

PUBLICATION

Federal Crackdown on DEI Programs Intensifies – Government Enforcement and Investigations Risks

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In our prior Baker Donelson Client Alert, we examined the labor and employment implications of Attorney General Pam Bondi's *Ending Illegal DEI and DEIA Discrimination & Preferences* memorandum. This alert focuses on the government enforcement and investigation risks stemming from that memorandum, including the increased scrutiny of corporate DEI programs and the potential for civil and criminal liability.

On February 5, 2025, the Department of Justice issued a directive instructing the Civil Rights Division and the Office of Legal Policy to identify enforcement actions against organizations with DEI programs that may be deemed unlawful under federal anti-discrimination laws. These enforcement actions include civil compliance investigations, regulatory actions, and, in some cases, potential criminal investigations. This directive builds on Executive Order 14173, issued on January 21, 2025, which calls for federal agencies to scrutinize the DEI practices of publicly traded corporations, large non-profits, foundations, professional associations, and universities with significant endowments. The administration has signaled that it intends to use every available enforcement mechanism to curb what it has characterized as unlawful preferences embedded within DEI programs.

Executive Summary

- **The False Claims Act (FCA) will be a primary enforcement tool** against federal contractors and grant recipients who fail to certify compliance with the new DEI restrictions. While the FCA is a civil statute, companies that knowingly submit false certifications could also face criminal liability under federal fraud statutes.
- **Beyond the FCA, the administration is pursuing broader investigations and regulatory actions** against companies with DEI programs, including restrictions on diverse hiring panels, employee resource groups, and other workplace initiatives. These enforcement efforts are likely to face constitutional and statutory challenges, particularly under the First Amendment.
- **Organizations facing FCA enforcement may have strong legal defenses**, including challenges based on causation, the Supreme Court's ruling in *SuperValu* regarding intent, and the materiality standard established in *Escobar*. These defenses may make it difficult for the government to prove liability in some cases.

False Claims Act and Criminal Liability Risks

A central component of the administration's enforcement strategy involves the FCA, a civil statute that the Department of Justice intends to use as a tool against federal contractors and grant recipients. Under Executive Order 14173, organizations receiving federal funding must certify that they do not operate DEI programs that constitute unlawful discrimination or preference. Entities that fail to discontinue such programs by the April 21, 2025, deadline could be subject to FCA enforcement, which carries treble damages and statutory penalties.

Although the FCA is a civil statute, the government may also pursue criminal liability under 18 U.S.C. § 287, which applies when false claims are made to the federal government knowingly and willfully. If the Department of Justice determines that a contractor knowingly submitted a false certification regarding compliance with DEI restrictions, it could pursue criminal fraud charges in addition to civil FCA enforcement. This distinction between civil and criminal liability is critical, as criminal cases require proof of intent beyond a reasonable doubt, whereas civil FCA cases require only a preponderance of the evidence.

Expanded Investigations and Regulatory Scrutiny

Beyond FCA liability, the administration's crackdown on DEI programs extends to broader corporate governance and workplace policies. The Bondi memorandum defines "illegal DEI" to include hiring practices such as diverse hiring panels and "diverse slate" recruiting policies, as well as employee resource groups (ERGs) that promote DEI-based hiring, benefits, or retention efforts.

The administration instructed federal agencies to close all pending investigations by the Office of Federal Contract Compliance Programs (OFCCP) by January 31, 2025, and issue new guidance eliminating references to affirmative action plans. While the executive order does not explicitly criminalize DEI, its broad language leaves room for significant regulatory enforcement against private-sector employers, including those that do not receive federal funding.

Additionally, the Department of Justice's directive requires agencies to identify up to nine civil compliance investigations focused on publicly traded corporations, large non-profits, and institutions with significant financial assets. These investigations will likely target organizations that continue to engage in DEI initiatives that the administration views as unlawful preferences. With the Attorney General specifically calling for potential regulatory actions, companies should prepare for heightened scrutiny in federal investigations and compliance audits.

Legal Challenges and Potential Defenses

Organizations facing FCA-related enforcement actions or broader government investigations may have strong legal arguments to challenge these actions. One key issue for the government will be proving causation, as FCA liability requires a direct connection between a false claim and government payment. If an entity's DEI-related certification is not directly tied to the specific purpose of the federal funding received, establishing this causal link may prove difficult.

In addition to causation challenges, the Supreme Court's 2023 decision in *United States ex rel. Schutte v. SuperValu Inc.* clarified that FCA liability hinges on the defendant's subjective belief at the time of the alleged violation. If a company reasonably believed that its DEI programs were compliant with federal law, it may be able to argue that it did not act with the requisite intent to violate the FCA.

Another major hurdle for the government is the FCA's materiality requirement, as articulated in *Universal Health Services, Inc. v. United States ex rel. Escobar*. In that case, the Supreme Court held that FCA liability applies only if the alleged misrepresentation was material to the government's decision to pay. If federal agencies have historically continued funding entities despite knowledge of their DEI programs, defendants may argue that the certifications were not material under *Escobar*. These defenses could limit the government's ability to successfully enforce FCA claims related to DEI compliance.

Beyond FCA defenses, there are broader constitutional and statutory challenges that may arise. The Eleventh Circuit's recent decision in *Honeyfund.com v. Governor, Florida* struck down Florida's anti-DEI restrictions under the Stop WOKE Act, ruling that the law violated the First Amendment. That decision may provide a strong basis for legal challenges to the federal administration's DEI enforcement policies, particularly where restrictions implicate free speech, employee resource groups, or corporate governance decisions. Additional

challenges may arise where these enforcement efforts conflict with longstanding employment discrimination laws or exceed the executive branch's authority under federal contracting and procurement regulations.

Key Considerations for Employers

In light of these enforcement developments, organizations should act swiftly to assess their legal and regulatory risks. Reviewing DEI policies and compliance certifications is essential to ensuring that corporate practices align with federal contracting obligations and do not create FCA exposure. Federal funding recipients should evaluate whether their receipt of government funds could trigger FCA enforcement actions and should be prepared for heightened scrutiny from DOJ and federal agencies.

Companies should also take steps to mitigate internal whistleblower risks by reviewing reporting mechanisms and strengthening compliance programs. Given the evolving legal landscape, employers should closely monitor ongoing litigation and agency guidance that could shape the enforceability of these DEI restrictions in the coming months.

How Baker Donelson Can Assist

The Department of Justice's focus on DEI programs presents significant risks for federal contractors, grant recipients, and private-sector employers. Baker Donelson attorneys are available to assist with FCA compliance reviews, risk assessments for organizations receiving federal funding, litigation defense against FCA enforcement or criminal investigations, and constitutional challenges to federal DEI restrictions.

For guidance on navigating these regulatory and enforcement developments, please contact your Baker Donelson attorney, or members of our [Government Enforcement and Investigations](#) or [Labor & Employment](#) teams.