

New DEI Executive Order Signals New Potential Enforcement of The False Claims Act

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President Trump recently issued Executive Order 14173 titled “[Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#)” (“Order”). The Order broadly aims to eliminate diversity, equity, and inclusion (“DEI”) policies and programs across the Government. In doing so, the Order also signals that the Government will scrutinize the DEI policies of prospective contractors and grantees under federal anti-discrimination laws and may use the federal False Claims Act (“FCA”) to police perceived violations.

The FCA was enacted in the midst of the U.S. Civil War, in 1863, to combat abuses by defense contractors taking advantage of lucrative government spending to sell bullets that would not fire and boots that fell apart.

How, then, does the administration tie this old anti-fraud statute to DEI?

False Claims Act Overview

United States Code Title 31, Section 3729 defines “false claims” essentially as false or fraudulent demands for payment submitted to the government. To deter such fraud, the FCA imposes treble damages and inflation-adjusted civil penalties of \$14,308 to \$28,619 for *each* false claim for payment. The statute contemplates both direct enforcement by the Government and *qui tam* suits by private whistleblowers as “Relators” on the Government’s behalf.

To violate the FCA, a representation must be both false and material to payment. The concept of falsity under the FCA encompasses express or implied false certifications of compliance with federal laws or regulations. And materiality refers specifically to the effect on the Government’s decision to pay the claim or not.

The Order ties this primary statutory tool for combatting fraud to DEI by making a commitment *not* to pursue or promote DEI a condition of federal contracting. As such, the Order directs each federal agency to include the following in all new Government contracts or grants:

- “A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code [the False Claims Act]; and”
- “A term requiring such counterparty or recipient to certify that it does not operate any

programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

Implications for FCA Liability

The Order aims to streamline litigation of FCA actions by incorporating an express certification of compliance with anti-discrimination laws and specifying that such compliance is material to payment. Materiality is frequently a hotly contested issue in FCA cases, particularly following the Supreme Court’s decision in *Universal Health Services, Inc. v. Escobar*, 579 U.S. 176 (2015), emphasizing the FCA’s “demanding” materiality standard. By expressly specifying compliance with such laws as material, the Government seeks to cut off counterarguments by defendants that compliance with anti-discrimination laws is unrelated to the subject matter of the contract and, thus, immaterial to payment.

It is important to note that the Order does not and cannot alter or amend any existing anti-discrimination laws. That said, current and prospective contractors and grantees should heed the Government’s signal that it will more closely scrutinize their employment practices, and specifically DEI initiatives, under federal anti-discrimination laws. The Order provides a 90-day grace period for prospective contractors and grantees to evaluate and, if necessary, modify their policies to comply with federal law. Prospective federal contractors and grantees should conduct a review of their existing policies, keeping in mind that, while the law itself has not changed, there is heightened risk that the Government or private whistleblowers could use the FCA to attack perceived DEI practices. Although contractors and grantees under existing contracts need not make these express certifications, they should note the Order’s clear signal that the Government now views DEI programs as material to payment, because there is some risk that the Government could bring similar cases under an implied false certification theory.

Kelley Drye is closely monitoring this space and is prepared to help clients evaluate internal policies to ensure compliance with the changing enforcement priorities of the Trump administration. Please reach out to Kelley Drye’s White Collar and Labor and Employment teams for assistance.