

Publications

May 27, 2025 • Updates

DOJ Announces Intent to Use False Claims Act To Target Diversity and DEI Initiatives

At a Glance

- The Department of Justice (DOJ) will use the False Claims Act (FCA) to investigate and pursue claims against entities that violate federal civil rights laws, including anti-discrimination and equal employment opportunity obligations, which may include diversity, equity, and inclusion (DEI) programs. Unlike many federal civil rights laws, the FCA allows for significant uncapped damages.
- To the extent your organization receives an inquiry from the Department of Justice or any agency inquiring about compliance with federal civil rights laws or DEI, contact your counsel. Recipients of federal funds should carefully review any representations regarding federal civil rights laws or DEI associated with federal contracts or grants. Further, recipients of federal funds should proactively review their compliance with federal civil rights laws and initiate such review promptly, prioritizing review of externally facing information, as such information could trigger an investigation.

The DOJ has announced a new “Civil Rights Fraud Initiative” (Initiative) under which it will use the government’s chief anti-fraud statute, the FCA, to pursue claims against institutions for violating civil rights laws including the anti-discrimination and equal employment opportunity obligations under Title VII of the Civil Rights Act of 1964 (Title VII) and specifically illegal diversity and DEI initiatives.

Under the FCA, 31 U.S.C. § 3729, the government may recover treble damages as well as significant penalties from any recipient of federal funds that makes a false claim for such funds. Further, unlike many federal civil rights laws, such as Title VII, the FCA does not have caps on damages. Under this Initiative, DOJ is targeting recipients of federal funds who “falsely certify” compliance with federal civil rights laws. In its announcement, DOJ specifically outlined situations in which it believes institutions—in particular universities—may violate civil rights laws and thus provide a basis for an FCA cause of action, including: “encourage[ing] antisemitism, refus[ing] to protect Jewish students, allow[ing] men to intrude into women’s bathrooms, or require[ing] women to compete against men in athletic competitions.”

The Initiative will be led by the Fraud Section of DOJ’s Civil Division, which typically

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oversees FCA matters, as well as the Civil Rights Division, which enforces federal laws prohibiting discrimination. The effort will also be supported by the various United States Attorney's offices as well as DOJ's Criminal Division. And, further, the announcement directs DOJ to engage with other agencies such as the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Labor in pursuit of this work—highlighting that recipients of federal funding distributed by these agencies may be the first in line for DOJ scrutiny.

The Administration's Anti-DEI Efforts

This new Initiative is part of the administrations' larger effort to combat DEI and other policies, as articulated in President Trump's Executive Order 14151, "Ending Radical and Wasteful Government DEI Programs and Preferencing;" Executive Order 14168, "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government;" and Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." Read Polsinelli's analysis of recent Executive Orders and other developments here.

Notably, Attorney General Pam Bondi had already issued a memorandum entitled "Ending Illegal DEI and DEIA Discrimination and Preferences" on February 5th which directed DOJ's Civil Rights Division to develop recommendations for enforcing civil-rights laws against DEI policies. The Initiative is an early indication of the enforcement steps DOJ will be taking to further the Executive Orders.

Legal Challenges to Anti-DEI Efforts

The administration's anti-DEI Executive Orders have already been subject to numerous legal challenges.

In *National Association of Diversity Officers in Higher Education v. Trump*, Case No. 25-1189 (D.M.D.), plaintiffs challenged the executive orders on the basis that they violated the First Amendment's free speech protections and the Fifth Amendment's due process clause. Though successful at the district court level, on March 14, 2025, the Fourth Circuit stayed the district court's preliminary injunction pending appeal.

In *Chicago Women in Trades v. Trump*, Case No. 25-2005 (N.D. Ill), a similar case, the district court issued a nationwide injunction on April 14, 2025, that restricts the Department of Labor (DOL) from requiring a federal contractor to make certifications relating to their DEI programs.¹

Polsinelli will continue to monitor these cases as they develop. The legal challenges to these Executive Orders—such as violation of the First or Fifth Amendments—will inform whether and how DOJ may pursue FCA claims as laid out by the Initiative.

FCA Potential Theories and Risks

To state a claim under the FCA, DOJ must show a false claim, knowledge of the falsity on the part of the defendant and materiality of the false statement to the government's decision to pay.

Executive Order 14173 referenced above requires government agencies to ensure that federal contractors and grant recipients make certifications that they do not engage in any DEI or other programs that the administration believes violate anti-discrimination laws. While the DOL is currently enjoined from enforcing the DEI certification requirement, other government agencies are permitted to move forward with the certification requirement.

These certifications will almost certainly be used to provide express false certifications for the purposes of FCA claims involving illegal DEI programs.

Further, Executive Order 14173 requires that government agencies include a term in every contract or grant award indicating that “compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions.” This language has started to be rolled out by various government agencies and will be used to try to satisfy the FCA’s materiality requirement.

The FCA also includes a *qui tam* provision that allows individuals to file lawsuits on behalf of the government and, if successful, receive a portion of the recovered funds. In addition to DOJ enforcement actions, whistleblower complaints related to illegal DEI programs pose a substantial risk to federal contractors and grant recipients.

Even if no DEI certification is made, other representations made or implied by recipients of federal funding in their interactions with the government could also form a basis for an FCA inquiry.

These issues will no doubt be the subject of legal challenges to future FCA enforcement actions brought by both the DOJ and whistleblowers.

Key Takeaways

- Recipients of federal funding should proceed cautiously. Further, such recipients should proactively review their diversity and DEI programs and documentation now with the assistance of experienced counsel to allow time for the review and implementation of any recommended changes. Under this new Initiative, DEI and other programs, especially those externally facing, may draw DOJ or whistleblower attention. In addition, representations made as part of contracting or other communications with the government, particularly any direct representations regarding DEI or other programs, should be made carefully.
- Recipients of federal funding should continue to monitor the development of legal challenges to the various Executive Orders. As these cases wind through the courts and result in nationwide or more limited injunctions, there will be substantial uncertainty in their enforceability and the validity of any related FCA claims.
- To the extent that you receive any inquiry from DOJ, any funding agency or other law enforcement entities regarding DEI or other policies, seek counsel. Such inquiries may indicate an underlying FCA investigation.

If you have any questions about how these changes may impact you or your organization, please feel free to reach out to Jessica Andrade, Erin Schilling, Daniel Petkoff, Polsinelli’s Executive Action Working Group or your regular Polsinelli attorney.

[1] Other challenges include *Shapiro et al. v. U.S. Department of the Interior et al.*, Case No. 25-763 (E.D. Pa.), *National Urban League v. Trump*, Case No. 25-00471 (D.D.C.), and *San Francisco AIDS Foundation et al. v. Trump et al.*, Case No. 25-1824 (D.D.C.).