

A Federal Contractor's Preliminary Playbook for Avoiding False Claims Under President Trump's DEI Executive Order

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On January 21, 2025, President Trump issued an Executive Order titled, "Ending Illegal Discrimination and Restoring Merit Based Opportunity" (the "EO"). The EO seeks to eliminate diversity, equity, and inclusion ("DEI") and diversity, equity, inclusion, and accessibility ("DEIA") programs. It also reversed over 60 years of federal contracting requirements that obligated federal contractors to implement affirmative action programs. The EO appears to lay the foundation for enforcement actions initiated by private parties through the *qui tam* provisions of the False Claims Act ("FCA"). Federal contractors should take note of the fast-approaching deadlines to ensure their compliance with the EO and avoid potential liability under the FCA.

Key Deadlines

- **January 21, 2025**
The EO directs the Office of Federal Contract Compliance Programs to "immediately cease," among other things, "[a]llowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin."
- **April 21, 2025**
The EO provides a grace period for compliance. "Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025" for 90 days from the date of the EO— until April 21, 2025.
- **May 21, 2025**
The EO requires the US Attorney General to produce a report within 120 days— by May 21, 2025— regarding enforcement of federal civil rights laws. The report will likely identify key sectors of concern, outline strategies for encouraging the private sector to "end illegal DEI discrimination," and recommend a "strategic enforcement plan" that identifies "[l]itigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest."

The EO's Impacts on Federal Contractors' Compliance with Federal Civil Rights Laws

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The EO purports to “terminate all discriminatory and illegal preferences” and “combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.” Section 3(b)(iii) states that federal contractors and subcontractors shall not consider race, color, sex, sexual preference, religion, or national origin “in ways that violate the Nation’s civil rights laws.”

By extension, Section 3(b)(iv) of the EO requires the inclusion of two new terms in all federal contracts and grants that could give rise to an increased number of false claims. First, it requires the head of each federal agency to require federal contractors and grant recipients to agree that “its compliance in all respects with all applicable federal anti-discrimination laws is material to the government’s payment decisions” under the FCA. Second, it requires federal contractors and grant recipients to certify that “it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

An Overview of the False Claims Act

The FCA, 31 U.S.C. §§ 3729–3733, makes liable anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim[.]” A person acts “knowingly” when they act with actual knowledge, deliberate ignorance, or reckless disregard of the false information submitted. The FCA defines a “claim” as any “request or demand, whether under contract or otherwise, for money or property” that is presented “to an officer, employee, or agent of the United States.” The FCA’s materiality element is expressly referenced in the EO. Fraudulent conduct is “material” when it has the ability or tendency to influence the request for payment at issue. Courts across the United States have recognized multiple theories of liability under the FCA; including, the supply of substandard products or services, false negotiations, bid rigging, defective pricing, and false certification of compliance with federal laws.

Federal contractors should be wary of false claims arising from their failure to comply with the EO, because of the FCA’s *qui tam* and damage provisions. The FCA’s *qui tam* provision allows private citizens to file lawsuits on behalf of the government against alleged offenders (i.e., federal contractors). If the government declines to intervene after an investigation by the Attorney General, the suits may be prosecuted by private citizens. These private citizens, also referred to as “realtors” or “whistleblowers,” are financially incentivized to prosecute false claims by the ability to potentially share in a significant amount of the recovery, including reasonable attorneys’ fees and costs. The FCA allows claimants to recover treble damages and civil penalties.

The interpretation and enforceability of the EO will likely remain moving targets until the US Attorney General submits her report in May 2025 and these issues work their way through the court system. In the meantime, and before the end of the grace period, federal contractors should meet with their attorneys and DEI and human resource professionals to ensure all affirmative action programs and policies comply with the EO to avoid potential liability under the FCA. Likewise, federal contractors should consider

waiting to sign any new DEI certifications for federal contracts or grants until they consult with their attorney and can certify compliance with the EO.