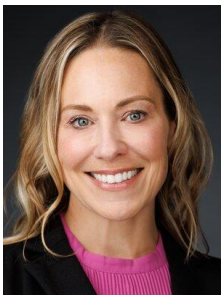
How To Address FCA Risk After 4th Circ. Ruling On DEI Orders

By **Jaime Jones, Brenna Jenny and Matt Bergs** (April 25, 2025)



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Early in his second term, President Donald Trump issued two executive orders targeting diversity, equity and inclusion programs at companies that do business with the federal government by imposing liability under the False Claims Act, among other potential penalties.

The executive orders were quickly challenged in National Association of Diversity Officers in Higher Education v. Trump, and in February, the U.S. District Court for the District of Maryland issued a sweeping nationwide preliminary injunction prohibiting their enforcement against all government contractors.

Last month, however, the injunction was stayed by the U.S. Court of Appeals for the Fourth Circuit, freeing the administration and whistleblowers to enforce the executive orders and pursue FCA liability for unlawful DEI programs while the litigation continues.

In light of the evolving legal landscape and the draconian potential penalties under the FCA, those doing business with the federal government should consider taking stock of any operations that could attract scrutiny for being potentially unlawful DEI programs.

Potential FCA Liability for DEI Programs

The first DEI order, Executive Order No. 14151, titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," requires "the termination of all discriminatory programs," including "'equity-related' grants or contracts," which is known as the termination provision.[1]

The second order, Executive Order No. 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," builds upon the first. Among other things, it requires contractors and grant recipients to certify that they do not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws," and to agree in their federal contracts that their compliance "with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of [the FCA]," which is known as the certification provision.[2]

Through these executive orders, the federal government has signaled its strong interest in using unlawful DEI programs as a basis for FCA liability.

The FCA is a long-standing, powerful tool for combating fraud on the federal fisc, although it is often enforced by private parties through its qui tam provision. That provision allows private whistleblowers, also known as relators, to file suit under seal, giving the U.S. Department of Justice an opportunity to investigate and take over the case.

Even if the DOJ declines to do so, relators can still litigate the case and are entitled to up to 30% of the ultimate financial recovery, which is premised on treble damages and per-claim

penalties up to $28,619.

The FCA also includes an antiretaliation provision that prohibits employers from taking adverse employment actions against employees who are attempting to report or stop fraud on the government.

To prove an FCA violation, the government or whistleblowers must establish the following four things: (1) a false claim or statement, (2) that it was made with the requisite knowledge that it was false, (3) that it was material to payment, i.e., that it would influence the government's purchasing decision, and (4) that it caused the government to make a payment.

Put simply, they must establish falsity, scienter, materiality and causation. The federal government appears to be using the executive order's certification provision to build support for the falsity and materiality elements.

The certification provision sets up an FCA theory of falsity known as express false certification, which provides that a claim is false if a person falsely certifies compliance with a law — here, it would be federal antidiscrimination laws.

Regarding materiality, the certification provision specifically requires contractors to agree that compliance with federal antidiscrimination laws is material to the government's payment decisions.

Court Challenges to the DEI Orders' Constitutionality

On Feb. 3, shortly after Trump signed the DEI executive orders, the plaintiffs filed their complaint in National Association of Diversity Officers in Higher Education v. Trump.

The plaintiffs allege that certain provisions of the executive orders are unconstitutional, including the termination and certification provisions, because they allegedly violate both the free speech clause of the First Amendment by outlawing a particular viewpoint, and the due process clause of the Fifth Amendment by being unconstitutionally vague.

The plaintiffs seek a declaratory judgment that the executive orders are unlawful and unconstitutional, as well as a permanent injunction preventing their enforcement. They also sought a preliminary injunction preventing enforcement of the executive order provisions while the case was being litigated.[3]

On Feb. 21, the district court granted the plaintiffs' request for a preliminary injunction, concluding that they were likely to prevail on the merits of their First and Fifth Amendment claims.

With respect to the First Amendment claim, the court held that "the provision expressly targets, and threatens, the expression of views supportive of equity, diversity and inclusion," and therefore imposes unconstitutional viewpoint discrimination.

Regarding the Fifth Amendment claim, the court held that the executive orders invite arbitrary enforcement and do not provide sufficient notice to regulated parties, because they do not define key terms such as "DEI," "equity" and "equity-related."

Notably, the preliminary injunction protects not just the plaintiffs, but all similarly situated nonparties. It was also later clarified to prevent enforcement of the DEI executive orders

not only by the defendants, but also by nondefendant federal entities.

The federal government promptly appealed the preliminary injunction to the Fourth Circuit.[4]

On March 14, a Fourth Circuit panel unanimously voted to stay the nationwide injunction pending resolution of the appeal. Each judge, however, wrote a separate concurrence to explain their reasoning.

Chief U.S. Circuit Judge Albert Diaz emphasized that the government had met its burden to justify a stay, but suggested that the DEI executive orders are not good policy because "people of good faith who work to promote diversity, equity, and inclusion deserve praise, not opprobrium."

U.S. Circuit Judge Pamela Harris cautioned that while the DEI executive orders seem facially lawful, they could run afoul of the First Amendment and due process clause depending on how they are ultimately enforced.

U.S. Circuit Judge Allison Jones Rushing raised concerns about the scope of the injunction and the ripeness of the case, while underscoring that a "judge's view on whether certain Executive action is good policy is not only irrelevant to fulfilling our duty to adjudicate cases and controversies according to the law, it is an impermissible consideration."[5]

The appeal is now proceeding on an expedited briefing schedule — the government filed its opening brief on April 8, the plaintiffs' response is due by May 8 and the government's reply is due by May 29.

Steps for Employers to Address FCA Risk

The DEI executive orders are an open invitation for potential whistleblowers, such as employees who assert that they were passed over for a promotion or competitors that allegedly lost bids, to blame DEI programs and pursue a qui tam suit.

Although companies would have defenses, FCA investigations are expensive and can be a distraction to efficient operations, even for those that ultimately prevail. As such, those that do business with the government should consider taking the following steps to further mitigate risk.

Government contractors should review and understand the process by which they submit claims to the federal government and receive payment. In February, the U.S. Supreme Court embraced a new and potentially more expansive definition of a "claim" under the FCA in Wisconsin Bell Inc. v. U.S. ex rel. Heath, holding that as long as the government provides any portion of the payment requested, even a small fraction, that is enough to constitute a claim under the FCA.[6]

Government contractors that have DEI programs should determine the risk that their particular programs present. While the Trump administration has not yet provided guidance regarding the specific types of DEI programs that will be the target of government-initiated enforcement or otherwise considered unlawful, this is likely to be a complex and rapidly developing area of law that contractors will need to wade through.

Government contractors should review their policies and procedures addressing discrimination in the workplace to ensure that they align with the goals set forth in the DEI

executive orders. They should also have mechanisms in place to ensure that employees review and receive effective training on the requirements of those policies and procedures.

Due to the whistleblower risk presented by the FCA, government contractors should ensure that they offer adequate internal reporting mechanisms for employees to raise any DEI-related complaints, e.g., a compliance hotline. Upon receipt of any such complaints, government contractors should investigate the complaint and ensure that their response will not run afoul of the FCA's antiretaliation provisions.

Conclusion

Open questions remain about how the government, and whistleblowers, will seek to enforce the DEI executive orders. But with the shifting legal landscape, government contractors should understand that the executive orders heighten their risk under the FCA, and accordingly, they should closely monitor and respond to ongoing litigation developments.

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[1] Ending Radical and Wasteful Government DEI Programs and Preferencing, White House (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/.

[2] Ending Illegal Discrimination and Restoring Merit-Based Opportunity, White House (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

[3] Complaint, Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, No. 1:25-CV-00333-ABA (D. Md. Feb. 3, 2025).

[4] Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, No. 1:25-CV-00333-ABA, 2025 WL 573764 (D. Md. Feb. 21, 2025), opinion clarified, 2025 WL 750690 (D. Md. Mar. 10, 2025).

[5] Nat'l Ass'n of Diversity Officers in Higher Educ. v. Donald J. Trump, No. 25-1189, Dkt. 29 (4th Cir. Mar. 14, 2025).

[6] Wisconsin Bell, Inc. v. United States ex rel. Heath, 145 S. Ct. 498 (2025).