

# LEGALLY SPEAKING

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## Disadvantaged Business Enterprise Programs Drastically Revamped – Voice Your Comments Now –

Federal and state policies giving preference to job applicants, employees, students, or government contractors based upon race or sex have been significantly impacted by a series of recent court decisions, Executive Orders, and – most notably – the **Interim Final Rule** of the federal Department of Transportation (DOT) issued October 3, 2025. The DOT's new rule immediately eliminates race- and sex-based presumptions of social and economic disadvantage, declaring such preferences unconstitutional. Stakeholders have until November 3, 2025, to submit formal comments that the DOT will consider before the rule becomes final. The Interim Final Rule is available [here](#). Submit your comments through the process outlined on page 2 of the rule.

### What the Rule Does

The Interim Final Rule, revising 49 C.F.R. Parts 23 and 26, requires all Disadvantaged Business Enterprise (DBE) participants – both current and prospective – to prove social and economic disadvantage on an individualized basis. The previous

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automatic presumptions for women and certain minority groups (with resulting automatic set-asides) are now repealed.

Program opponents have long contended that the system unfairly perpetuated indefinitely preferential treatment for certain protected classes without substantiation of any disadvantage. Several programs set aside a specific percentage of project funding for businesses considered to be disadvantaged, solely because they were part of a particular group that had been subject to past discrimination. The new rule aligns the DOT's approach with similar constitutional rulings that invalidated race-based presumptions in the Small Business Administration's 8(a) program. Each applicant must now meet strict certification criteria set forth in Section 26.67 of the rule.

Applicants and recertifying DBEs must submit:

- A personal narrative detailing specific experiences of economic hardship, systemic barriers, or denied opportunities in education, business, or employment.
- Documentation quantifying how those disadvantages caused measurable economic harm.
- A personal net worth statement, establishing genuine economic disadvantage relative to non-disadvantaged peers.

The burden of proof now rests entirely on applicants. Failure to meet the individualized standards will result in decertification. Notably, current DBEs that fail to comply or respond to the new requirement will have no access to a hearing before losing their existing certification.

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## **Effects on Current Contracts and Goals**

Until each Unified Certification Program (UCP) completes reevaluations under the new process, federal and state recipients of DOT funding must pause race- and sex-based DBE participation goals, substituting race-neutral measures only. The Ohio Department of Transportation, for example, has suspended its DBE contract goals and will no longer require certification of compliance with older affirmative action requirements during this transition.

While existing DOT contracts that began before October 3, 2025, are generally expected to remain valid, participation goals under those projects may not count until recertification concludes. DOT has pledged further guidance to address this uncertainty.

## **Anticipated Impacts**

Expect substantial administrative delays, as thousands of firms undergo recertification and as every UCP reevaluates eligibility. With the elimination of automatic group-based eligibility, the pool of certified DBEs is likely to shrink, creating potential disruptions in procurement and vendor availability. Small Business Enterprise programs, which are purely economic and already race-neutral, will continue unaffected.

We anticipate additional court challenges to the revised rule, either from those seeking reinstatement of group-based preferences or from businesses disputing decertification decisions.

## **What Contractors Should Do Now**

- Carefully review new solicitations to confirm criteria are race- and sex-neutral.
- Check current contracts to identify changes in affirmative action obligations.

- Prepare for recertification: collect your narratives, documentation, and financial statements early.
- Evaluate your vendor and subcontractor network to ensure continued credit eligibility.
- Anticipate procurement delays and potential shortfalls in the availability of DBE-certified partners.
- Stay alert for developments, including court attacks on revised DBE programs and their eligibility criteria.
- Submit public comments on the Interim Final Rule by November 3, 2025, via the Federal Register docket (refer to DOT-OST-2025-0897).

#### **Quick Reference: Old vs. New System**

<b>Feature</b>	<b>Previous System</b>	<b>Under October 2025 Rule</b>
Eligibility	Group-based presumption for women and minorities	Individualized proof of disadvantage required
Burden of Proof	Automatic presumption	Applicant must prove disadvantage
Certification	Prior certification valid unless challenged	All must recertify
DBE Goals	Race- and gender-based	Only race-neutral
Appeals	Hearing rights available	Decertification may occur without hearing
Program Impact	Broad participation	Likely contraction due to new standards

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## Conclusion

This rule represents a seismic shift in the federal government's approach to affirmative action and small business contracting. Businesses should act swiftly to understand the new criteria and preserve eligibility in this redefined legal and regulatory environment.

For more information on this and other business, labor and construction issues, contact Bob Dunlevey or Marc Fleischauer, Board Certified Labor and Employment Law Specialists at Taft Law, at (937) 228-2838 or via [rdunlevey@taftlaw.com](mailto:rdunlevey@taftlaw.com) or [mfleischauer@taftlaw.com](mailto:mfleischauer@taftlaw.com).