

LEGAL UPDATES

Whistleblowers Get a Stronger Whistle: The False Claims Act Liability Under President Trump's DEI Order

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One of the new administration's Executive Orders, titled "[Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#)," has significant potential impact on companies operating diversity, equity and inclusion (DEI) programs and initiatives. Much of the media attention about this Executive Order (EO) has focused on its impact on DEI programs at any companies or institutions that take federal funds and/or contract with the federal government. However, a noteworthy aspect of the DEI Order for businesses around the country may be its express reference to the False Claims Act, 31 U.S.C. §3729 (FCA). ***The potential for considerable civil liability under the FCA relating to DEI programs is a new angle and a new tool for enterprising plaintiffs.***

On February 21, the U.S. District Court for the District of Maryland [case no. 1:25-cv-00333-ABA] issued a nationwide preliminary injunction as to three pertinent provisions of the EO (and a similar order) which direct:

1. executive agencies to "terminate . . . 'equity-related' grants or contracts,"
2. all executive agencies to "include in every contract or grant award" a certification, enforceable through the False Claims Act, that the contractor and grantee "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws," and
3. the Attorney General to take measures to encourage enforcement of the EO.

Further court proceedings, including potential appeals, are expected.

DEI Programs and Potential FCA-Related Civil Liability

The FCA is a federal statute designed to prevent companies from defrauding the federal government. Generally, the FCA prohibits parties from submitting false claims for payment to the federal government, and bars material failure to comply with statutory, regulatory or contractual requirements with the federal government. In such cases, the federal government can pursue violations of the

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FCA, imposing significant liability – including penalties of up to \$28,619 per claim – as well as mandatory treble damages, litigation costs and attorney fee recovery. FCA claims are also particularly dangerous because the statute permits both corporate liability and personal liability for management and executives. Using these powerful tools, the federal government recovers billions of dollars annually from private companies through FCA litigation.

But the government itself is not the only party that can pursue private companies for violations of the FCA. The FCA itself permits private parties to file actions on behalf of the government – known as *qui tam* actions. Private parties with original, non-public information about allegedly fraudulent activity (often called “whistleblowers”) can pursue FCA claims and recover up to 30% of the amount received in the litigation (a “relator’s share”). Whistleblowers and their attorneys can also recover their litigation costs and attorney fees in both *qui tam* (fraud) and anti-retaliation cases if their claims are successful. This aspect of the FCA provides economic incentives to coopt private parties to police and pursue FCA claims on behalf of the government.

In light of the DEI Executive Order, there is substantial potential for whistleblowers or other insiders to assert and pursue FCA claims against companies and their executives arising out of DEI programs. The pathway to liability starts with the EO requiring that all new federal contracts or federal grants require parties to certify (1) that they do not operate DEI programs in violation of federal law, and (2) that compliance with federal anti-discrimination laws is “material” to the government decision to pay a federal contract or a federal grant. These provisions set up FCA claims against a company by private parties who can allege that a company (and its executives) have falsely certified their compliance with these provisions to the federal government while still operating DEI programs that violate federal anti-discrimination laws. This legal theory massively empowers employees and insiders at companies who are aware of and have non-public, original information of the company’s DEI programs.

What This May Mean for Your Business

While it is too early to anticipate the full impact of FCA claims under this Executive Order – which presently are on hold under the nationwide preliminary injunction – companies and their executives may face increased liability and exposure to private FCA claims in several common situations:

- The pool of potential whistleblower claimants may be radically increased as any employee or insider with non-public, original information about DEI programs could be a potential plaintiff with a significant claim.
- Employees already considering or asserting a discrimination claim against an employer could have financial incentives to add or incorporate FCA claims – and with the U.S. Supreme Court’s recent apparent leaning toward opening doors to reverse discrimination claims, the field for potential discrimination claimants appears to be growing rather than shrinking.
- Employees who attribute adverse employment decisions (like a lack of promotion) to DEI policies may have significant incentives to assert private FCA claims. Employees or insiders with ideological objections to DEI programs and practices have a powerful tool and an incentive to assert FCA claims.
- Enterprising plaintiffs’ counsel will likely be on the lookout for potential FCA plaintiffs, particularly given the substantial potential economic rewards available under the FCA.

Next Steps

Much remains to be clarified about the scope of this Executive Order, including resolution of pending legal challenges and potential additional legal challenges to various aspects of it. There exists some ambiguity about what types of programs constitute “illegal” DEI programs, and the EO itself does not provide clarity. Current litigation has challenged



the constitutionality of multiple provisions of the EO including constitutionality of the certification requirements under the First Amendment. Further information and clarity from the administration and the courts is likely to follow, which may shed some light on these ambiguities.

In the meantime, businesses and decision-makers involved with federal contracts or federal grants should be aware of the potential for FCA claims by private parties arising out of DEI programs. Careful consideration of any business DEI programs should occur promptly to mitigate litigation risk and ensure compliance with federal contracts and grants in the coming days.

If you have questions about the impact of this recent Executive Order on potential civil liability under the FCA relating to your DEI programs, please contact [Billy Jones](#) or [Joey Mark](#), or your regular Lathrop GPM attorney.