



Enforcement Risks for DEI Programs:

What Government Contractors and Private
Employers Need to Know

Part 1:
*Shifting Diversity, Equity, and Inclusion Landscape
Webinar Series*

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Seyfarth Shaw LLP

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Part 1: *Shifting Diversity, Equity, and Inclusion Landscape Webinar Series Agenda*

- 1** | An overview of Key Executive Order and Preliminary Injunction Of EO 14173
- 2** | Impact of Executive Orders On Private Employers Including False Claims Act Issues
- 3** | What “Targeted” Organizations Can Expect From Agency Investigations
- 4** | Strategic Responses and Next Steps



1. Executive Order 14173



EO 14173: Ending Illegal Discrimination And Restoring Merit-Based Opportunity: Implications for Agencies and Federal Contractors

- Requires various actions by federal agencies to eliminate DEI practices
 - Revokes older Executive Orders touching on DEI issues
 - Orders a review of government-wide programs
 - Requires elimination of references to DEI and DEIA principles from acquisition, contracting, grants, and financial assistance procedures;
 - Orders the termination of all federal “diversity,” “equity,” “equitable decision-making,” “equitable deployment of financial and technical assistance,” “advancing equity,” and similar mandates
- Revokes EO 11246, ending affirmative action obligations for federal contractors, and directs all federal agencies to take action against “DEI discrimination” throughout private industry.
- Adds new certification requirements with False Claims Act Implications



EO 14713: Implications for the Private Sector

- Section 4: “Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences”
- Directs federal agencies to immediately take “all appropriate action” to advance the policy of “individual initiative, excellence, and hard work” in the private sector.
- Directs the Attorney General, along with agency heads and the Director of OMB, to provide recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.
- Within 120 days, the Attorney General must create a "strategic enforcement plan" that:
 - Identifies sectors of concern within each agency’s jurisdiction,
 - Identifies the "most egregious" DEI practitioners in each sector of concern,
 - Outlines specific deterrence steps for DEI programs deemed discriminatory, and
 - Include potential litigation strategies and regulatory actions.
 - Each federal agency must identify up to 9 potential investigation targets, focusing on large employers (publicly traded corporations, nonprofits with \$500M+ assets, state/local bar and medical associations, universities with \$1B+ endowments).



National Association of Diversity Officers in Higher Education et al v. Trump et al., No. 1:25-cv-00333 (D. Md. Feb 21, 2025)

- Federal district court for the district of Maryland issued a preliminary injunction temporarily prohibiting the enforcement of certain provisions of, among others, EO 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity:
 - The “Certification Provision” which requires federal contractors and grant recipients to include in every contract or grant award a certification enforceable through the False Claims Act that the contractor or grantee does not operate illegal DEI programs
 - The “Enforcement Threat Provision” which directs the attorney general to take appropriate measures to encourage the private sector to end illegal DEI and identify civil compliance investigations to accomplish said deterrence
- The preliminary injunction applies not just to plaintiffs who brought the action, but also to all similarly situated contractors, grant recipients, and private sector entities nationwide.



National Association of Diversity Officers in Higher Education et al v. Trump et al., No. 1:25-cv-00333 (D. Md. Feb 21, 2025)

- The preliminary injunction does not:
 - impact investigations or lawsuits based on longstanding civil rights laws, such as Title VII of the Civil Rights Act of 1964;
 - prevent private plaintiffs—applicants, employees or third-party organizations—from pursuing discrimination claims based on what they perceive to be illegal DEI programming;
 - *prevent the Department of Justice, agencies, or state attorneys general from issuing letters, investigation, and lawsuits based on employer DEI initiatives;*
- The court declined to enjoin the Attorney General from preparing the report EO 14173 directed
- The court also declined to enjoin the Attorney General from engaging in DEI investigations



National Association of Diversity Officers in Higher Education et al v. Trump et al., No. 1:25-cv-00333 (D. Md. Feb 21, 2025)

- The DOJ filed its Notice of Appeal: Opening Briefs Are Due On April 8, 2025
- Requested a Stay Pending Appeal – ruling requested by March 14, 2025
- Separately, there was a motion for clarification of the preliminary injunction filed in the District Court case
 - DOJ took the position that only those agencies that were specifically named in the complaint were subject to the preliminary injunction
 - Plaintiffs filed a motion for clarification on whether the Preliminary Injunction applied to all federal executive agencies or only those specifically named as defendants
 - The Court granted the motion and clarified the ruling applied to “all executive federal agencies”



2. False Claims Act and Exposure

False Claims Act



False Claims Act Implications From EOs

- False Claims Act, 31 U.S.C. 3729 et seq.
 - Background
 - Liability Elements
 - Damages
- EO 14173 requires all agencies to include in every federal contact and grant:
 - (1) a requirement for contractors and grantees to agree that their “compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions” for purposes of the False Claims Act (“FCA”).
 - (2) a requirement for contractors and grantees to certify that they are not “operat[ing] any programs promoting DEI that violate any applicable Federal anti-discrimination laws”

False Claims Act



False Claims Act Implications

- Compliance with EO 14173
 - What constitutes an “illegal” DEI program or policy?
- Implementation
 - How is the EO implemented in a contract or grant?
- Certification
 - What is the impact?
- Flow Down
 - Is it a required flow down?
- Mandatory Disclosure Rule
 - What am I *required* to disclose?

False Claims Act



False Claims Act Implications From EOs

- What is the risk of Non-Compliance?
 - Qui Tam Lawsuits
 - DOJ Enforcement
- Has my FCA exposure changed with the implementation of EO 14173?
 - DOJ Investigations may still be permitted
- How can I defeat an FCA claim?
 - FCA requires “knowing” submission of a false claim
 - Bolster your Ethics & Compliance Program



3. What Targeted Organizations Can Expect



February 5, 2025 Bondi Memo: Ending Illegal DEI and DEIA Discrimination and Preferences

- The Attorney General's Memo directs the DOJ's Civil Rights Division and the Office of Legal Policy to jointly submit a report by March 1, 2025, containing recommendations for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences
- The report should include:
 - Key sectors of concern within the Department's jurisdiction
 - The most egregious and discriminatory SEI and DEIA practitioners in each sector
 - A plan to deter the use of DEI and DEIA programs and principles, including proposals for criminal investigation and for up to nine potential civil compliance investigations
 - Additional potential litigation activities, regulatory actions, and guidance; and
 - Other strategies to end illegal DEI and DEIA discrimination and preference to comply with all federal civil-rights laws



Examples of Actions by Federal Agencies

- **February 12, 2025:** Chair of the Federal Communications Commission orders investigation into the DEI practices of one of its constituents
- **February 14, 2025:** Dear Colleagues Letter from the Department of Education, in which the DOE provides its interpretation of federal law related to the Civil Rights Act and DEI practices and warns educational institutions that it intends to “vigorously” enforce the law and advises such institutions to assess their compliance with the law based on the interpretation included in the letter
- **March 10, 2025:** Department of Health and Human Services announced four investigations into unnamed medical schools and hospital under Title VI of the Civil Rights Act of 1964 based allegations and information the Office of Civil Rights received that certain medical schools and hospitals that receive HHS funding may operate medical education, training, or scholarship programs for current or prospective workforce members that discriminate on the basis of race, color, national origin, or sex

Mechanism of Investigations



How will an investigation start?

- Identified by a regulator
- Whistleblower complaint

First contact with agency or regulator about an investigation?

- Letter
- Civil Investigative Demand
- Subpoena

What will agency/regulator be looking for?

- Correspondence will request information and documents related to DEI practices and policies
- Can expect broad requests
 - “an accounting . . . DEI initiatives, preferences, mandates, policies, programs, and activities— including DEI activities that are ongoing but may be operating today under different labels”

What does the process of a government investigation look like?

Types of Investigations

Agency

DOJ - Civil

DOJ - Criminal

Whistleblower Issues



- Under multiple federal statutes and programs, employee “whistleblowers” can submit information and seek financial rewards.
 - Under current executive orders, complaints about existing or continuing DEI programs could be filed by employees.
- Where the whistleblower submits a claim under the False Claims Act, the matter is initially filed “under seal” in the federal court, and thus the employer is unaware of the filing or the fact that a FCA claim is pending.
- Both the SEC and DOJ also have whistleblower bounty programs, which allow for recovery in the event of an eventual settlement or judgment.
- Employees are also protected from retaliation for filing a whistleblower claim or raising an issue deemed “protected” under federal law.
- Thus, an employee complaining about an entity’s existing DEI program or complaining about a failure to make changes to its DEI program could claim protected status.

A hand is holding a camera lens in the foreground, with the lens's aperture visible. The lens is focused on a blurred background of a blue lake and green mountains under a blue sky with white clouds. The lens is held in a way that frames the background scene.

4. Strategic Responses and Next Steps



Strategic Responses and Next Steps

- Review the company's process for evaluating and responding to hotline or other internal complaints to quickly identify and address complaints about discrimination or retaliation that may now implicate broader corporate exposure and may need to be evaluated by senior management or the Board of Directors.
- Consider conducting a privileged DEI assessment
- Review all external and internal communications regarding DEI and EEO practice
- Review any DEI training that is conducted or required
- Rely on currently available resources to glean some “dos” and “don'ts” until more detailed guidance is provided:
 - The memorandum issued by the US Office of Personnel Management (OPM) regarding the future of federal agencies' DEI programs;
 - Multi-state guidance issued by the Attorneys General of 15 states addressing DEI employment initiatives
- Assess with counsel any state or local requirements that may differ
- Promptly and effectively process, investigate and address any discrimination and retaliation claims
- Consider your external messaging if you are identified by an agency as potentially having “discriminatory DEI or DEIA” programs or policies

FCA Compliance Best Practices

- 1. Identify all the contracts, projects, and other programs subject to the FCA**
 - Maintain a list in a central location
 - Update as necessary
- 2. Comply with all applicable requirements**
 - Identify all contract or grant requirements and all mandatory regulations and statutes (e.g., FAR requirements, quality and testing requirements, cost allowability requirements, repayment obligations).
- 3. Verify and strengthen internal controls, policies and procedures to ensure compliance with requirements.**
 - Who at the company is charged with the responsibility of ensuring compliance.
- 4. Review Certification Process**
 - Identify certification requirements
 - Identify who in the company will be charged with ensuring compliance with certification requirements
 - Ensure individuals charged have appropriate knowledge and training.
- 5. Document intent to comply - especially with ambiguous requirements**
 - Document all deliberate, good faith efforts to comply with all regulatory and contractual provisions
 - Document any clarifications sought from government,
 - Clarify your understanding of contract ambiguities in writing before a dispute
- 6. Develop robust training program on relevant requirements**
 - Continuously update program and updates
- 7. Audit and assess for weaknesses**
 - Where are company vulnerabilities?
 - Red flags for industry?

Why Invest In Ethics & Compliance Programs?

Legal

Many elements of an effective ethics program are required by law or regulation and can reduce penalties in event of misconduct.

Reputational

Allegations of misconduct can damage the reputation of a single company or the entire industry.

Financial

An effective ethics program can help identify and address issues before they affect quality, cost or schedule.

Elements of an Effective Ethics Program



Stay Tuned for Upcoming Sessions

Shifting Diversity, Equity, and Inclusion Landscape Webinar Series

- Part 1: Enforcement Risks for DEI Programs: What Government Contractors and Private Employers Need to Know

Upcoming Series:

- Navigating the Contours of What Might Be Considered to be “Illegal” DEI Programs
- Navigating Supplier Diversity Issues
- Navigating Cause Based Investment Strategies
- Community-Based Giving
- And more....



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