Insights: Alerts

# DOJ Announces Plans to Use False Claims Act to Target Anti-Semitism and DEI Policies

May 22, 2025

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In the first five months of this administration, it is clear that one of the foremost concerns of President Trump's agenda is its focus on Diversity, Equity, and Inclusion ("DEI") initiatives. Issued in January 2025, Executive Order ("EO") 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," introduced significant implications for federal contractors, particularly concerning their DEI programs. On Monday, May 19, the Department of Justice ("DOJ") announced its intention to use the False Claims Act ("FCA") to prosecute recipients of federal funds that have policies the DOJ deems promote antisemitism and "illegal DEI."

## False Claims Act Refresher

The FCA creates civil monetary liability for entities that knowingly submit false or misleading claims or statements to the Government, provided that the false claim or statement is material to the Government's payment decision. The theory of "implied certification," endorsed by the Supreme Court in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar* (2016), posits that contractors implicitly certify compliance with material terms when submitting claims for payment.

Violations of the FCA can result in treble damages—three times the amount of harm caused to the Government—and civil penalties for each false claim. Contractors may also face suspension or debarment from federal contracting. Whistleblower-initiated lawsuits, known as qui tam actions, pose additional risks, as whistleblowers may share in Government recoveries and are incentivized through the FCA's provisions for attorney's fees and costs.

## Application of FCA to DEI Programs Under EO 14173

EO 14173 underscored the administration's focus on DEI, which the administration deems as "dangerous, demeaning, and immoral race- and sex-based preferences." The EO contends that such policies undermine the principles of individual achievement and merit, replacing them with the EO describes as an "identity-based spoils system."

EO 14173 directed agency heads to include a term in every federal grant or contract that requires the grantee or contractor to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." The certification is a significant addition, as under Escobar's implied theory of certification, if this administration considers a federal contractor's compliance with EO 14173 and other anti-DEI

policies as material, a contractor might be considered to have submitted an implied false certification for payment if they certify their compliance with anti-DEI measures but are then later found to have internal DEI policies that this administration deems impermissible. As of April 14, 2025, a federal judge has issued a nationwide injunction preventing the Department of Labor from forcing federal funding recipients to certify pursuant to EO 14173 that they do not operate "illegal DEI" initiatives. *See Chicago Women in Trades v. Trump, et al.*, No. 1:25-cv-2005 (N.D. Ill.)

The memo issued this week by the DOJ announcing the planned prosecution of DEI FCA claims did not contain details of what would be considered an improper company or organizational policy that might implicate an FCA prosecution. But the memo did reference EO 14173 and additionally cited to a quote from the Supreme Court case, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023): "Eliminating racial discrimination means eliminating all of it." The memorandum also states that despite race-based preferences violating civil rights laws, many corporations "still adhere to racist policies and preferences- albeit camouflaged with cosmetic changes that disguise their discriminatory nature."

## Recommendations for Federal Contractors

EO 14173 introduces new, albeit vague, compliance challenges for federal contractors, particularly concerning DEI programs. The DOJ's announcement to utilize the FCA as an enforcement tool for this executive order and other regulations that the administration alleges combat racial discrimination and antisemitism should be an acute nudge for all recipients of federal funding to review any policies related to race, sex, or sexual orientation, even if these policies were approved or promoted as beneficial by past administrations.

By conducting comprehensive reviews of DEI programs, updating policies, monitoring certification requirements, and ensuring compliance with anti-discrimination laws, contractors can reduce the likelihood of FCA investigations and litigation. A strategic approach will be critical to navigating this complex and evolving legal landscape. We recommend that federal contractors employ the following self-assessments to ward against an FCA investigation on the basis of a company's DEI programs.

- **Conduct a legal review of current DEI programs.** Contractors should evaluate all aspects of their DEI initiatives to ensure compliance with the administration's revised interpretation of anti-discrimination laws. Engaging legal counsel to conduct this review ensures privileged communications and documents the contractor's good faith efforts to align with the administration's merit-based employment decisions.
- **Update internal DEI policies to reflect compliance with EO 14173**. Contractors should emphasize merit-based policies and prohibit practices that could be construed by this administration as impermissible employment decisions based on an individual's race, sex, or other immutable characteristic. Regular audits to ensure adherence to updated policies will further mitigate risk.
- **Monitor certification requirements**. Contractors should identify internal personnel responsible for receiving and responding to DEI certification requests and consult legal counsel to address ambiguities in certification language or propose alternative responses.
- **Review your organization's messaging**. Contractors should review website content, recruiting materials, and other external statements for consistency with legal compliance. Updates to descriptions or commitments should be made strategically to avoid the appearance of unlawful practices.

For further guidance or assistance, please contact Kilpatrick's Government Contracting Team or Labor & Employment Team.

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