Blogs
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Trump DEI Executive Order Signals Risks of False Claims Act Liability for Government Contractors and Grantees

Among the many issues raised by President Trump's ***Executive Order (EO) 14173*** ("Ending Illegal Discrimination and Restoring Merit-Based Opportunity") targeting diversity, equity, and inclusion (DEI) programs is the prospect for civil False Claims Act (FCA) enforcement actions and whistleblower lawsuits against government contractors and grant recipients, related to alleged non-compliance with anti-discrimination laws. Language in EO 14173 directing the inclusion of language in contracts and grants related to the FCA highlights the potential for new theories of FCA liability.

In this post, we address the FCA enforcement implications of EO 14173.

EO 14173

On January 21, 2025, President Trump signed EO 14173, which revokes several long-standing executive orders focusing on nondiscrimination and affirmative action, and directs the Department of Labor's Office of Federal Contract Compliance Programs to immediately cease holding contractors responsible for taking affirmative action in employment actions. EO 14173 followed EO 14151 ("Ending Radical and Wasteful Government DEI Programs and Preferencing"), issued the previous day, which calls for removing DEI and other such initiatives from executive branch agencies. On February 4, 2025, higher education organizations and the Mayor and City Council of Baltimore filed a lawsuit in Maryland District Court seeking to block the orders on First Amendment, Fifth Amendment, and other constitutional grounds.

EO 14173 expressly contemplates using the FCA as an enforcement tool. Section (b)(iv) of the EO requires that the "head of each agency" include in "every contract or grant award" (1) a term requiring the contractor or grant recipient to "agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decision for purposes" of the FCA, and (2) a term requiring such contractor or grant recipient to "certify that it does not operate any programs promoting DEI that violate any

applicable Federal anti-discrimination laws."

The FCA and DEI Programs

As a civil statute imposing liability on persons that submit (or cause to be submitted) false or fraudulent claims for payment to the government, the FCA is routinely used to combat fraud against government contracts and programs in a variety of contexts. It is unusual, however, for FCA enforcement to be called out in an executive order like this.

Among the open questions is how procuring agencies will go about carrying out EO 14173's directive to insert a materiality provision into "every" contract and grant (and whether that includes existing contracts and grants or just new ones). The EO is silent as to whether the administration will propose changes to the Federal Acquisition Regulation (FAR) to implement its provisions.

Guidance from procuring agencies regarding EO 14173 may shed further light on the potential enforcement consequences. As of this writing, the Department of Health and Human Services (HHS) has issued a notice in the System for Award Management indicating its intentions to take "immediate action" to begin "forbearing" enforcement of all FAR or HHS contract clauses, provisions, terms, and conditions "if inconsistent with EOs and implementing guidance issued by the current administration[.]" The notice does not speak to FCA enforcement.

Significant Questions Remain

Significant questions remain regarding EO 14173 (especially given the pending litigation), including those related to its FCA provisions noted above. It is unclear what the certification that contractors would be required to make may ultimately look like and whether different agencies will take different approaches. Also, the term "applicable anti-discrimination laws" is not defined, leaving potential for confusion. Likewise, the term DEI, in the context of EO 14173, lacks an agreed-upon definition, creating risks for contractors to the extent that they are required to make a certification of compliance.

The extent to which the EO may prompt *qui tam* litigation premised on alleged knowing non-compliance with anti-discrimination laws remains unclear. Every year, the U.S. Department of Justice (DOJ) relies heavily on whistleblowers (*qui tam* relators) to bring new FCA cases under lawsuits filed under seal in district courts. Relators are entitled to between 15% and 30% of any recovery by DOJ in an FCA action.

There is also a question as to the practical impact of the "materiality" language in the EO. Under the FCA, a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the government's decision in order to trigger FCA liability. The materiality inquiry focuses on the effect of the likely or actual conduct in question on the government's payment decision. The FCA defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 29 U.S.C. 3729(b)(4). The U.S. Supreme Court has explained that whether a provision is "labeled a condition of payment is relevant to but not dispositive of the materiality inquiry." *Universal Health Servs., Inc. v. United States*, 579 U.S. 176 (2016). Rather, statutory, regulatory, or contractual requirements "are not automatically material, even if they are labeled conditions of payment." *Id.* It is reasonable to expect arguments over materiality to arise.

Final Thoughts

While the extent to which DEI programs will create FCA risks for contractors remains unclear, to reduce potential enforcement risks, contractors and grant recipients should carefully review EO 14173 and other executive orders bearing upon diversity and affirmative action issues. They should be prepared to document their decision-making and communicate with government contracting officers.

Authors

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