

DOJ Doubles Down on Antidiscrimination FCA Claims, Identifies Problematic Practices

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by Alex Hontos, Chris DeLong, and Matthew Gillespie

Deputy Assistant Attorney General Brenna Jenny reaffirmed DOJ's commitment to targeting employment practices at organizations that receive federal funding with the False Claims Act during the Federal Bar Association's annual *Qui Tam* Conference in Washington, D.C. In her prepared remarks, Jenny also identified fact patterns that represent the types of "antidiscrimination" FCA claims DOJ is pursuing.

What was the state of play before Jenny's remarks?

In the early months of 2025 and the second Trump administration, the White House and DOJ issued numerous executive orders¹ and memoranda threatening federal enforcement actions against entities engaging in ambiguously defined "illegal DEI." According to public reporting by the *Wall Street Journal* (and confirmed by Jenny), DOJ has opened FCA investigations into claims of discrimination by corporate federal contractors. DOJ's theories, however, have yet to be tested in court or result in publicly acknowledged settlement agreements.

What did Jenny say?

Jenny distanced DOJ's efforts from the administration's previous emphasis on "DEI," stating that the targets of DOJ's investigations were not being investigated for having DEI programs. Jenny specifically observed that federal contractors can operate DEI programs without discriminating, and that DOJ's enforcement efforts were instead focused on noncompliance with federal antidiscrimination laws. Jenny suggested this approach was consistent with both statute and the judiciary's interpretation of the law, saying those authorities have rejected discriminating today to fix discrimination in the past.

Jenny also referred to preexisting antidiscrimination standards in the Federal Acquisition Regulation ("FAR"), such as the FAR's prohibition on discrimination against employees or applicants based on race, sex, or other protected characteristics (see FAR 52.222-26(c)(1)), as an example of the basic commitment to opportunity, advancement, and

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compensation based on merit rather than protected characteristics. Jenny did not address the tension between DOJ's position and the FAR's longstanding affirmative action requirements.

Notably, Jenny also disclosed that nearly 500 *qui tam* lawsuits have been filed in the first six weeks of this year, a figure that far outpaces even 2025's record-breaking number of filings. This is explosive growth in *qui tams*—for additional context, prior to the 1986 Amendments to the False Claims Act, the number of *qui tams* filed nationally often was less than 20 per year.

What types of conduct is DOJ investigating?

Jenny reported that DOJ's antidiscrimination FCA investigations have centered around companies with programs or practices that pressured supervisors to make hiring or promotion decisions based on race or sex. She also noted that the "particularly strong" cases were those in which the pressure had the intended effect and resulted in employment decisions based on race or sex. DOJ's pending investigations generally fall within three categories of fact patterns:

- **Creating and tracking demographic goals for particular roles.** According to Jenny, these are frequently tracked via color-coded charts where green indicates the goal has been met. Jenny characterized this tracking as treating race or sex as a performance metric.
- **Tying employee compensation to the development of diversity goals.** While Jenny noted that promoting diversity is not "necessarily" unlawful, tying compensation or performance evaluations to the development or achievement of diversity goals is problematic under DOJ's interpretation of the law.
- **Tying employee compensation to achieving demographic goals.** Jenny stated this most often occurs with senior executives or recruiting professionals, either on a business-wide or unit-specific basis.

Jenny also warned against executive training and mentoring programs for employees with specific protected characteristics that are internally marketed as providing exclusive opportunities. Jenny also indicated that requiring a certain number of applicants with specific protected characteristics to apply, or lowering standards for interviews for candidates with specific protected characteristics, "raises serious questions" under federal antidiscrimination law.

What did Jenny say about DOJ's legal theories?

Jenny provided some insight into DOJ's view of how the FCA supports its antidiscrimination claims.

Addressing the element of materiality, Jenny stated federal contracting is not solely about the good or service being contracted for: it is about carrying out public works consistent with the law and federal policy objectives. When a company discriminates, Jenny said, they step outside the conditions for federal financial support. Jenny also rejected the notion that the "headcount" of previous claims based on similar violations

indicates a lack of materiality.

Jenny also argued that scienter is not hard to prove in these cases, even when there is no direct evidence of a directive to hire a certain number of individuals of a particular race or sex, for example. Training materials, emails, meeting notes, and other records showing a directive or intent to make employment decisions based on protected characteristics can all support a finding of scienter, according to Jenny.

Finally, Jenny noted the government holds a lot of flexibility in determining damages for antidiscrimination FCA claims against government contractors, up to and including the full value of the contract(s) with the government. In considering any multipliers, Jenny said DOJ will consider cooperation, the duration and scope of the conduct, the involvement of senior leadership, and remediation. Finally, Jenny warned that DOJ will seek per-claim penalties in addition to damages.

While DOJ's theories behind their antidiscrimination FCA investigations have not yet been tested in court, DOJ continues to project a commitment to using the FCA to punish recipients of federal funding for engaging in what the administration views as discriminatory practices. Recipients of federal funds should ensure that they have a full understanding of their own diversity, DEI, and employment practices and conduct a candid assessment of DOJ's likely view of those practices. And given the long duration of FCA investigations and litigations, organizations should think strategically and carefully about risk mitigation and act with purpose when they receive a civil investigative demand.

¹ See Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Jan. 21, 2025).