

Commonly Asked Questions and Answers Regarding Executive Order 13166

Providing Meaningful Access to Individuals Who are Limited English Proficient to Federally Assisted and Federally Conducted Programs and Activities

1) What is new in Executive Order 13166?

Executive Order 13166 (EO 13166) contains two major initiatives. The first is designed to better enforce and implement an existing obligation: Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating based on national origin by, among other things, failing to provide meaningful access to individuals who are limited English proficient (LEP). The Executive Order requires federal agencies that provide federal financial assistance to develop guidance to clarify those obligations for recipients of such assistance ("recipient guidance"). Thus, for instance, the Department of Justice (DOJ) is developing guidance specifically for its recipients, which are primarily state and local law enforcement agencies and departments of corrections.

Second, the Executive Order sets forth a new obligation: Because the federal government adheres to the principles of nondiscrimination and inclusion embodied in Title VI, the Executive Order requires all federal agencies to meet the same standards as federal financial assistance recipients in providing meaningful access for LEP individuals to federally conducted programs. Each federal agency must thus develop a plan for providing that access. For example, DOJ components such as the Immigration and Naturalization Service, the Federal Bureau of Investigation, the Bureau of Prisons, the Civil Rights Division, and others, are in the process of developing a combined plan. Each federal agency must undertake the same process.

The Federal Coordination and Compliance Section (FCS) of the Civil Rights Division of DOJ has taken the lead in coordinating and implementing this Executive Order. In late August, Assistant Attorney General Bill Lann Lee sent a letter to heads of agencies, general counsels, and (where available) civil rights offices in every federal agency. The letter informed each agency of its obligations under the Executive Order and of FCS's role in providing technical assistance and review to agencies.

In an effort to secure the federal government's full compliance with EO 13166, and under the DOJ's coordination authority conferred by Executive Order 12250, Attorney General Eric Holder issued a memorandum on February 17, 2011 requesting that each agency recommit to the implementation of EO 13166. See Attorney General Eric Holder's Memorandum to All Federal Agencies Regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166 (February 17, 2011), http://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf.

2) What federal activities are covered by the Executive Order?

The Executive Order covers all "federally conducted programs and activities." Anything a federal agency does falls within the scope of federally conducted programs or activities. All of the over ninety agencies are responsible for developing and implementing "federally conducted plans" to ensure that persons who are LEP have meaningful access to federal programs and activities.

The definition of federally conducted programs is the same under Executive Order 13166 as the definition used under the regulations for application of Section 504 of the Rehabilitation Act of 1973 to federally conducted programs. 28 C.F.R. Pt. 39, Editorial Note, Section 39.102 Application. That definition states:

Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by the regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the department for program beneficiaries and participants. Activities in the first part include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the Department's facilities (cafeteria, library). Activities in the second category include programs that provide Federal services or benefits (immigration activities, operation of the Federal prison system). Id.

Federally conducted activities include the provision of federal benefits or services, the imposition of a burden on a member of the public, and any other activities a federal agency conducts. For example, the investigation of a complaint of discrimination by an office of civil rights or the provision of information by a law enforcement agency that would inform a person of or allow a person to exercise their rights would be a "service." The grant of authority to engage in temporary employment by the Immigration and Naturalization Service or of social security benefits would be a "benefit." The imposition of taxes by the Internal Revenue Service or discipline upon a prisoner in a Bureau of Prisons correctional facility would be a "burden." Another example of federal activities covered by the Executive Order are law enforcement activities such as custodial interrogations, arrests and detentions, searches, investigations, etc., performed by federal law enforcement agencies.

3) What is an agency's "recipient guidance?"

Throughout the questions and answers, when we refer to "recipient guidance" we mean the guidance that agencies must develop to ensure that entities to which they grant federal financial assistance comply with Title VI's prohibition against national origin discrimination. Approximately 28 federal agencies provide some form of federal financial assistance to private, state, or local entities. Federal financial assistance includes, but is not limited to, grants and loans of federal funds; grants or donations of federal property; training; details of federal personnel; or any agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. For instance, the Department of Justice provides federal

financial assistance to several agencies, primarily state and local law enforcement agencies, and departments of corrections.

4) What is the general DOJ Guidance on Limited English Proficiency that was issued along with EO 13166? How can agencies use it? How is it different from the guidance that DOJ and other agencies are working on now?

DOJ has consistently interpreted Title VI and its regulations to require recipients of federal financial assistance to provide meaningful access to LEP individuals, and funding agencies have found recipients in violation of this obligation and prescribed remedial efforts on myriad occasions. The general DOJ LEP Guidance sets forth the standards DOJ has been applying, and it provides a framework for agencies to use in developing specific guidance for their own recipients. EO 13166 requires each agency to prepare guidance that is tailored to the agency's recipients. For example, DOJ is preparing guidance as to how the general LEP standards apply in law enforcement agencies and departments of corrections. EO 13166 also requires agencies to apply the standards set forth in the DOJ LEP Guidance to their own federally conducted activities. The general DOJ LEP Guidance can be found on the FCS website at www.LEP.gov.

5) If an agency does not provide federal financial assistance, does the Executive Order apply to that agency?

Yes. EO 13166 requires that ALL federal agencies take reasonable steps to provide meaningful access to their own federally conducted activities. Each agency must have developed and begun implementing a plan for doing so by December 11, 2000. That plan must be submitted to the Department of Justice, through the Federal Coordination and Compliance Section, by sending it to:

Deeana Jang, Chief
Federal Coordination and Compliance Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue NW - NWB
Washington, D.C. 20530

FCS staff is available to discuss these plans with agencies.

6) What is the time frame for action?

By December 11, 2000, each agency was to develop and begin implementation of a plan for providing meaningful access for LEP individuals to the agency's federally-conducted activities.

Also by December 11, 2000, each agency that provides federal financial assistance must have submitted a draft of its guidance for recipients of that assistance to the Department of Justice, Civil Rights Division, Federal Coordination and Compliance Section (FCS), at the address

noted above. FCS reviews each guidance for consistency with other agencies' guidance and with the Executive Order. Once FCS approves the guidance, it must be published in the Federal Register for review and comment.

7) What standards should agencies apply to recipient guidance and to their plans for federally conducted activities?

Each agency and each recipient of federal financial assistance must take reasonable steps to provide meaningful access to LEP individuals. Among the factors to be considered in determining what constitutes reasonable steps to ensure meaningful access are: (1) the number or proportion of LEP persons in the eligible service population; (2) the frequency with which LEP individuals come into contact with the program; (3) the importance of the service provided by the program; and (4) the resources available to the recipient. These four factors are further explained in the DOJ LEP Guidance found on the FCS website and published in the Federal Register on August 16, 2000.

8) If a recipient is covered by a state or local "English-only" law, must it still comply with the Title VI obligation and agency guidance interpreting that obligation?

Yes. State and local laws may provide additional obligations to serve LEP individuals, but cannot compel recipients of federal financial assistance to violate Title VI. For instance, given our constitutional structure, State or local "English-only" laws do not relieve an entity that receives federal funding from its responsibilities under federal anti-discrimination laws. Entities in States and localities with "English-only" laws are certainly not required to accept federal funding – but if they do, they have to comply with Title VI, including its prohibition against national origin discrimination by recipients of federal assistance. Failing to make federally assisted programs and activities accessible to individuals who are LEP will, in certain circumstances, violate Title VI.

9) When developing plans and guidance regarding translations of documents, how do we determine which documents must be translated?

It is important to ensure that written materials routinely provided in English also are provided in regularly encountered languages other than English. It is particularly important to ensure that vital documents are translated into the non-English language of each regularly encountered LEP group eligible to be served or likely to be affected by the program or activity. A document will be considered vital if it contains information that is critical for obtaining the federal services and/or benefits, or is required by law. Vital documents include, for example: applications; consent and complaint forms; notices of rights and disciplinary action; notices advising LEP persons of the availability of free language assistance; prison rule books; and written tests that do not assess English language competency, but rather competency for a particular license, job, or skill for which English competency is not required; and letters or notices that require a response from the beneficiary or client. For instance, if a complaint form is necessary in order to file a claim with an agency, that complaint form would be vital. Non-vital information includes documents that are not critical to access such benefits and services. Advertisements of federal agency tours and copies of

testimony presented to Congress that are available for informational purposes would be considered non-vital information.

Vital documents must be translated when a significant number or percentage of the population eligible to be served, or likely to be directly affected by the program/activity, needs services or information in a language other than English to communicate effectively. For many larger documents, translation of vital information contained within the document will suffice and the documents need not be translated in their entirety.

It may sometimes be difficult to draw a distinction between vital and non-vital documents, particularly when considering outreach or other documents designed to raise awareness of rights or services. Though meaningful access to a program requires an awareness of the program's existence, we recognize that it would be impossible, from a practical and cost-based perspective, to translate every piece of outreach material into every language. Title VI does not require this of recipients of federal financial assistance, and EO 13166 does not require it of federal agencies. Nevertheless, because in some circumstances lack of awareness of the existence of a particular program may effectively deny LEP individuals meaningful access, it is important for federal agencies to continually survey/assess the needs of eligible service populations in order to determine whether certain critical outreach materials should be translated into other languages.

10) Does the Executive Order apply to materials on websites?

Yes. However, the decision to place something on the web will not affect whether the document must be translated. For example, placement on the website should not change the agencies' or recipients' original assessment regarding the number or proportion of LEP persons that comprise the intended audience for that document.

The four-factor analysis applies to each individual "document" on the website. Generally, entire websites need not be translated, as only the vital information within the website might need translation. If, in applying the four-factor analysis, the agency or recipient determines that a particular document/piece of information should be translated, that translation should also be posted on the website if the English-language version is on the website. If documents are translated within a website, the existence of the translation should be noted (in the appropriate language) at an initial entry point to the site (usually the homepage).

11) What are the standards for oral interpretation?

The obligation to provide meaningful opportunity to individuals who are LEP is not limited to written translations. Oral communication between recipients and beneficiaries often is a necessary part of the exchange of information. Thus, a recipient that limits its language assistance to the provision of written materials may not be allowing LEP persons "effectively to be informed of or to participate in the program."

There are a number of steps which can assist recipients and federal agencies in providing such oral assistance. They range from hiring bilingual staff or staff interpreters competent in

the skill of interpreting, to contracting with qualified outside in-person or telephonic interpreter services, to arranging formally for the services of qualified voluntary community interpreters who are bound by confidentiality agreements. Generally, it is not acceptable for agencies or recipients to rely upon an LEP individual's family members or friends to provide the interpreter services. The agency or recipient should meet its obligations under EO 13166 or Title VI by supplying competent language services free of cost. In rare emergency situations, the agency or recipient may have to rely on an LEP person's family members or other persons whose language skills and competency in interpreting have not been established. Proper agency or recipient planning and implementation is important in order to ensure that those situations rarely occur.

12) Does the Executive Order apply to federally conducted activities overseas or to foreign recipients of federal financial assistance?

No. The Department of Justice has determined that EO 13166 applies only within the United States and its territories and does not apply extraterritorially.

However, agencies that conduct activities overseas must still submit a plan for making their domestic activities accessible to people who are limited English proficient. That plan should indicate that the agency conducts federal activities abroad, but that DOJ has determined that the EO does not apply to those activities.

Similarly, agencies that provide federal financial assistance abroad and domestically must still create guidance for their domestic recipients, and may include a statement in the guidance indicating that the guidance does not apply extraterritorially.

13) Does Executive Order 13166 require that bids be let in languages other than English?

Generally, current practice with regard to announcing federal government contracts and grants would not be altered under the Executive Order. In determining what is required, the focus of the analysis in this situation is on the first factor – the number or proportion of eligible LEP persons. Except, perhaps, in territories, it is reasonable to expect that the number or proportion of eligible contract or grant recipients who are LEP and are themselves attempting to find and respond to announcements of grants and contracts is negligible.

14) If a federal agency contracts with a private or other entity to conduct certain activities of the agency, does the Executive Order apply to the activities of the contractor?

Yes. When a different entity conducts certain activities for the federal agency, then the Executive Order applies to the entity's activities. The agency should ensure that the entity knows the general standards for LEP access and applies the agency's plan to the activities it is conducting on behalf of the agency. An agency cannot avoid its obligations by contracting them out. Mandatory compliance with the agency's LEP policy should be included in the contract.

15) What does Executive Order 13166 require for federal employment practices?

If English is essential in a job, the Executive Order would not require any services for LEP individuals. For jobs where agencies determine English is not essential, agencies should apply the four factors.

16) Where can I get a copy of the Executive Order and the DOJ General LEP Guidance?

A copy of the Executive Order and DOJ's general LEP Guidance (both translated into Spanish and Chinese) can be found on the Federal Coordination and Compliance Section website at <http://www.justice.gov/crt/about/cor>. For more information on Executive Order 13166, please contact the Federal Coordination and Compliance Section, 202-307-2222.