Westlaw Today

Federal judge pauses enforcement of DEI executive order; FCA risks remain

By Jaime L.M. Jones, Esq., Brenna E. Jenny, Esq., Katherine A. Roberts, Esq., and Cody M. Akins, Esq., Sidley Austin LLP*

MARCH 12, 2025

On Friday, February 21, a federal district judge in Maryland issued a nationwide preliminary injunction prohibiting the U.S. Department of Justice (DOJ) and defendant federal agencies from enforcing portions of two presidential executive orders (EOs) targeting diversity, equity, and inclusion (DEI) programs at companies that do business with the federal government, including provisions tethering allegedly unlawful DEI programs to potential False Claims Act (FCA) liability.

Despite the unusually sweeping breadth of this injunction, the Trump administration retains significant latitude to undertake actions targeting federal contractor DEI programs it believes are unlawful, and companies should carefully consider their response to the injunction.

The EOs direct all federal agencies to terminate "equity-related grants or contracts." They also require agencies to include in federal contracts a clause requiring the contractor or grant recipient to (1) agree that its compliance with federal antidiscrimination laws is material to the government's payment decisions for purposes of the FCA and (2) certify that it does not operate any programs promoting DEI that violate federal antidiscrimination laws.

The Trump administration retains significant latitude to undertake actions targeting federal contractor DEI programs it believes are unlawful, and companies should carefully consider their response to the injunction.

The combination of these two provisions appears designed to set out a roadmap to impose FCA liability on contractors that sign the certification but then persist in implementing an allegedly unlawful DEI program.

Finally, the EOs direct DOJ, in collaboration with other agencies, to develop a strategic plan for "end[ing] illegal discrimination and preferences, including DEI," in the private sector. As part of that plan, the EOs direct each agency to "identify up to nine potential civil compliance investigations" of publicly traded corporations and other large organizations.

Shortly after President Donald Trump signed the EOs, three trade associations and the City of Baltimore sued the President and the head of every executive department in Maryland federal district court.

It is unusual for a court preemptively to enjoin a broad range of potential steps a federal agency could take to implement an EO.

The plaintiffs argue that the EOs violate the Free Speech Clause of the First Amendment by outlawing a particular viewpoint and that the EOs are unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. The plaintiffs moved for a preliminary injunction blocking enforcement of the EOs while the litigation plays out.

On February 21, the district court granted plaintiffs' request. The court held that the plaintiffs are likely to prevail on the merits of their First and Fifth Amendment claims. As to the former, the court held that the EOs "expressly targe[t] ... the expression of views supportive of equity, diversity and inclusion" and therefore impose unconstitutional viewpoint discrimination.

Turning to plaintiffs' Fifth Amendment claim, the court held that the EOs invite arbitrary enforcement and do not provide sufficient notice to regulated parties because the EOs did not define key terms such as "DEI," "equity," and "equity-related."

In light of its holdings, the court enjoined all federal agency heads from (1) pausing, modifying, or terminating any contracts or grants "on the basis of" the EOs; (2) requiring a contractor or grantee to make any "certification" "pursuant to" the EOs; and (3) bringing any "enforcement action," including an FCA enforcement action, "pursuant to" the EOs.

Over the government's objection, the court held that its order applies to parties and nonparties alike, meaning the government is barred from taking the prohibited actions against anyone.

Agencies may still continue to develop and report to DOJ a list of targets for "potential civil compliance investigations."

It is unusual for a court preemptively to enjoin a broad range of potential steps a federal agency could take to implement an EO, as opposed to enjoining agencies once they take concrete action to implement that EO. Indeed, as the government argued, some of the plaintiffs' asserted concerns over vagueness are problems of their own making by preemptively raising a pre-enforcement suit.

But while this litigation plays out, companies doing business with the federal government should understand the potential for ongoing enforcement risk, particularly under the FCA and its whistleblower provision, arising from DEI programs and activities.

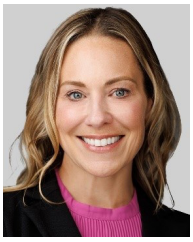
Although the injunction bars federal agencies from modifying the terms of contracts to implement the EOs, including to incorporate the EO express certification requirement, many federal contracts already include provisions requiring compliance with antidiscrimination laws, and agencies may take the view that they do not need to modify contracts to be justified in exploring FCA liability for DEI programs that result in allegedly unlawful discrimination.

Under this approach, an agency may argue that it is not violating the injunction by pursuing an enforcement action on the basis of existing antidiscrimination laws because the court's order merely prohibits agencies from taking any enforcement action "pursuant to" or "on the basis of" the EOs.

Furthermore, the court's injunction does not prohibit any agency from engaging in strategic planning pursuant to the EOs. Accordingly, agencies may still continue to develop and report to DOJ a list of targets for "potential civil compliance investigations," and DOJ may take the position that it is free to pursue those investigations because an investigation alone is not an "enforcement action" prohibited by the court's order.

The FCA's whistleblower provision may also attract qui tam suits relating to allegations of unlawful DEI programs, and DOJ may similarly take the position that it is free to investigate those claims even where they implicate the challenged EOs.

About the authors




(L-R) **Jaime L.M. Jones**, a partner and co-leader of **Sidley Austin LLP**'s global health care practice, defends health care and life sciences companies in government investigations, enforcement actions and False Claims Act litigation. She is based in Chicago and can be reached at jaime.jones@sidley.com. **Brenna E. Jenny**, a partner in the firm's health care practice, aids companies with internal investigations and compliance reviews. She previously served as counsel to the assistant attorney general of the U.S. Justice Department's civil division. She is based in in Washington, D.C., and can be reached at bjenny@sidley.com. **Katherine A. Roberts**, a partner and co-chair of the firm's labor, employment and immigration group, focuses on wage-and-hour class and collective actions involving overtime exemptions, and discrimination, harassment and wrongful-termination claims. She is based in Los Angeles and can be reached at kate.roberts@sidley.com. **Cody M. Akins**, a managing associate in the firm's supreme court, appellate and litigation strategies practice, represents individuals and corporations with appeals and critical motions. He is based in Washington, D.C., and can be reached at cakins@sidley.com. This article was originally published Feb. 26, 2025, on the firm's website. Republished with permission.

This article was published on Westlaw Today on March 12, 2025.