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Legal Perspectives on Executive Order 14173, DEI, and the False Claims Act

A New Paradigm in Federal Anti-Discrimination Law Enforcement

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Legal Perspectives on Executive Order 14173, DEI, and the False Claims Act*

For the last 60 years, federal anti-discrimination law enforcement under Title VI and VII of the Civil Rights Act of 1964, the Education Amendments Act of 1972, and the Equal Protection Clause of the U.S. Constitution have primarily involved two types of civil remedies: monetary damages payments from defendants to those determined to be victims of illegal discrimination and various forms of equitable relief to make victims whole and to correct systemic discriminatory practices. Since taking office, President Donald Trump and his administration have demonstrated their commitment to enforcing federal anti-discrimination laws through novel and varied mechanisms not historically associated with enforcement of such laws. The administration has emphasized its intent to root out "illegal DEI" practices by using the more muscular remedies available under the False Claims Act (FCA) and various criminal statutes. This is a watershed change in both what is considered "discrimination" under existing federal law, as well as in the methods and means the federal government will use to enforce existing federal anti-discrimination laws.

This report, prepared by members of Husch Blackwell's Government Contracts, White Collar, Internal Investigations & Compliance, Labor & Employment, and Higher Education practice groups, is intended to guide both private and public entities that may be impacted by the administration's new anti-discrimination focus. This report will help organizations and individuals evaluate how to (1) understand and recognize what employment, procurement, and educational policies and practices may now be considered "illegal," (2) identify issues for self-review and/or assistance from outside counsel, and (3) be aware of, prepare for new, and, if necessary, respond to novel federal civil and criminal enforcement mechanisms.

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SECTION I

EXECUTIVE ORDER 14173 AND RELATED GUIDANCE FROM THE TRUMP ADMINISTRATION

Since January 2025, the administration has rolled out a series of orders and announcements outlining its plan to emphasize and enforce its anti-discrimination agenda. First, the day after his inauguration, President Trump issued Executive Order 14173 (EO 14173), which outlined a number of broad-stroke policy considerations and detailed agency directives aimed at "enforcing… civil-rights laws…by ending illegal preferences and discrimination."[1] Among others, EO 14173 included the following key directives:

- Revoke Executive Order 11246, which had served as the cornerstone for race and sex based affirmative action efforts by federal contractors since it was issued by President Lyndon Johnson in 1965;
- Order the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) to cease "promoting 'diversity'" and stop supporting contractors' DEI or affirmative action programs;
- Prospectively require all recipients of federal contracts and grants to certify their understanding that "compliance… with all applicable Federal anti-discrimination laws" is material to the government's payment of federal funds and certify that the contractor or grant recipient "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws"; and
- Require all education agencies and institutions that receive any type of federal funds to comply with recent Supreme Court guidelines[2] for ensuring anti-discrimination requirements in schools and educational agencies.

President Trump's Executive Order was followed shortly thereafter by a memorandum from Attorney General Pamela Bondi (the "February Bondi Memo") affirming the Department of Justice's (DOJ's) commitment to the principles set forth in EO 14173.[3] The February Bondi Memo explained that the DOJ would "investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."[4]

In July 2025, Attorney General Bondi issued a second memoranda expounding upon the administration's view and planned implementation of its anti-discrimination agenda (the "July Bondi Memo").[5] The July Bondi Memo, which reiterates and expands upon concepts articulated in a February 2025 U.S. Office of Personnel Management

[1] Exec. Order No. 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633 (Jan. 21, 2025).
[2] *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (hereinafter, "*SFFA*").
[3] U.S. Dep't of Justice, Office of the Att'y Gen., *Memorandum re: Eliminating Internal Discriminatory Practices* (Feb. 5, 2025), https://www.justice.gov/ag/media/1388556/dl?inline.
[4] *Id.*
[5] U.S. Dep't of Justice, Office of the Att'y Gen., *Memorandum re: Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination*, at Part II (Jul. 29, 2025), https://www.justice.gov/ag/media/1409486/dl?inline (last accessed Aug. 26, 2025) (hereinafter, "July Bondi Memo").

memorandum[6] regarding DEI in the federal workspace, explains the administration's focus on "federal anti-discrimination laws," including highlights as to what the administration views as essential for organizations to understand as they navigate the key compliance and enforcement points of this developing federal framework. The July Bondi Memo also outlines specific "significant legal risks of initiatives that involve discrimination based on protected characteristics" and advises organizations on best practices for avoiding investigation and enforcement of potential violations of federal anti-discrimination laws. In part, the July Bondi Memo includes the following key compliance considerations and best practices for organizations:

- Organizations should avoid discrimination based on "race, sex, color, national origin, [] religion," and other protected characteristics, even when embedded in DEI and other programs meant to enhance access or opportunities for individuals and subcontractors with those protected characteristics;

- Use of DEI programs and discrimination based on protected characteristics, even when effected by "proxy" through facially neutral criteria, may constitute a "legal pitfall[]";

- Recipients of federal funding that use or otherwise support third party entities in connection with their use of federal funds must ensure that the third parties are not violating federal anti-discrimination laws; and

- Individuals and organizations may not retaliate against those who refuse to participate in an activity that may be viewed as unlawfully discriminatory.

The framework of which federal anti-discrimination laws are implicated is somewhat vague, and while the July Bondi Memo provides a clearer picture, questions remain about what type and level of so-called "discriminatory" activity may be investigated or penalized.

[6] U.S. Office of Personnel Management, Acting Director, *Memorandum re: Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives* (Feb. 5, 2025), https://www.opm.gov/policy-data-oversight/latest-memos/further-guidance-deia.pdf (last accessed Aug. 26, 2025).

SECTION II

WHAT CONSTITUTES A VIOLATION OF ANTI-DISCRIMINATION LAWS?

The threshold issues for organizations receiving federal funding or grants, as well as entities generally subject to federal anti-discrimination laws, are (i) what constitutes a violation of these laws and (ii) what constitutes best practices for compliance. For example, if a federal funding recipient certifies that it is complying with anti-discrimination laws "today," what exactly does this certification mean? Conduct that was proper before January 2025 may now be viewed as violating federal anti-discrimination laws, so the meaning of such a certification may be in constant flux.

As of the date of this report's publication, there has been no change in the key federal statutes. In particular, the Civil Rights Act of 1964, the Education Amendments Act of 1972, and the Equal Protection Clause of the U.S. Constitution have not been amended or changed by Congress in 2025. As such, "federal anti-discrimination law," as enumerated through federal statutes and as interpreted by federal courts for the last sixty years, is still in effect.[7] What *has* changed is the administration's interpretation and application of those long-standing laws, especially as related to DEI.

"DEI" does not have a single definition across federal statutes or regulations, and what is considered "illegal DEI" is in flux given seismic shifts in public policy and enforcement of federal anti-discrimination laws. The Supreme Court decision in *Students for Fair Admission v. Harvard, et al.* (*SFFA*)[8] precipitated this shift. Following the decision, state attorneys general from 13 states issued a letter warning that race-based initiatives, "whether under the label of diversity, equity, and inclusion or otherwise," "including explicit race quotas and preferences in recruiting, hiring, retention, promotion, advancement, and contracting are discriminatory and illegal," and threatened enforcement action. Following recent Supreme Court decisions like *SFFA*,[9] which struck down race-based preferences in college admissions, stating that "college admissions are zero-sum" in that "a benefit provided to some applicants but not others necessarily advantages the former group at the expense of the latter," the Trump administration has amplified the holding in *SFFA* and applied it more broadly from the education field to employment and procurement contexts through the issuance of EO 14173.

Now, practices that were once widely accepted as part of lawful DEI initiatives may be viewed as non-compliant or even illegal under the administration's interpretation of federal anti-discrimination laws adopted in EO 14173.[10] If

[7] Notably, Title VII continues to prohibit discrimination and retaliation in employment on the basis of an individual's race, color, religion, sex, or national origin and Title VI provides nearly identical prohibitions in the employment and procurement contexts for organizations that receive federal financial assistance. In addition, sexual orientation and gender identity remain protected characteristics under the Supreme Court's decision in *Bostock v. Clayton Cty.,* 590 U.S. 644 (2020).
[8] *SFFA, supra* at fn. 2.
[9] *Id.*
[10] Since the issuance of EO 14173, the Equal Employment Opportunity Commission (EEOC) clarified in its March 19, 2025, guidance that DEI trainings and initiatives may also create valid hostile work environment claims under Title VII if the employee can present evidence as to how the training was discriminatory in its content, context, or application. The EEOC ties the legal definition of "workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics," to the general definition of "harassment" by explaining that DEI trainings which result in "an adverse change to a term, condition or privilege of employment, or is so frequent or severe that a reasonable person would considerate intimidating, hostile, or abusive," may constitute a hostile work environment.

an organization continues certain practices without updating its policies, it risks making false certifications, thereby exposing itself to new federal enforcement tools. In response to the February and July Bondi Memos, federal agencies will be working to "identify additional initiatives and working groups that may be advancing a divisive DEI agenda, including programs using coded or imprecise language to disguise their activity."[11]

As our understanding of what may constitute unlawful discrimination and DEI programs under federal anti-discrimination laws evolves, it will be vital to remember that any opposition to DEI programs or trainings by employees, potential or actual applicants, interns, or other participants subject to DEI initiatives may constitute protected activity, against which retaliation is prohibited.[12]

Considerations and Risk Areas for Federal Contractors and Grant Recipients

In light of EO 14173, federal contractors and grant recipients face a rapidly shifting compliance environment. The July Bondi Memo issued new interpretive guidance to recipients of federal funds on compliance measures, providing detailed legal requirements and actionable guidance that EO 14173 did not address or expand upon.

Specifically, the July Bondi Memo identifies five categories of DEI-related practices that the DOJ considers "unlawful" or presenting "significant legal risks" for federal funds recipients unless they meet narrow exceptions under federal law ("illegal DEI"). Those practices include granting preferential treatment based on protected characteristics, such as offering scholarships or other programs exclusively for individuals from specific racial groups; segregation based on protected characteristics, such as employee resource or affinity groups open only to individuals from specific backgrounds; the use of protected characteristics in candidate selection, such as having "diverse slate" requirements or specific quotas to hire individuals from certain backgrounds; and training programs that promote discrimination or hostile environments, such as mandatory training that includes concepts such as "toxic masculinity" or "white privilege."

The July Bondi Memo also takes the position that facially neutral criteria—such as "lived experience," "cultural competence," "overcoming obstacles," or geographic/institutional targeting—may be unlawful if selected or applied with the intent to advantage or disadvantage based on protected characteristics, or if they function as substitutes or "proxies" for explicit race/sex-based criteria. Examples of such practices, according to the DOJ, include requiring "diversity statements" or "overcoming obstacles" essays that advantage candidates based on protected traits and targeting recruitment to geographic areas or institutions chosen primarily for their racial or ethnic composition.

In addition, federally funded entities that allow males, including those self-identifying as women, to access single-sex spaces designed for females, such as bathrooms, showers, locker rooms, or dormitories, may be in violation of Title VII of the Civil Rights Act and Title IX of the Education Amendments. The DOJ asserts that affirming sex-based boundaries rooted in biological differences is required to avoid hostile environments or denial of equal

[11] U.S. Dep't of Educ., *Press Release, U.S. Department of Education Takes Action to Eliminate DEI* (Jan. 23, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-takes-action-eliminate-dei (last accessed Aug. 26, 2025).
[12] *See* discussion *infra* at page 22 ("Retaliation Considerations").

opportunity for women and girls. We anticipate that this position is likely to conflict with various federal court decisions and state or local laws, requiring organizations to navigate a complex and evolving legal landscape.

The July Bondi Memo also asserts that recipients of federal funds may be held liable for discriminatory practices by contractors, grantees, and other third parties to which the recipients further distribute those funds, especially if they fund these entities despite "knowledge" that the entities are engaging in such practices. The DOJ encourages, but does not expressly require, recipients to include explicit nondiscrimination clauses in all subcontracts, monitor compliance, and terminate funding or relationships for noncomplying entities. Importantly, the DOJ's Civil Rights Fraud Initiative signals that the FCA will be used as a primary enforcement tool. Federal contractors that knowingly incorporate or make false certifications of compliance with anti-discrimination laws may trigger FCA investigations and liability.

Lastly, the July Bondi Memo emphasizes robust anti-retaliation protections and encourages the creation of confidential, accessible reporting mechanisms for employees, program participants, and beneficiaries. Individuals who object to or refuse to participate in potentially discriminatory programs are protected from retaliation, and whistleblower reports may trigger investigations, including under the FCA.

A Specific Note on Certifications Considering EO 14173 and Other Recent Federal Guidelines

Organizations receiving federal grants or contracts, including universities, private employers, and public entities, have always been required to certify compliance with a wide variety of federal laws and regulations as part of SAM.gov registrations or specific contract or grant documents. Receipt of federal funds has always been conditioned upon the making of these certifications, as it is the standard practice across federal agencies to require certain certification before any funds are disbursed or contracts executed.

EO 14173 has significantly expanded certification requirements specifically related to anti-discrimination law compliance. For 60 years since the passage of the Civil Rights Act of 1964, there has been no requirement for contractors or grant recipients to certify compliance with federal anti-discrimination law as a condition precedent to receiving payment from the federal government. However, under EO 14173, all agencies are now required to include the following in every contract or grant award:

- "A term requiring the contractual counterparty or grant recipient to agree to 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; and

- A term requiring the contractual counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[13]

It is notable that EO 14173 does not define what is considered to be a "Federal anti-discrimination law" nor does the EO expressly enumerate which laws may be considered a "Federal anti-discrimination law." Similarly, EO

[13] EO 14173, *supra* at fn. 1.

14173 does not define what constitutes "DEI" or what could be construed as "promoting DEI." These are just some of the issues raised in the pending litigation challenging the legality of EO 14173.[14]

By making the certifications now required by EO 14173, organizations are not only committing to current compliance but also asserting that their policies and practices prospectively align with evolving legal standards and interpretations of what constitutes "illegal DEI." Conversely, declining or otherwise failing to make a required certification will result in the denial of federal funding or contract eligibility. This presents organizations with a consequential choice: certify compliance and accept potentially undefined future legal liability resulting from future interpretations of what constitutes "illegal DEI," or decline to certify and forfeit federal funding opportunities. Certifications serve as the government's primary enforcement mechanism for ensuring compliance with federal mandates—and they often serve as the foundation for many FCA investigations.

Federal Contractors and Subcontractors and the Ongoing Federal Acquisition Regulation Update

In parallel with EO 14173, the Trump administration also commenced a rewrite of the Federal Acquisition Regulations (FAR). The FAR is the catalogue of standard contract clauses the federal government has used in federal procurement for decades. It is expected that the revised FAR will remove many provisions regarding affirmative action in employment for federal contractors and small business set-asides and preferences for contractors and subcontractors, to the extent the current provisions are not expressly required by federal statute. Based on which current provisions are eliminated as a result of the FAR revisions, organizations may be able to deduce a clearer picture of what the administration considers to be "illegal DEI" in the employment and procurement contexts.

In the meantime, in February 2025, the Civilian Agency Acquisition Council (CAAC) issued a letter and corresponding supplement (the "CAAC Letter" and "CAAC Letter Supplement"), both of which authorized federal agencies to implement class deviations in line with EO 14173 by revoking certain FAR clauses and provisions related to affirmative action and equal opportunity, and revising others to remove references to the revoked requirements for new solicitations or contracts.[15] To date, several FAR clauses have been impacted by the CAAC Letter and CAAC Letter Supplement, which instructed agencies to remove provisions focused on "affirmative action" and "equal opportunity[ies]" for contractors, including FAR 52.222-23, Notice of Requirement for Affirmative Action To Ensure Equal Employment Opportunity for Construction; FAR 52.222-25, Affirmative Action Compliance; and FAR 52.222-26, Equal Opportunity.[16] While contractors must still comply with existing

[14] *Natl. Association of Diversity Officers in Higher Education, et al. v. Trump*, 1:25-cv-00333-ABA (D.Md. Feb. 21, 2025), on appeal at *Natl. Assoc. of Diversity Officers in Higher Edu. v. Trump*, No. 25-1189 (4th Cir. 2025) (as of Aug. 26, 2025, ongoing briefing and hearings regarding various issues).

[15] U.S. Gen. Servs. Admin., Office of Gov't-wide Policy, *Memorandum re: CAAC Consultation to Issue a Class Deviation from the FAR Regarding EOs 14173 and 14168*, CAAC Letter 2025-01 (Feb. 15, 2025), https://www.acquisition.gov/sites/default/files/caac/CAAC_Letter_2025-01.pdf (last accessed Aug. 26, 2025) (hereinafter, the "CAAC Letter"); U.S. Gen. Servs. Admin., Office of Gov't-wide Policy, *Memorandum re: Supplement to CAAC Consultation to Issue a Class Deviation From the FAR Regarding EOs 14713 and 14168,* CAAC Letter 2025-01, Supplement 1 (Feb. 18, 2025), https://www.acquisition.gov/sites/default/files/caac/CAAC_Letter_2025-01_Supplement-1.pdf (last accessed Aug. 26, 2025) (hereinafter, "CAAC Letter Supplement").

[16] For up-to-date listings of agency deviations following the CAAC Letter and CAAC Letter Supplement, see the following: https://www.acquisition.gov/caac/2025-01 (deviations following the CAAC Letter) (last accessed Aug. 26, 2025), https://www.acquisition.gov/caac/2025-01-supplement-1 (deviations following the CAAC Letter Supplement) (last accessed

federal civil rights and anti-discrimination laws, agencies are given discretion on how to apply EO 14173 to existing contracts. Following the issuance of this guidance, multiple federal agencies—including the General Services Administration,[17] Departments of Treasury, [18] Defense, [19] Homeland Security, [20] Commerce, [21] and others—have adopted class deviations to implement these changes.[22] The agencies that have issued class deviations have closely followed the mandates in the CAAC Letter and CAAC Letter Supplement, removing all of the specific EEO/affirmative action FAR provisions and clauses.[23] As discussed above, a full rewrite of the FAR is underway, which will officially update or remove the impacted clauses and provisions government-wide. Once those changes go into effect, the current deviations will be replaced by the new FAR language. Thus, the recent class deviations essentially only apply to contracts formed or amended prior to the future, final implementation of the revised FAR.

Considerations and Exposure Points for Colleges, Universities, and Educational Institutions

Colleges, universities, and other institutions of higher education face even greater legal challenges under EO 14173 and increased overall scrutiny of every aspect of their employment, procurement, admissions, and other operational policies.

In its February 14, 2025 "Dear Colleague" letter, the Department of Education highlighted specific examples of "illegal DEI" in the college and university context, emphasizing that educational institutions which rely on federal funding must reevaluate their practices pertaining to "admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation, ceremonies, and all aspects of student, academic and campus life."[24] Specific examples identified in the Dear Colleague Letter include DEI programs that "teach students that certain racial groups bear unique moral burdens that others do not[,]" and the

Aug. 26, 2025), and https://www.acq.osd.mil/dpap/policy/policyvault/USA000368-25-DPCAP.pdf (DOD-specific deviations) (last accessed Aug. 26, 2025).

[17] U.S. Gen. Servs. Admin., Office of Acquisition Policy (MV), *Memorandum re: Supplement 1 to FAR Class Deviation for Revoked Executive Order 11246, Equal Employment Opportunity*, Class Deviation CD-2025-04, Supplement 1 (Feb. 2025), https://www.acquisition.gov/sites/default/files/caac/deviation/GSA_Deviation_CAAC_Letter_2025-01.pdf (last accessed Aug. 26, 2025).

[18] U.S. Dep't of the Treasury, *Memorandum re: Class Deviation No. 2025-00001 — From the Federal Acquisition Regulation (FAR) Regarding EOs 14173 and 14168*, Acquisition Bulletin No. 25-01, Deviation No. 2025-00001 (Feb. 19, 2025), https://www.acquisition.gov/sites/default/files/caac/deviation/Department_of_Treasury_Class_Deviation_2025-01.pdf (last accessed Aug. 26, 2025).

[19] U.S. Dep't of Def., Office of the Under Sec'y of Def. for Acquisition & Sustainment, *Memorandum re: Class Deviation—Restoring Merit-Based Opportunity in Federal Contracts,* DARS Tracking No. 2025-O0003 (Mar. 2025), https://www.acq.osd.mil/dpap/policy/policyvault/USA000368-25-DPCAP.pdf (last accessed Aug. 26, 2025).

[20] U.S. Dep't of Homeland Sec., *Memorandum re: Federal Acquisition Regulation Class Deviation (Number 25-01) – EOs 14173 and 14168* (Feb. 21, 2025), https://www.acquisition.gov/sites/default/files/caac/deviation/DHS_Class_Deviation_2025-01_Supplement-1.pdf (last accessed Aug. 26, 2025).

[21] U.S. Dep't of Commerce, *Memorandum re: Federal Acquisition Regulation (FAR) Class Deviation Regarding EOs 14173 and 14168*, Procurement Memo. No. 2025-02 (Feb. 21, 2025), https://www.acquisition.gov/sites/default/files/caac/deviation/DOC_2025-01_supplement-1_FAR_Class_Deviation.pdf (last accessed Aug. 26, 2025).

[22] *See supra* at fn. 16.

[23] *See supra* at fn. 16.

[24] U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter* (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf (last accessed Aug. 26, 2025) (addressing Title VI compliance after *SFFA* decision).

use of "students' personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student's race or disfavoring such students."[25]

This Dear Colleague Letter and other recent higher education-focused guidance leverages reasoning from the Supreme Court's *SFFA* decision that declared the use of race in admissions to be illegal and applies the same reasoning to all institutional programs that might assign a benefit or burden based on race.

To illustrate how evolving legal standards can create new compliance risks, consider the obligations of universities under Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, color, or national origin in any program receiving federal funds. Each year, universities must certify their compliance with Title VI as a condition for receiving federal funding.

Following the Supreme Court's decision in *SFFA,* the use of race as a factor in admissions decisions is now presumptively unlawful. Similarly, an institution's use of certain scholarships designated only for students of a given race (or, perhaps, "underrepresented" minorities) is problematic. The U.S. Department of Education would consider the award of a scholarship an institutional benefit, and to the extent race is an eligibility criterion, the Department would view the award as illegal under Title VI, applying reasoning from *SFFA*. *See* Section IV.B.3, *infra*, for a discussion on how a circumstance such as this may play out in an enforcement context.

These examples highlight a broader risk for all organizations that certify compliance with anti-discrimination laws and that have numerous programs that confer benefits and burdens. As legal definitions and enforcement priorities change, practices that were previously accepted may become non-compliant. Institutions must therefore remain vigilant, regularly reviewing and updating their policies to ensure that certifications accurately reflect current law.

General Anti-discrimination Laws for Entities Other than Contractors, Grant Recipients or Education Institutions (e.g., Law Firms, Professional Associations)

Although EO 14173 imposes new certification requirements on federal contractors, grantees, and educational institutions, it also directs federal agencies to take proactive measures to identify and address violations of anti-discrimination laws across the private sector.[26] This extends beyond entities receiving federal funds and explicitly includes publicly traded corporations, non-profits, professional associations, and other influential institutions.

Under EO 14173, the DOJ and other federal enforcement agencies are tasked with developing strategic enforcement plans that:

- Identify sectors and organizations viewed as significant actors in the use of potentially unlawful DEI programs;
- Target organizations for potential civil compliance investigations or litigation; and

[25] *See id.*
[26] EO 14173, *supra* at fn. 1.

- Recommend regulatory or sub-regulatory actions to deter practices deemed inconsistent with federal anti-discrimination laws.

For organizations such as law firms, trade associations, medical societies, or foundations, this represents a shift toward direct federal scrutiny under existing federal anti-discrimination laws. The focus is not on compliance certifications, but rather on traditional enforcement tools, including investigations, agency charges, negotiated settlements, and federal litigation under Titles VI and VII of the Civil Rights Act of 1964 and other existing longtime federal anti-discrimination laws.

The potential exposure is twofold:

1. Program Design and Implementation—DEI initiatives that include preferences, quotas, or selection criteria linked to protected characteristics may be evaluated as potential disparate treatment under existing federal anti-discrimination laws. This includes recruiting pipelines, leadership development programs, fellowship eligibility rules, and client or vendor diversity requirements.

2. Communications and Training—Internal or external messaging that frames employment or membership opportunities in terms of race, sex, or other protected traits could form the basis of an enforcement action, particularly if tied to adverse decisions or differential treatment.

Because the enforcement emphasis is shifting toward targeted, high-impact cases, the DOJ, EEOC, and other federal agencies are likely to pursue matters that can serve as precedent or have deterrent effect within a given industry or sector. Organizations outside the federal contracting or grant space should therefore approach EO 14173 and related anti-discrimination compliance as more than a mere federal funding-related issue.

Navigating Conflicting Statutory and Regulatory Schemes

What policies or programs constitute a potential violation of federal anti-discrimination law for federal contractors and grant recipients can be even more difficult to determine given the administration's current interpretation of federal anti-discrimination laws applied to various federal contracting and subcontracting set-aside and minority preference programs that are required by federal law or affirmative action programs or required by state or local laws.

Statutory Procurement Set-Aside and Preference Programs

Federal set-aside requirements, like the programs used by the Department of Transportation (DOT) or Small Business Administration (SBA), require agencies to implement preferences based on various socioeconomic, demographic, or geographic designations.[27] Many of these statutory contracting minority preference regimes were enacted by Congress years after passage of the more general Title VI of the Civil Rights Act of 1964. Historically,

[27] For example: the Disadvantaged Business Enterprise, *see* 49 C.F.R. pt. 26; the 8(a) Business Development program, *see* 13 C.F.R. pt. 124; the HUBZone program, *see* 13 C.F.R. pt. 126; the Women-Owned Small Business program, *see* 13 C.F.R. pt. 127; and the Service-Disabled Veteran-Owned Small Business program, *see* 13 C.F.R. pt. 128.

based on basic canons of statutory construction,[28] specific and later-enacted Small Business Act statutory requirements related to what procurement practices are allegedly discriminatory have taken and should take precedence over Title VI and the administration's current interpretation of that older statute. [29] This will raise interesting enforcement issues if specific statutorily authorized procurement set-aside programs are deemed "illegal DEI" and such enforcement actions were challenged in court.[30]

Prior to January 2025, FAR Part 19, which established requirements for small business set-aside acquisitions, required contracting officers to set aside an individual acquisition or a class of acquisitions for certain categories of small businesses when there is a reasonable expectation of obtaining offers from at least two responsible small businesses and that award can be made at a fair market price. Further, some federal contracts that are awarded to "other than small" businesses have requirements on the prime contractor to include plans for subcontracting to these small businesses. The rewrite of the FAR is ongoing, and it remains to be seen exactly what portions of the prior FAR Part 19 will remain.

Regardless, for contracts already in place, agencies have discretion on how they will apply the new EO 14173 requirements (whether to modify existing contracts or allow them to continue under old terms). As discussed above, the widespread adoption of class deviations by numerous federal agencies demonstrates the government-wide implementation of EO 14173.

State and Local Affirmative Action Requirements

Many state and local governments have their own anti-discrimination, affirmative action, and/or procurement preference statutes. Federal contractor and grant recipient compliance with EO 14173 can be complicated if states and municipalities require certain affirmative action in hiring or procurement that the federal government now prohibits.

When Congress enacted the Civil Rights of 1964, it made explicit that federal law did not preempt state and local laws on the same subject, unless such state or local laws were inconsistent with federal law.[31] Whether the administration's current interpretation of the Civil Rights Act and its views on what constitutes "illegal DEI" under that statute implicates the statutory exclusions from federal preemption to call into question the enforceability of specific state and local laws that were enacted based on nearly sixty years of judicial

[28] See, e.g., *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)

[29] The Small Business Act of 1953 was amended in 1978, creating an Office of Small and Disadvantaged Business Utilization (OSDBU) in many government agencies to promote working with small and minority owned businesses. *See* Pub. L. No 95-507.

[30] While there are carveouts stating that EO 14713 does not restrict lawful contracting preferences for veterans or blind individuals, implemented "consistent with applicable law," the new DOJ guidance and EO 14713 hold practices like these mandatory set asides based on race and or sex to be "discriminatory and illegal."

[31] *See, e.g.*, 42 U.S.C. 2000e-7 ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."); 42 U.S.C. 2000h-4 ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.").

interpretations of the Civil Rights Act is currently an open question. Regardless, the potential for conflict exists with state and local laws or executive orders explicitly requiring DEI programs, diverse hiring practices, or pay equity reporting as compared to the federal position finding such programs and policies to be "illegal DEI." As a result, grant recipients and contractors receiving federal funds may be forced to make a choice between compliance with federal laws (risking state/local penalties) or compliance with state/local laws (risking federal enforcement). This dilemma implicates the new EO 14173 contract and grant certification requirements. Recipients of state or local funding or contracts should carefully scrutinize whether and to what extent federal funds tied to EO 14173 compliance requirements may be involved.

After identifying areas of exposure, the next issue is navigating what changes an organization should make and how to make them without finding itself caught between conflicting federal and state/local directives. When faced with inconsistent guidance, organizations should conduct a thorough risk assessment, taking into account the likelihood of enforcement actions by each agency, as well as potential litigation exposure. To mitigate uncertainty, organizations can seek clarification directly from the relevant state agencies. This may involve submitting formal requests for advisory opinions, engaging in public comment opportunities, or participating in industry working groups to advocate for harmonized standards. Developing internal policies that reflect a balanced approach to compliance is essential. Organizations should document their decision-making processes, including legal research and consultation with counsel, to demonstrate a good-faith effort to reconcile conflicting guidance.

THREE KEY PARADIGM SHIFTS

As outlined above, the landscape of what constitutes a violation of federal anti-discrimination law is evolving. While this is happening, there is a concurrent watershed change in how the administration will investigate and enforce alleged violations of federal anti-discrimination law. We have identified three apparent paradigm shifts related to executive branch enforcement priorities: (1) realignment of the EEOC and the DOJ's anti-discrimination resources with the Trump administration's enforcement priorities; (2) investigations and enforcement of civil rights and anti-discrimination fraud as enforcement priorities; and (3) explicit invitations to private citizens to identify potential violations and potentially initiate FCA investigations. The significance of each is explored below.

Redefining Enforcement Priorities: From Minority Protection to Equal Application and Ideological Alignment

While the Supreme Court's unanimous decision in *Ames v. Ohio Department of Youth Services* confirmed that all Title VII plaintiffs (whether asserting traditional or reverse discrimination claims) bear the same evidentiary burden,[32] the more consequential shift in the practical meaning of "discrimination" has come from the Trump administration's enforcement priorities. These priorities do not expand the statutory definition of discrimination but instead reframe it through the lens of the administration's stated political objectives, effectively redefining which claims are pursued and which are deprioritized.

At the EEOC, current leadership has made bias against American workers a central focus, positioning national origin discrimination claims by U.S. citizens as a priority.[33] This shift aligns with the administration's broader emphasis on curbing immigration and scrutinizing DEI programs.[34] The agency has also pulled back from enforcing protections for LGBTQ+ employees.[35]

The DOJ has advanced complementary policies, including its "English-first" initiative, which directs federal agencies to scale back multilingual services in favor of English-only communications.[36] While the DOJ frames this as consistent with existing law, its stance diverges from decades-old EEOC regulations that treat blanket English-

[32] *See* generally *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303 (2025).
[33] U.S. Equal Emp. Opportunity Comm'n, *Press Release, EEOC Acting Chair Vows to Protect American Workers from Anti-American Bias* (Feb. 19, 2025), https://content.govdelivery.com/accounts/USEEOC/bulletins/3d31ad3 (last accessed Aug. 26, 2025).
[34] *See, e.g.,* Exec. Order No. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, 90 Fed. Reg. 8339 (Jan. 20, 2025); Exec. Order No. 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, 90 Fed. Reg. 8615 (Jan. 20, 2025) (hereinafter, "EO 14168"); Exec. Order No. 14161, *Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats*, 90 Fed. Reg. 8451 (Jan. 20, 2025); Exec. Order No. 14165, *Securing Our Borders*, 90 Fed. Reg. 8467 (Jan. 20, 2025); Exec. Order No. 14159, *Protecting the American People Against Invasion*, 90 Fed. Reg. 8443 (Jan. 20, 2025); EO 14173, *supra* at fn. 1; Exec. Order No. 14287, *Protecting American Communities From Criminal Aliens*, 90 Fed. Reg. 18761 (Apr. 28, 2025).
[35] *See* EO 14168, *supra* at fn. 36.
[36] U.S. Dep't of Justice, Office of the Att'y Gen., *Memorandum re: Implementation of Executive Order No. 14224: Designating English as the Official Language of the United States of America* (Jul. 14. 2025), https://www.justice.gov/ag/media/1407776/dl?inline (last accessed Aug. 26, 2025).

only workplace rules as presumptively discriminatory. The resulting regulatory tension underscores the degree to which enforcement direction, rather than statutory change, is reshaping outcomes.

The *Ames* decision interacts directly with this new enforcement posture. By eliminating the "background circumstances" test for non-minority group plaintiffs, the Court has removed a substantive hurdle on so-called "reverse discrimination" claims in several federal circuits. This, combined with the administration's focus on anti-American bias, is likely to drive an increase in "reverse discrimination" claims, particularly in contexts where hiring preferences, DEI goals, or language restrictions can be portrayed as disadvantaging majority-group or American employees.

In effect, the legal standard for discrimination remains constant. Title VII continues to protect "any individual" from disparate treatment based on protected characteristics. But enforcement efforts now appear to be concentrated on the administration's priorities, with fewer resources devoted to other, more traditional forms of bias.

Enforcement of Federal Anti-discrimination Law Fraud Through the False Claims Act

The second paradigm shift arises from the introduction of the FCA as a federal anti-discrimination law enforcement tool. The FCA was originally enacted during the Civil War in 1863 to combat fraud perpetrated by suppliers who sold defective goods or services to the Union Army, aiming to protect government funds from unscrupulous contractors. Since its inception, the FCA has generally been used as a powerful tool to uncover and penalize fraud against the federal government, particularly in areas such as healthcare, defense contracting, and other government-funded programs.

On May 19, 2025, the DOJ issued a memorandum announcing its Civil Rights Fraud Initiative (CRFI).[37] The CRFI focuses on what the memorandum described as "civil rights fraud" and brings together resources from across the federal government—plus participating state and local governments—to use the FCA to investigate allegations of discriminatory conduct that violates federal anti-discrimination laws. This represents a major enforcement shift because, traditionally, the FCA's focus has been on financial fraud and the recovery of misappropriated government funds, and it predates the federal anti-discrimination laws that are the focal points of the CRFI. With the creation of the CRFI, the Trump administration is clearly expanding the scope of issues to which the FCA has been used as an enforcement tool to an area where it has not traditionally, or at least regularly, been utilized. This means that federal contractors, subcontractors, or grant recipients could become the target of an FCA investigation or violation if (i) the recipient of federal funding certified compliance with federal anti-discrimination laws and (ii) the recipient's program or policies constitute "illegal DEI" or are found to prefer or exclude individuals on the bases of protected categories. Notably, in the July Bondi Memo, the DOJ clarified that the protected categories about which the DOJ likely will be concerned are race, sex, color, national origin, or religion.[38]

[37] U.S. Dep't of Justice, Office of the Deputy Att'y Gen., *Memorandum re: Civil Rights Fraud Initiative* (May 19, 2025), https://www.justice.gov/dag/media/1400826/dl (last accessed Aug. 26, 2025) (hereinafter, the "May DAG Memo").
[38] July Bondi Memo, *supra* at fn. 5.

Focus on Private Citizen Involvement

The third paradigm shift comes from the Administration's explicit invitation to private citizens to bring federal anti-discrimination law fraud cases. Under the FCA, private parties (including individuals and corporate organizations) may initiate litigation on behalf of the federal government. These private party actions are known as *qui tam* relator actions. The memorandum announcing the creation of the CRFI included a specific plea to private *qui tam* relators: "[t]he Department recognizes that it alone cannot identify every instance of civil rights fraud."[39] Private citizen involvement in the FCA is not new, but the overt invitation to private parties is unusual. Though this option has long been available through the FCA's *qui tam* provisions (explored in detail below) and other less formal whistleblower mechanisms, the CRFI seems to open a new era in private citizen involvement in law enforcement efforts.

The subject matter of federal anti-discrimination law issues may be particularly attractive to private citizens, disappointed bidders for subcontracts, or other FCA *qui tam* relators because, unlike more complicated monetary or contractual fraud issues, potential federal anti-discrimination law violations may be more apparent to insiders and easier for untrained observers to spot. Unlike misconduct arising from areas like accounting, product testing, or healthcare coding, which can be complex and difficult to describe or identify, alleged federal anti-discrimination law violations may be easier for relators to identify and articulate. As such, federal funding recipients should be wary of any hotline or internal complaint that implicates DEI issues, as the complaint may be a signal of a coming FCA investigation. The newly empowered army of private party investigators—who may be employees within the funding recipient's own organization, disappointed bidders for subcontractors, or third parties on the hunt for apparent violations motivated by ideological concerns or the potential financial incentives the FCA provides to successful relators and their lawyers—are enough to warrant federal funding recipients to take a careful look at any employment, procurement, or admissions programs or policies that might be deemed to be "illegal DEI."

[39] May DAG Memo, *supra* at fn. 39.

SECTION IV

FALSE CLAIMS ACT IMPLICATIONS AND ISSUES

We turn now to a discussion of the FCA and how it may be used by the Trump administration as a new enforcement mechanism to investigate and penalize recipients of federal funds, including private and public entity contractors and grantees, for alleged federal anti-discrimination law fraud. As noted above, in May 2025, the DOJ announced that the FCA will be used as a tool to enforce the administration's anti-discrimination priorities. Because the FCA has never really been used before like this in the 60-year history of modern federal anti-discrimination laws, what follows is an educated guess as to how the DOJ may apply these two previously unconnected areas of law.

DOJ's Civil Rights Fraud Initiative

The February Bondi Memo[40] signaled the DOJ's agency-wide effort to focus on "aggressively pursu[ing]" intentional violations of federal anti-discrimination laws by any federal fund or grant recipients.[41] While the CRFI pertains to any private or public entity federal funding recipient, it focuses specifically on two areas:

- Government contractors certifying "compliance with civil rights laws while knowingly engaging in racist" activities and practices; and
- Educational institutions, including colleges and universities, which accept federal funds while "discriminating against their students."

The July Bondi Memo[42] added further context to the administration's view on what constitutes unlawful discrimination.[43] Useful for attempting compliance with these developing laws and expectations, recipients of federal funds and grants should use this guidance to assist with navigating best practices for avoiding CRFI investigation.

The administration is dedicating significant financial and personnel resources to CRFI and related FCA enforcement, meaning that waves of federal anti-discrimination law fraud investigations and litigation in the near future are likely. As such, federal fund recipients should understand the FCA's general enforcement framework and institute policies and procedures that can be used to demonstrate good-faith compliance in the event that an FCA investigation begins.

Basic Elements of FCA Relevant to Federal Anti-Discrimination Law Fraud Cases

The FCA, codified at 31 U.S.C. §§ 3729-3733, imposes liability on individuals and organizations that make false statements to the federal government for payment by the government. FCA claims can be brought directly by the DOJ on behalf of the federal government. Alternatively, the FCA permits private parties, referred to as relators or

[40] *See* February Bondi Memo, *supra* at fn. 3.
[41] *Id.*
[42] *See* July Bondi Memo, *supra* at fn. 5.
[43] *See* discussion on "illegal DEI", *supra* at pp. 6-9 ("Considerations and Risk Areas for Federal Contractors and Grant Recipients").

whistleblowers, to bring a *qui tam* civil suit on behalf of the government. When a relator brings a suit, the DOJ can choose to intervene and take over the case, or the relator may continue the case on their own.

When either the DOJ or a relator brings an FCA claim, the potential damages for an organization can be extremely high. The FCA imposes a penalty, adjusted for inflation, of thousands of dollars per false claim. In addition to the per-claim penalty, violators are liable for treble damages, meaning three times the amount of damages the government sustains because of the false claim. Typically, the federal government will claim its damages are equal to the full value of all money paid to the organization, or some other large segregable portion of all funds paid. This means that, if the government is successful in its FCA claims, the organization could be facing an existential threat of treble damages in an amount greater than the organization's net worth. Relators can receive a portion of the recovered damages, incentivizing them to file and prosecute FCA claims. Finally, an FCA suit can reveal information that may lead to a parallel criminal investigation and a variety of potential criminal charges, many of which include years of imprisonment as potential penalties.

There are several variations of possible FCA liability, but in general, FCA cases hinge on the government proving three key elements: a false or fraudulent claim, knowledge of the falsity, and materiality of the false claim to the government's payment decision. Litigation and defenses related to FCA cases, therefore, typically involve questions about: (1) whether the claim was actually false; (2) whether the claimant knew or should have known the claim was false; and (3) whether the false claim was material—or important—to the government's payment decisions. Each element, specifically related to the DOJ's new focus on federal anti-discrimination law enforcement, is discussed below.

Falsity and Certifications

The FCA does not define "false" or "falsity," but reviewing courts have established false or fraudulent statements as those aimed at extracting money the government otherwise would not have paid. There are two types of false claims: factual and legal falsity. Factual falsity exists where a contractor, for example, has incorrectly described the types of goods or services that were provided to the government. Legal falsity occurs when a contractor or fund recipient falsely represents goods or services as being compliant with particular statutes, regulations, or contract terms. Based on the DOJ's recent policy announcements, FCA investigations into federal anti-discrimination law fraud allegations are likely to arise from compliance certifications that are alleged to be legally false.

FCA cases involving legally false certifications also tend to fall into two categories: express and implied false certifications. A typical case of express falsity in an FCA case arises where a contractor has signed a certification that claims the contractor complied with specified contract or funding requirements. Implied falsity, on the other hand, does not require any actual certification, but the act of submitting a claim itself implies that the claimant has complied with certain rules or regulations. For example, if a healthcare provider seeks reimbursement from the federal government for services provided by a registered nurse, submitting the claim impliedly certifies that the person providing the services was actually a registered nurse rather than an unlicensed assistant.

Cases brought as part of the CRFI will likely focus on whether a federal contractor or funding recipient signed an express certification stating that it has no "illegal DEI" policies or practices and otherwise complied with federal

anti-discrimination laws. Certifications that were executed after the issuance of EO 14173 in January 2025 are more likely to draw scrutiny because the DOJ or relator's attorneys will have an easier time proving that the defendant organization was on notice of EO 14173, the July Bondi Memo, and the DOJ's current interpretation of federal anti-discrimination laws. Similarly, invoices or purchase orders that were submitted or issued after January 2025 and that include language about compliance with federal anti-discrimination laws are also possible sources of FCA exposure.

Consider the following concrete example in the higher education context based on the Supreme Court's recent ruling in *SFFA*.[44] Suppose a university's admissions office, despite the *SFFA* ruling, continues to consider race as part of its admissions process. In its annual certification to the U.S. Department of Education, the university then affirms that it is in compliance with Title VI and not engaging in prohibited discrimination. If the DOJ or a whistleblower learns that the university is still using race-conscious admissions, contrary to its certification, the university's approach could trigger an investigation. As discussed herein, the university's certification, made while knowingly engaging in a now-prohibited practice, could be deemed a "false claim," exposing the institution to significant liability under the FCA.[45]

Knowledge and Intent

The FCA does not require proof of specific intent to defraud. Rather, the FCA focuses on the claimant's knowledge (also known as "scienter") about the false claim. The FCA defines three levels of knowledge:

- Actual knowledge—The person/entity actually knows information related to the claim is false but submits the claim anyway.
- Deliberate ignorance—The person/entity deliberately avoids learning the truth or falsity of the information.
- Reckless disregard—The person/entity acts with reckless disregard for the truth or falsity of the information.

This broad set of definitions is designed to capture a wide range of wrongful conduct, from intentional fraud to willful blindness or gross negligence. Proving knowledge, however, is inherently difficult and depends on careful review of facts and circumstances. As a result, for example, evidence that a person or company continued with a DEI program even after receiving notice that it may no longer be compliant or ignoring complaints from employees about DEI programs or policies would help to prove "knowledge." Conversely, if a contractor or grant recipient merely continued an employment or procurement practice that had been expressly approved or required by a prior federal court decision, but which now potentially conflicts with the DOJ's current interpretation of federal anti-discrimination laws, "knowledge" may be difficult to establish. Finally, to the extent an organization is faced with a dilemma as to whether to follow state/local laws requiring affirmative action or the administration's

[44] *SFFA, supra* at fn. 2.
[45] *See* discussion *supra* at pp. 7-8 ("A Specific Note on Certifications considering EO 14173 and Other Recent Federal Guidelines").

current interpretation of federal law to the contrary, there could be a very difficult and fact-intensive analysis as to whether and to what extent any defendant organization had "knowledge" about a false claim.

The outcome of an FCA "knowledge" analysis also depends on the actual individual or entity being investigated and to whom knowledge of the alleged falsity can or should be attributed. Again, we turn to an example in the higher education context, introduced *supra* at Section II.A.B: consider the existence of a scholarship issued to students from "underrepresented" demographics and awarded at a department level, but not directly known to top university leadership. Depending on a heavily fact-specific analysis, "knowledge" could be attributed to university leadership, leading to FCA exposure, despite decisions being made at a department level, potentially leading to a finding of a false certification of Title VI compliance and resulting FCA risk. Issues such as these will inevitably be played out in courts across the country as the FCA enforcement scheme is newly applied in an anti-discrimination context.

Materiality

Materiality is another heavily litigated area in FCA cases. The Supreme Court has explained that materiality is a "demanding" standard, and not every misrepresentation will qualify as material—only those likely to affect a government's payment decision will be deemed to be "material." From the inception of the Civil Rights Act of 1964 until the issuance of EO 14173 in January 2025, compliance with federal anti-discrimination laws has not traditionally been deemed "material" to government payment decisions.[46]

Likely with the materiality requirement in mind, the administration began to set up CRFI's enforcement regime when it issued EO 14173. In that order, the administration required that all federal contracts and grants include a requirement that the recipient certify that "compliance… with all applicable Federal anti-discrimination laws" is material to the government's payment of federal funds and certify that the contractor or grant recipient "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." In doing so, EO 14173 is attempting to check the "materiality" box as part of every funding recipient's certification. These types of certifications will likely make it easier for the DOJ or relators to prove materiality and, thus, help to drive settlements or FCA damages awards.

Because of the resources being poured into CRFI and similar initiatives, it is safe to assume that the government will be launching many investigations related to federal anti-discrimination law fraud. Perhaps more importantly, the DOJ has explicitly invited whistleblowers and private citizens to bring alleged FCA federal anti-discrimination law fraud violations to the DOJ for review. This means that, under § 3730(b), if a whistleblower or *qui tam* relator prepares a complaint, the DOJ must review and investigate. As anyone who has experienced litigation or an

[46] For example, this is demonstrated by President Trump's 2017 rollback of President Obama's *Fair Pay and Safe Workplaces* ("FPSW") Executive Orders and related regulations (81 Fed. Reg. 58562 (Aug. 25, 2016)). The FPSW rules provided a mechanism to find federal contractors not "responsible" to receive or continue federal contracts if they had too many "labor law violations," including violations of federal anti-discrimination laws. Congress issued a rare joint resolution under the Congressional Review Act to rescind the entirety of the FPSW regulatory scheme, which President Trump signed on March 27, 2017. *See* H.J.Res. 37. The same day, President Trump also issued Executive Order 13782 (Revocation of Federal Contracting Executive Orders) rescinding the Obama Executive Orders that established FPSW. Through these actions, one could argue President Trump and Congress effectively declared that compliance with generally applicable federal anti-discrimination laws may not be "material" to a federal contractor's receipt of federal funds.

investigation knows, the investigation itself can impose heavy costs and burdens, even if it results in no other adverse actions or consequences. Federal fund recipients should take a close look at their diversity and discrimination policies and procedures and ensure that they comply with the most current updates from the administration and the DOJ guidance. Every whistleblower complaint involving DEI policies or practices should be evaluated carefully as a potential FCA case.

FCA's Qui Tam *Provisions*

In addition to investigations and lawsuits brought directly by the DOJ and based on federal audit or inquiry, federal contractors and grant recipients should be aware that there are other potential origination sources for FCA enforcement. As discussed above, the FCA's *qui tam* provisions empower private citizens to file lawsuits on behalf of the federal government against individuals or organizations suspected of defrauding government programs.[47] If the lawsuit is successful, the whistleblower may receive a portion of the recovered damages as a reward. Under the Trump administration, these *qui tam* provisions are being heralded as a central tool in the enforcement of federal anti-discrimination law fraud. By leveraging the involvement of whistleblowers, the CRFI apparently aims to uncover and address instances of federal anti-discrimination law noncompliance that might otherwise go undetected, thus expanding the reach and effectiveness of enforcement through the FCA.

The Trump administration and the DOJ rationalized their strategy of leveraging private resources and citizen involvement in federal anti-discrimination law fraud enforcement under the FCA by recognizing the unique challenges inherent in detecting alleged violations of federal anti-discrimination laws compared to traditional FCA violations like procurement fraud. In cases of procurement or financial fraud, misconduct is often evident in the claims submitted to the government, making it easier for federal agencies to identify and investigate wrongdoing. However, noncompliance with federal anti-discrimination laws—such as discrimination or failure to provide equal access—may not be readily apparent from paperwork or external audits, as these violations are often embedded within an organization's internal practices or culture. To address this, the administration emphasized the importance of private citizens, especially employees or insiders, who are well-positioned to observe and report such hidden misconduct. By incentivizing whistleblowers to come forward through the FCA's *qui tam* provisions, the government aimed to supplement its limited enforcement resources and gain crucial insight into potential statutory violations that would otherwise remain undetected. Indeed, whistleblowers may be uniquely positioned to uncover instances of federal anti-discrimination law noncompliance given the nuanced and organization-specific nature of this body of law. This approach likely will accelerate compliance with the administration's interpretations of federal anti-discrimination laws because companies and other organizations that receive federal funding will have to recognize that any employee, vendor, or even competitor could launch an FCA investigation if they have credible evidence of non-compliance.

[47] It is worth noting that even the *qui tam* provisions themselves are currently in flux. In particular, the *Zafirov* decision highlighted a potential watershed shift in interpreting the FCA's *qui tam* provisions, namely, by holding that the *qui tam* provisions are unconstitutional and thus that relators are no longer allowed to bring FCA cases on behalf of the federal Government, as has been the case since the FCA's inception. *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, 751 F.Supp.3d 1293 (M.D. Fla. Sep. 30, 2024). Several other federal Circuits have taken up the *qui tam* relator question, likely prompted by *United States, ex rel. Polansky v. Executive Health Resources Inc.*, 599 U.S. 419, 449–50 (2023), and it is likely that the question will be presented to the Supreme Court in the near future.

Retaliation Considerations

The FCA includes strong anti-retaliation provisions designed to protect *qui tam* whistleblowers who report fraud. Under 31 U.S.C. § 3730(h), organizations are prohibited from discharging, demoting, harassing, or otherwise discriminating against employees for lawful acts done in furtherance of an FCA action or efforts to stop violations. If a company retaliates, it can be held liable for damages, including reinstatement, double back pay, and compensation for special damages such as litigation costs and attorneys' fees. Unlike traditional Title VII retaliation provisions, the FCA's anti-retaliation provisions have no administrative exhaustion requirement and putative whistleblower plaintiffs can proceed directly with filing lawsuits in federal court under 31 U.S.C. § 3730(h).

The administration's federal anti-discrimination law fraud agenda placed a renewed emphasis on rooting out fraud and protecting whistleblowers, potentially increasing the scrutiny on organizations accused of retaliation, and in turn paving the way for more aggressive and ambitious *qui tam* relators. Federal fund recipients should take all employment, procurement, and education discrimination and/or fraud allegations seriously, timely and appropriately investigate such claims, and proactively take steps to ensure that any purported whistleblowers are not retaliated against.

POTENTIAL CRIMINAL IMPLICATIONS AND ISSUES

The memorandum establishing the CRFI primarily focused on using the FCA as a tool to counter alleged anti-discrimination law violations through civil cases brought under that statute by relators or the Department's components that handle civil cases, such as the Civil Division, the Civil Fraud Section, and the Civil Rights Division. However, the memorandum was also addressed to the Department's Criminal Division in Washington, D.C., and it directed the Civil Fraud Section and the Civil Rights Division to "engage with the Criminal Division" and "establish partnerships with state attorneys general and local law enforcement to share information and coordinate enforcement actions."[48]

Although the memorandum does not provide additional details on this engagement and coordination, these provisions should put recipients of federal funds on notice of the possibility that the DOJ could pursue criminal investigations and prosecutions of alleged violations of federal anti-discrimination law as part of its new initiative. While the likelihood of criminal charges or successful convictions in this area is probably lower than the risk of FCA suits, the mere existence or threat of a criminal investigation could cause federal funds recipients severe reputational harm, heavy litigation expenses, and other damages. As discussed below, obtaining legal advice regarding the legality of DEI-related initiatives can help reduce the risk of a criminal investigation and provide a defense to any criminal prosecution.

The DOJ has a variety of federal criminal statutes it could attempt to use as a basis for investigating or charging a federal funds recipient with federal anti-discrimination law-related criminal conduct. All of these approaches would be novel applications of federal law, but the DOJ could attempt to use them as part of its CRFI. Some of the more likely criminal statutes available to the DOJ are discussed below.

False Statements

In the context of an allegedly false statement on a recipient's certification that their activities comply with federal anti-discrimination laws, the DOJ's most likely path to potential criminal charges may be to rely on 18 U.S.C. § 1001. Section 1001 punishes a person with up to five years imprisonment for "knowingly and willfully" making any "materially false, fictitious, or fraudulent statement or representation" to a federal agency in a matter within its jurisdiction, or if the individual "falsifies, conceals, or covers up by any trick, scheme, or device a material fact." In general, the knowing and willful element of § 1001 requires some proof that the defendant made the statement "deliberately and with knowledge that the representation was false," as opposed to making a false statement accidentally. *See United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). This element could also be satisfied if the defendant acted "with reckless disregard of the truthfulness or falsity of a statement coupled with a conscious effort to avoid learning the truth." *United States v. Schaffer*, 600 F.2d 1120, 1122 (5th Cir. 1979) (internal quotation marks and citations omitted). Therefore, it is possible that the DOJ could attempt to use §

[48] The memorandum was also addressed to other components of the Department that handle both criminal and civil cases, including the Civil Rights Division and the United States Attorneys' offices.

1001 to charge individuals or entities that knew or should have known a DEI-related initiative violated federal anti-discrimination law and yet deliberately and knowingly certified that it did not.

Mail and Wire Fraud

Given that a private or public federal funds recipient would likely use interstate mail or electronic communications in connection with a certification of compliance with federal anti-discrimination laws, the DOJ could also use the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, as a basis for investigations and prosecutions. These statutes, which carry a penalty of up to 20 years imprisonment, punish anyone who voluntarily and intentionally uses the mail or an interstate wire, which includes an interstate telephone call or an interstate electronic communication (like most emails), in furtherance of a scheme to defraud another—including the U.S. government—out of money. In general, the mail and wire fraud statutes require an intent to defraud, as opposed to an accidental mistake. *See, e.g., United States v. Faulkner* 17 F.3d 745, 771 (5th Cir. 1994); *United States v. Proffit*, 49 F.3d 404, 406 n. 1 (8th Cir. 1995).

Criminal Violations of Civil Rights Laws

Although false statements to a federal agency or mail and wire fraud statutes may be the simplest vehicles for criminal investigations of DEI-related activities by federal funds recipients, the DOJ also could also rely on more elaborate prosecution theories. For example, prosecutors might allege that a recipient has violated federal statutes that prohibit criminal civil rights violations, such as under 18 U.S.C. § 241, which punishes conspiracies to violate civil rights. Additionally, if the recipient of federal funds is a state, municipality, or other government entity, the DOJ could invoke 18 U.S.C. § 242, which prohibits a deprivation of rights under color of law, as the basis for an investigation of DEI-related activities or an allegedly false certification of compliance with federal anti-discrimination laws.

In order to reduce the risk of a criminal investigation or prosecution in connection with DEI-related initiatives, individuals and organizations seeking federal funds should obtain legal advice regarding whether their initiatives are compliant before executing any certifications. If an individual or entity seeking federal funds obtains advice from an attorney regarding the legality of its DEI-related initiatives, the attorney determines the initiatives do not violate federal anti-discrimination law, and the individual or entity relies on that advice in proceeding with the initiatives or certifying compliance with federal anti-discrimination laws to obtain federal funds, the individual or entity may be able to rely on a legal defense, known as the advice of counsel defense, to rebut any later criminal charges. Any advice of counsel defense, however, comes with its own set of complex factual and legal issues that need to be carefully considered before invoking any such defense.

SECTION VI

PRACTICAL GUIDANCE FOR ORGANIZATIONS

Conducting Cross-functional Audits of Certifications and DEI-related Policies

To mitigate risk under the FCA and ensure compliance with evolving DOJ interpretations of federal anti-discrimination law, organizations should proactively review their DEI policies and certification processes in the employment, procurement, and enrollment contexts. Cross-functional audits, ideally conducted under attorney-client privilege, allow organizations to identify gaps, correct deficiencies, and document good-faith efforts to comply with the law. These audits should be thorough and candid, enabling organizations to make necessary changes as appropriate while minimizing legal exposure. Additionally, organizations must ensure that all programs and policies as well as employment, procurement, and admissions decisions are based as much as possible on objective criteria and that access is truly inclusive, regardless of protected characteristics. Avoiding demographic-driven decision-making is essential, even when criteria appear neutral on their face, to reduce the risk of claims that the organization is intentionally seeking certain discriminatory outcomes.

KEY STEPS

- **Audit under Privilege:** Conduct regular, cross-functional audits of certifications and DEI policies under attorney-client privilege to protect findings and facilitate open, honest evaluation. Implement changes thoughtfully to avoid inadvertent admissions of past non-compliance.
- **Review for "Illegal DEI":** Scrutinize all policies and programs for the kinds of "illegal DEI" identified in the July Bondi Memo and any subsequent federal guidance.
- **Ensure Inclusive Access:** Review all programs, resources, and activities to confirm that they are accessible to all individuals, regardless of race, gender, or other protected characteristics.
- **Objective Criteria:** Base all selection decisions on specific, measurable skills and qualifications that are directly relevant to job, procurement, or program performance.
- **Avoid Demographic-Driven Criteria:** Refrain from using demographic-based criteria, even if facially neutral, when the underlying intent is to achieve specific outcomes related to protected characteristics, as this can create legal risk under both federal anti-discrimination laws and the FCA.
- **Scrutinize Criteria for Potential Proxy Effects:** Reexamine the use of facially neutral criteria (such as "lived experience," "first-generation status," or "geographic diversity") to ensure they are not functioning as proxies for protected characteristics and document the race- and gender-neutral rationale for any such criteria used in employment, procurement, and admissions decisions.
- **Avoid Overcorrection:** Consider the unintended consequences of "overcorrecting" or removing all DEI practices and policies, such as decreased representation and inclusion and potential discrimination claims from individuals from underrepresented backgrounds. Also, assess the internal and external reputational impact of reversing some or all organizational DEI policies and practices.

Reviewing and Updating Compliance Documentation and Training Programs

Staying ahead of regulatory changes requires organizations to regularly review and update their compliance documentation and training programs. As language and expectations around DEI and federal anti-discrimination law evolve, it is important to ensure that policies reflect current legal standards and organizational values. Messaging changes, such as removing terms like "equity," should be carefully communicated to avoid confusion or the perception that the organization is retreating from its commitment to fairness or overall compliance with federal anti-discrimination laws. Training should help managers understand both the letter and spirit of the law, emphasizing inclusion that goes beyond protected characteristics to encompass diverse experiences and perspectives. Employee Resource Groups (ERGs) can be valuable, but their structure and purpose should be thoughtfully considered to minimize legal and reputational risk. Similarly, small business set-asides and/or preferences under existing federal and state law should be carefully considered to minimize legal risk.

KEY STEPS

- **Certification Controls:** Implement robust review processes prior to making each compliance certification tied to EO 14173 specifically, and all federal grant or contract funds generally.
- **Thoughtful Messaging:** If modifying policy language (*e.g.*, removing "equity"), clearly articulate the reasons and reinforce the organization's ongoing commitment to creating a non-discriminatory and welcoming environment for all.
- **Comprehensive Training:** Train leaders, human resources personnel, procurement personnel, managers, and staff on lawful and effective inclusion practices, ensuring they understand how the organization defines key terms and whether any changes will be taking place with respect to organizational policies and practices. Training should be tailored to each group based on what information is most relevant based on titles and roles.
- **Maintaining Documentation:** Keep thorough records of compliance decisions, training participation, and policy changes to demonstrate diligence in the event of an investigation or litigation.
- **Reviewing ERGs:** Consider restructuring ERGs as professional or leadership development groups open to all employees, mitigating risks of perceived exclusion or division while maintaining their benefits for underrepresented groups. Consider whether and when to prohibit the creation of certain ERGs, such as those related religious or political beliefs.

Human Resources departments, procurement departments, compliance officers, and frontline managers should receive targeted training on how to recognize, respond to, and escalate potential FCA issues that may arise from internal reports. Training should cover the basics of FCA liability, including how misrepresentations or failures to comply with federal requirements, such as those tied to government contracts or grants, can lead to significant legal and financial exposure for both the federal funds recipient and any officer or employee signing EO 14173 certification documents. Training should further include information on proper documentation, the importance of impartial investigations, and when to involve legal counsel.

Individuals should be educated and empowered to recognize and respond to red flags that could indicate potential FCA violations, such as falsified diversity data, misstatements in compliance certifications, or retaliation against individuals or subcontractors who raise concerns. Training should also include instruction on the proper

escalation procedures for suspected FCA issues, emphasizing the importance of timely, thorough, and impartial investigations. By equipping key personnel with the knowledge and tools to manage FCA exposures, organizations can better safeguard themselves against whistleblower actions and demonstrate a proactive approach to legal compliance.

Managing Internal Reporting and Whistleblower Risk

With the DOJ's renewed focus on anti-discrimination law enforcement and whistleblower protections, organizations should anticipate an uptick in internal complaints and potential FCA litigation. Proactive preparation is critical to ensure that reports are handled appropriately and that the organization can demonstrate a good-faith commitment to compliance. This includes making sure employees know how to report concerns, maintaining thorough documentation, and being able to explain the rationale behind policy changes or decisions.

KEY STEPS

- **Anticipate Reporting:** Promote awareness of reporting channels and ensure employees, subcontractors, and others feel safe raising concerns.
- **Document Decisions:** Maintain clear records of policy decisions, including the reasoning and data supporting any changes, to provide a defensible record if challenged.
- **Monitor Trends:** Stay alert to emerging patterns in complaints or litigation that could signal compliance gaps or areas of risk.

Moreover, effective internal investigations are essential for identifying and addressing potential violations before they escalate into regulatory or legal action. Organizations should establish clear, well-communicated protocols for investigating complaints and escalating issues when necessary. These protocols should emphasize promptness, thoroughness, and impartiality, while also protecting the confidentiality and rights of all parties involved.

KEY STEPS

- **Establish Clear Processes:** Develop detailed procedures for investigating DEI or FCA related complaints, including timelines, responsible parties, and documentation standards.
- **Ensure Impartiality:** Assign investigations to neutral parties and avoid conflicts of interest.
- **Protect Confidentiality:** Safeguard the privacy of those involved and protect whistleblowers from retaliation.
- **Escalate Appropriately:** Ensure there are clear guidelines for when and how to escalate matters to senior leadership or external counsel.

Working closely with legal counsel is vital for navigating the complex and evolving landscape of federal anti-discrimination law compliance and FCA risk. Legal counsel can help ensure that sensitive reviews are protected by privilege, that policies are up to date, and that the organization is prepared for potential investigations or

litigation. This includes proactively managing third-party relationships and ensuring anti-discrimination clauses are in place, as organizations may be held liable for the actions of contractors or grantees.

KEY STEPS

- **Review Third-Party Agreements:** Include all required federal contract or grant "flowdown" clauses related to federal anti-discrimination law and consider also including new or additional explicit nondiscrimination clauses in all contracts. Take appropriate measures to monitor compliance with all nondiscrimination clauses.
- **Strengthen Anti-Retaliation Policies:** Implement robust anti-retaliation procedures and confidential reporting channels to protect whistleblowers.
- **Engage Counsel Proactively:** Regularly consult with legal counsel to review and revise policies in light of new DOJ guidance and emerging risks.
- **Prepare for Enforcement:** Develop response plans for potential DOJ investigations and qui tam lawsuits, including protocols for preserving documents and communicating with regulators.
- **Monitor Downstream Liability:** Understand and manage the risk that your organization could be held responsible for discriminatory practices by third parties if you knowingly fund or enable such practices.

Encouraging Culture of Internal Resolution; Avoiding Retaliation or Further Ancillary Risks

A key component of managing internal reporting and whistleblower risk is cultivating an environment where employees and subcontractors feel safe to voice concerns and confident that those concerns will be addressed fairly. Organizations should actively promote a culture that encourages employees and subcontractors to seek internal resolution of issues before resorting to external channels. This can be achieved by communicating a clear, consistent message from leadership that all reports of misconduct or non-compliance will be taken seriously and handled with discretion.

To further support this culture, employers must implement, maintain, and enforce strict anti-retaliation policies. Employees should be regularly informed, through training, policy updates, and visible leadership support, that retaliation against whistleblowers or individuals who participate in investigations will not be tolerated. Mechanisms for anonymous reporting, as well as assurances of confidentiality, can increase trust in the process and reduce fear of reprisal.

To illustrate how the above principles can be applied in practice, consider the following example: An employee submits a confidential report alleging that certain aspects of the company's DEI program may cause discrimination or fail to comply with legal requirements.

- Acknowledgement and Intake—Once a report is received though the established internal channels, HR or the compliance team should promptly acknowledge receipt of the report and assure the employee that their report will remain confidential and reiterate any anti-retaliation policies.

- Preliminary Assessment—A timely preliminary review should be conducted to determine the nature and scope of the allegations. If the concern potentially implicates FCA exposure or other legal risks, the matter should be escalated to the appropriate compliance or legal personnel.

- Formal Investigation—A trained, impartial investigator should be assigned to any cases requiring formal investigation. The investigator will gather relevant documentation, interview involved parties and witnesses, and maintain thorough records throughout the process. This investigation will be conducted promptly and with sensitivity to all parties involved.

- Resolution and Remediation—At the investigation's conclusion, any findings should be timely reviewed and, if necessary, correct actions will be implemented. This may include timely revising DEI program components, providing additional training, or taking disciplinary action if misconduct is found.

- Communication and Follow-up—The employee who raised the concern should be informed as to the status of the investigation, within the bounds of confidentiality. Organizations must reiterate their commitment to a respectful, non-retaliatory workplace and then solicit feedback to assess the employee's experience with the process and to identify opportunities for improvement.

By following these steps, organizations demonstrate their commitment to internal resolution, compliance, and continuous improvement, resulting ultimately in reduced legal exposure and a workplace fostered in trust and transparency.

CONCLUSION

As the foregoing discussion demonstrates, the United States has entered a new era regarding what may be considered a violation of federal anti-discrimination law and whether and to what extent such alleged violations can be enforced by the federal government and/or qui tam relators under the False Claims Act or other federal statutory authority. So far in the current administration, there has been guidance from the DOJ and other federal agencies attempting to explain and set the boundaries for what may constitute "illegal DEI." Federal enforcement under the FCA and federal anti-discrimination laws has not yet begun in earnest, but it is reasonable to assume that such enforcement may commence in the second half of 2025 or early 2026.

It is imperative for federal contractors, grant recipients, higher education institutions, and all other persons or organizations receiving federal funding to stay vigilant for new federal guidance and decisions from federal courts setting the boundaries of what the federal government may and may not do in this new era of enforcement. Signing the now required EO 14173 certifications as to compliance with federal anti-discrimination laws as an express condition precedent to receiving federal funds raises a whole host of legal issues from whether existing practices constitute "illegal DEI" to whether there could be a basis for False Claims Act liability, civil penalties and treble damages. Given the broad range of legal subject matter covered by this new enforcement regime, ranging from traditional employment discrimination and higher education law to False Claims Act, federal contracting and grants, and potentially even federal criminal law, it is essential to engage skilled and specialized counsel to

conduct proactive cross-sector risk analyses, create and implement resilient compliance programs, manage whistleblower risk and devise legal strategies to meet a range of regulatory, civil and criminal legal risks.

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