women Business Enterprises (OMWBE) Disparity Study concluded: 1) women and people of color do not enjoy equal access to all aspects of State contracting opportunities; 2) the lack of remedial market intervention in the wake of Initiative 200 perpetuates this inequality; and 3) remedial action is necessary to end discrimination in State contracting activities; and

WHEREAS in 2020, the Washington State Legislature created the Washington state Office of Equity within the office of the governor for the purpose of promoting access to equitable opportunities and resources that reduce disparities and improve outcomes across state government; and

WHEREAS on January 20, 2021, United States President Joseph R. Biden signed **Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities through the Federal Government**, launching a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, by virtue of the power vested in me by the Constitution and statutes of the state of Washington, **do not** repeal Initiative 200 (I-200), now codified as RCW 49.60.400.

Effective immediately, I hereby rescind Governor's Directive No. 98-01 and reaffirm, consistent with the Washington State Supreme Court and the Washington Attorney General's interpretation of RCW 49.60.400, Washington state's commitment to Diversity, Equity and Inclusion.

Moreover, I reaffirm Washington state's commitment and immediate implementation of all Affirmative Action programs which replace systemic racism with systemic equity, without quotas and without any preferential treatment which uses solely race or gender to select a lesser qualified candidate over a more qualified candidate for a public education, employment or contracting opportunity.

To insure full transparency and accountability throughout the implementation of this Executive Order, effective immediately, I hereby order and direct as follows:

I. The Director of the Washington State Office of Equity

The Director of the Office of Equity shall serve as the Governor's Chief Diversity Officer (CDO) with responsibility for leading the implementation of this Executive Order. The CDO shall also establish, monitor and enforce diversity and equity policies throughout all of Washington's state agencies, boards and commissions. All executive agencies are directed to review their rules, policies and procedures to make changes where necessary to be consistent with this Executive Order.

To this end, the Director of the Office of Diversity shall direct each agency to take the following actions within sixty (60) business days of the date this Executive Order is signed:

- (A) Designate within existing resources, an agency liaison for diversity, equity, and inclusion to serve as the agency's lead representative to the office of equity;
- (B) Develop and submit a diversity, equity, and inclusion plan to the Office, in accordance with RCW 43.06D.040, which implements Affirmative Action policies and programs without using solely race or gender to select a lesser qualified candidate over a more qualified candidate for a public employment or public contracting opportunity;
- (C) Apply an equity lens, as developed by the Director in accordance with RCW 43.06D.040, to examine existing and proposed agency policies, services and service delivery, practices, programs, and budget decisions using the equity impact assessment tools developed by the office pursuant to RCW 43.06D.040;
- (D) Collaborate with the Director to deliver Diversity, Equity and Inclusion training for agency managers and develop performance measures in accordance with RCW 43.06D.040;
- (E) Provide data and information requested by the office in accordance with standards established under RCW 43.06D.040;
- (F) Develop and publish an annual report to the Governor on the agency's progress; 1) restoring RCW 49.60.400 compliant Affirmative Action and 2) increasing both employment diversity and minority and women contracting within each agency.

II. Office of Financial Management (OFM)

The Office of Financial Management (OFM) shall work directly with the Office of Equity to provide the necessary resources and guidance to ensure the successful implementation of this Executive Order. Specifically, OFM shall provide the following:

- (1) Current status of Affirmative Action policies and programs in state agencies, boards and commissions;
- (2) Diversity, equity and inclusion training for managers, supervisors and employees;
- (3) Establish an interagency **Healing, Reconciliation & Compensation** task force, Co-Chaired by the Director of the Office of Financial Management and Director of the Office of Equity to recommend to the Governor within ninety (90) days of the signing of this Executive Order, financial relief which Washington may extend to those certified small, minority and women owned contractors who suffered nearly \$4 billion of lost contracting opportunities due to the past 23 years of Washington's incorrect implementation of Initiative 200.

III. Definitions

- (1) "**Preferential treatment**" means government action which uses solely race or gender to select a less qualified applicant over a more qualified applicant. This definition of preferential treatment is based on the Washington state supreme court ruling in *Parents Involved In Community Schools vs. Seattle School District, No.1*, 72 P.3d 151, 166 (Wash. 2003).
- (2) "**Qualified**" describes an individual or entity which has met the published academic, professional, or technical qualifications for admission to an institution of higher education; employment with a state agency; or the awarding of a public contracting opportunity.

IV. PUBLIC EMPLOYMENT:

Washington state government, as one of the state's largest employers, shall adopt the goal that, by June 30, 2024, the gender and racial diversity of the Washington state workforce shall reflect no less than the same percentages of women and people of color who reside in our state population.

The measurement of this goal's achievement shall be based on state agencies' employment data filed with the U.S. Equal Employment Opportunity Commission (EEOC) in the biennial EEO-4 State and Local Government Reports and state population data reported in the most recent United States Census.

The Office of Financial Management shall establish new goals each year until employment/population parity is reached within the state's workforce.

(A) Race, Sex, etc. May Be Considered in State and Local Government Hiring Decisions.

Race, sex, color, ethnicity and national origin may be considered when hiring an applicant for public employment, as long as these are not the sole factors used to select a lesser qualified candidate over a more qualified candidate for an employment opportunity.

(B) Diversity Plans and Goals Shall Resume and are Binding.

Binding affirmative action plans and goals are **not** in conflict with RCW 49.60.400 and shall resume, as long as these factors are not used to select a lesser qualified candidate over a more qualified candidate for an employment opportunity, and as long as the plans and goals are allowed under RCW 49.60.400 (4) or (6). Race, sex, color, ethnicity or national origin may be considered in the selection of an applicant, as long as these factors are not used to select a lesser qualified candidate over a more qualified candidate for an employment opportunity.

(C) Outreach and Recruitment Efforts Shall Be Intensified.

Outreach and recruitment programs designed to generate a diverse pool of qualified applicants for employers are **not** in conflict with RCW 49.60.400. Efforts to increase the number of applications from underrepresented communities shall be intensified to ensure all qualified individuals are included and given fair consideration for public employment.

(D) Employment Security Department Shall Include BIPOC Jobless in Monthly Unemployment Reports

Effective immediately, the Employment Security Department (ESD) shall work with the U.S. Bureau of Labor Statistics to include Black Indigenous People of Color's (BIPOC) unemployment rates in ESD's monthly publication of Washington resident civilian unemployment reports.

V. PUBLIC CONTRACTING:

(A) Race, Sex, etc. May Be Considered in Awarding Construction Contracts or Contracts for the Purchase of Goods and Services.

Race, sex, color, ethnicity and national origin may be used in the selection of a bidder for a public contract, as long as race and gender are not the sole factors used to select a lesser qualified candidate over a more qualified candidate for a public contracting opportunity, and as long as they are allowed under RCW 49.60.400 (4) or (6).

Adding preference points or price preferences for meeting Minority and Women Business Enterprises (MWBE) goals, requiring attainment of MWBE goals as a condition of responsiveness, or otherwise awarding a contract to a bidder who did not submit the lowest bid but who met MWBE goals, and similar programs are permissible as long as these requirements are not used to select a lesser qualified candidate over a more qualified candidate for the contracting opportunity, and as long as these factors are allowed under RCW 49.60.400 (4) or (6).

(B) Mandatory and Laudatory MWBE Goals Shall Be Resumed Immediately.

Mandatory and laudatory MWBE purchasing and contracting goals are **not** in conflict with RCW 49.60.400 and shall be resumed immediately, as long as race, sex, color, ethnicity and national origin are not used to select a lesser qualified candidate over a more qualified candidate for a public contracting opportunity, and as long as these goals are allowed under RCW 49.60.400 (4) or (6).

The Office of MWBE shall continue to establish annual overall goals that will guide agencies in establishing laudatory goals. Annual overall goals are intended to help eliminate discrimination by identifying disparities between the number of qualified contractors of a particular group able to perform a particular service and the number actually engaged in work under state contracts.

Comparison of actual contracting data with goals may reveal barriers to equal opportunity or the need to increase outreach and recruitment efforts. Therefore, race, sex, color, ethnicity or national origin may be considered in the selection of a contractor, as long as these factors are not used to select a lesser qualified candidate over a more qualified candidate for a public contracting opportunity, and as long as these goals are allowed under RCW 49.60.400 (4) or (6).

(C) Diversity Outreach and Recruitment Efforts Shall Be Intensified.

Outreach and recruitment programs designed to diversify the pool of potential contractors and provide notice of public contracting opportunities are **not** in conflict with RCW 49.60.400. Efforts to increase the number of contractors from under-represented communities shall be intensified to ensure all qualified contractors are included and given full unbiased consideration in public contracting.

VI. PUBLIC EDUCATION:

(A) Washington State College & University Student Admissions.

Race, sex, color, ethnicity and national origin may be used in public college and university admissions programs, as long as these are not the sole factors used to admit a lesser qualified candidate over a more qualified candidate to a public college or university, and as long as they are allowed under RCW 49.60.400 (4) or (6).

Nothing in this Executive Order shall prohibit state colleges and universities from admitting qualified legal immigrants from international nations, states, territories, continents, and countries including, but not limited to, Canada, China, Africa, the Caribbean, Europe, India, Mexico, the Middle East, and the Pacific Rim.

(B) Outreach, Recruitment and Retention.

Higher education outreach, recruitment and retention programs designed to diversify the pool of potential student, staff and faculty candidates are **not** in conflict with RCW 49.60.400. Washington's state institutions of higher education are encouraged to intensify recruitment and outreach programs to maintain student, faculty and staff diversity.

(C) Supplier Contracting.

Institutions of higher education shall work with the Office of Equity and the Office of Minority and Women Business Enterprises to establish, implement and measure the results of a Supplier Diversity Program (SDP). An SDP is a proactive business program which facilitates public notice and contracting with certified minority-owned, women-owned, veteran-owned, LGBT-owned, service disabled veteran owned, historically underutilized business, and SBA-Defined small business vendors.

(D) Scholarships & Financial Aid

Race, sex, color, ethnicity and national origin may be used in the awarding of public college and university scholarships and other financial assistance, as long as neither race nor gender are the only factors used to award a public college or university scholarship or other financial assistance to a lesser qualified candidate over a more qualified candidate.

VII. CONCLUSION:

The purpose of this Executive Order is to ensure that henceforth, RCW 49.60.400's state and local government implementation is uniformly consistent with the explicit intent of Initiative 200 (I-200) as interpreted by the Washington State Supreme Court and the Washington State Attorney General.

However, nothing in this Executive Order shall prohibit a veteran, as defined in RCW 41.04.005, 41.04.007, and 73.08.005 and their spouses, widows, or widowers from receiving a veteran preference in public education, public employment or public contracting to which they are currently entitled under federal, state, or local law.

If you have questions regarding this Executive Order, please contact Dr. Karen Johnson, Director of the Washington State Office of Equity; or RaShelle Davis, Senior Policy Advisor on Equity, Social Justice, Civil & Human Rights; David Schumacher, Director of the Office of Financial Management (OFM); Franklin Plaistowe, Assistant Director for Human Resources for questions relating to public employment; Lisa van der Lugt, Director of the Office of MWBE, for questions relating to minority & women contracting; and Kathryn Leathers, my general counsel, for general legal assistance.

As agencies implement this Executive Order, the Governor's Office wants to assure that all questions relating to the Executive Order, and how it might impact agency business, receive consistent, thoughtful legal advice. Accordingly, agencies should direct all legal implementation questions to the Assistant Attorney General (AAG) assigned to their agency. That AAG will run those questions through an internal workgroup established by the Attorney General's Office, which can provide consistent advice to client agencies.

The section headings contained in this Executive Order are for reference purposes only and do not affect in any way the meaning or interpretation of this Executive Order.

While I cannot direct the actions of Washington state's cities, counties, local governments and institutions of higher education, I invite them to follow the provisions of this Executive Order to ensure consistency across all levels of government in the correct implementation of this Executive Order.

This Executive Order, which rescinds Governor's Director Order 98-01 and supersedes Executive Order 12-02, shall take effect immediately.

Signed and sealed with the official seal of the state of Washington, on this _____ day of Month, 2021, at Olympia, Washington.

By:

/s/ _____

Jay Inslee
Governor
BY THE GOVERNOR:

/s/ _____

Secretary of State

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