Articles + Publications | March 3, 2025

The False Claims Act May Be the Next Weapon in the Trump Administration's War on DEI

WRITTEN BY

Amy Pritchard Williams | Michael S. Lowe | Callan G. Stein | Ryan J. Strasser | Ayana D. Brown

One day after President Donald Trump's inauguration, on January 21, Trump issued Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (EO 14173). In the text of EO 14173, Trump first, stated its purpose — to ensure the enforcement of civil-rights laws "by ending illegal preferences and discrimination" — and second, announced a new policy — "to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work." In EO 14173, Trump also directed the federal government to take numerous specific actions to terminate all "diversity, equity, and inclusion" (DEI) and "diversity, equity, inclusion, and accessibility" (DEIA) initiatives and conduct, including directing the heads of all federal agencies "with the assistance of the Attorney General" to advance this policy in the private sector.

Consistent with these directives, on February 5, newly appointed U.S. Attorney General Pam Bondi issued a memorandum regarding EO 14173 titled "Ending Illegal DEI and DEIA Discrimination and Preferences" (the Bondi Memo), which stated that under her leadership the Department of Justice's (DOJ) Civil Rights Division will "investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that received federal funds." The Bondi Memo also directed the Civil Rights Division and the Office of Legal Policy to provide the associate attorney general with a report by March 1 that outlines recommendations for enforcing federal civil rights laws and encouraging the private sector "to end illegal discrimination and preferences." The report must also provide details on how to deter the use of DEI and DEIA programs, including proposals for deterrence through criminal investigations.

As U.S. companies await the release of this more fulsome report from the Civil Rights Division and the Office of Legal Policy, the text of EO 14173 provides some clues on what companies can expect. Section four of EO14173, titled "Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences," clarifies that the Trump administration is particularly interested in dismantling DEI within private companies and is willing to use a wide array of legal tools at its disposal to do so. For example, EO 14173 introduces a new requirement mandating that the head of each government agency include two new provisions in every government contract with private company contractors. The first provision requires the private contractors to "agree that [their] 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 second provision requires private contractors to certify that they do not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." While EO 14173 does not explicitly state what it considers to be "promoting DEI," the Bondi Memo suggests that any programs that involve quotas, mandates, or preferential treatment would likely be interpreted as promoting DEI. The Bondi Memo's citations to the Supreme Court's decision in Students for Fair Admissions provides additional hints by signaling that DOJ will likely be concerned with any instances of

companies, in the words of Justice Gorsuch's concurrence, treating "some [people] worse than others in part because of race."

FCA Implications

Another legal tool that the Trump administration is likely to utilize to enforce its anti-DEI agenda is the federal False Claims Act (FCA). The FCA allows the federal government and whistleblowers suing on behalf of the federal government (referred to as "relators") to bring claims against private companies that submit false claims for payment to the government. The FCA also applies to others, such as subcontractors, that cause the submission of false payment claims even if they do not get paid directly by the government. Liability under the FCA requires proof that a company knowingly or recklessly submitted a false claim or statement that was material to the government's decision to pay a claim, which caused the government to pay money. EO 14173 explicitly references the section of the FCA that defines the term "material," so its requirement that companies agree that compliance with applicable federal anti-discrimination laws is material to the government's payment decisions makes clear the intent to use the FCA as an enforcement mechanism. By so agreeing, private companies who contract with the government effectively admit to the FCA's materiality requirement, and thereby relieve the government or a relator from having to prove that element of FCA liability. But even companies that have not explicitly admitted the materiality of compliance with federal anti-discrimination laws, including those companies with contracts predating EO 14173, may still face scrutiny, as the government maintains the option of proving materiality independently. Further, EO 14173's requirement that companies certify that they do not operate DEI programs is another signal of pending FCA enforcement efforts. By so certifying, private companies wishing to contract with the federal government must either end their DEI programs (thereby making the certification accurate) or risk the government finding a false certification (thereby making the claim "false" under the FCA). Overall, these two requirements in government contracts will make it significantly easier for the government and relators to bring FCA suits against companies suspected to be engaged in "illegal DEI discrimination and preferences" per EO 14173.

Adding to the uncertainty faced by contractors, many existing government contracts or regulations contain requirements that directly conflict with EO 14173. Some government contractors are already pushing back against EO 14173, including the National Association of Diversity Officers in Higher Education, which filed a lawsuit against Trump and various federal agencies in the U.S. District Court for the District of Maryland. Plaintiffs in that case argue that the EO is unconstitutionally vague and violates the First Amendment's free speech clause and separation of powers principles. On February 21, the court issued a preliminary injunction blocking the certification requirement in EO 14173. This injunction prevents the president and federal agencies from requiring contractors to make certifications and from enforcing the FCA based on the EO's certification provision. While the injunction may seem like a win to contractors, the president's swift appeal of the decision serves as a reminder that companies should continue to review their DEI policies, and that this question is far from settled.

Preparing for the Forthcoming Report

Any company that has found itself on the receiving end of an FCA investigation or qui tam lawsuit from an FCA relator understands how costly it can be. Not only is there the risk of treble damages under the FCA, but internal investigations and defense costs can easily accumulate into the millions of dollars. Add to that the potential for being barred from future government contracts and substantial reputational damage, and it is no surprise that

companies are eager to avoid running afoul of the FCA.

In light of the text of EO 14173 and the Bondi Memo, it seems clear that the Trump administration will use the FCA as a weapon to combat DEI in the private sector. Thus, any company that contracts with the federal government going forward will be at risk for an FCA investigation (civil and criminal) or a qui tam lawsuit if it has policies in place that might be construed as promoting DEI or DEIA as this new administration interprets those terms. A recent survey by Littler Mendelson P.C. of government contractors revealed that 74% of government contractors are strongly considering changing their current DEI policies. This is a stark contrast to the 8% of companies from the general survey, highlighting that EO 14173 poses the greatest threat to companies that regularly contract with the government. The two new contract requirements will require these companies to take a very close look at their internal policies and general business practices, even if the companies view those policies and practices as being unrelated to the contract. Companies will need to take a broad view when identifying policies, practices, or programs that DOJ may construe as advancing DEI, and companies should likewise devote considerable attention to how they might refashion these policies, practices, and programs to support the certifications made in government contracts and avoid FCA liability. Companies should pay close attention to announcements by and communications from the agency with which they have contracted or that has oversight of the government programs in which they participate. Companies should also consider seeking clarification from the applicable agency. In some cases, companies may determine that, based on their risk tolerance, certain policies, practices, and programs cannot be refashioned or revised to sufficiently mitigate FCA risk, leaving those companies no choice but to rescind or abandon the policy, practice, or program altogether.

Moreover, anything in a company's hiring practices, team compositions, external communications, or other employment-related practices that could be interpreted by this administration as discriminatory or preferential to certain groups could result in FCA risk or liability. The forthcoming report will very likely provide additional context and information on the types of policies, practices, and programs that will be the focus of DOJ's scrutiny. However, the preview in the Bondi Memo puts companies on notice that DEI programming, even traces of it, will mean increased FCA exposure under the new administration.

Given that the forthcoming report will likely trigger aggressive enforcement of DEI-based FCA claims, companies should be thoroughly reviewing their DEI programs to revise any features that DOJ may construe as illegal and formulating a strategy for proactive communication with their government counter-party.

RELATED INDUSTRIES + PRACTICES

- False Claims Act + Other Whistleblower Actions
- Health Care + Life Sciences
- Regulatory Investigations, Strategy + Enforcement