Fourth Circuit Allows Immediate Enforcement of DEI Executive Orders: Implications for Federal Contractors and Grant Recipients

MARCH 20, 2025

On March 14, 2025, in a late Friday decision, a panel of judges from the U.S. Court of Appeals for the Fourth Circuit ruled that, for the time being, the Trump Administration is permitted to enforce Executive Orders (EOs) 14151 (Ending Radical and Wasteful Government DEI Programs and Preferencing) and 14173 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity), which prohibit Diversity, Equity, and Inclusion (DEI) (also referred to as Diversity, Equity, Inclusion, and Accessibility, or DEIA in the EOs) efforts within the federal government and by federal contractors, respectively.

Previously, on February 21, the U.S. District Court for the District of Maryland granted a nationwide preliminary injunction partially blocking the EOs and later denied the Trump Administration's request for a stay of the injunction pending appeal. The Trump Administration appealed, and the Fourth Circuit granted the Trump Administration's request for a stay of the injunction pending appeal. This decision allows the Trump Administration to immediately enforce its DEI EOs, which subject all government contractors and grant recipients to potential False Claims Act (FCA) liability and other enforcement actions as explained in our earlier article on the subject. Consequently, federal government contractors and grant recipients must take proactive steps to assess and mitigate potential liability.

THE EOS PROHIBIT DEI PROGRAMS THE ADMINISTRATION CONSIDERS "UNLAWFUL"

President Trump's actions revoked a number of long-standing civil rights orders, and require the government to proactively enforce the EOs against public and private companies, non-profit entities, institutions of higher education, and other organizations that receive federal funding in any capacity. The EOs target DEI/DEIA programs that are "illegal" and "violate federal civil rights laws," but provide little guidance on what DEI programs it considers to be unlawfully discriminatory. As explained in a previous article, among other things, the EOs:

- Mandate that all contractors and grant recipients certify that they are not "operat[ing] any programs promoting DEI that violate any applicable Federal anti-discrimination laws" (the Certification Provision);
- Direct each "[e]ach agency, department, or commission head" to "terminate, to the maximum extent allowed by law, . . . 'equity-related' grants or contracts" (the Termination Provision); and
- Instruct the U.S. Attorney General to prepare a report identifying "[t]he most egregious and discriminatory DEI practitioners" and outline a plan of action to "deter DEI programs or principles" that the Trump Administration

considers illegal under federal civil rights law (the Report Provision).

The Maryland district court had found these provisions prohibitively vague under the Due Process Clause, violative of the First Amendment, or both. The Fourth Circuit ruled, without explanation, that the Trump Administration satisfied grounds for a stay of enforcement of the preliminary injunction pending appeal. In Judge Pamela Harris's concurring opinion, joined by Chief Judge Albert Diaz, she acknowledged the government's representations that the EOs were not facially illegal as they only proscribe "conduct that violates existing federal anti-discrimination law." She warned, however, that "[w]hat the Orders say on their face and how they are enforced are two different things" and enforcement actions "that go beyond the Orders' narrow scope may well raise serious First Amendment and Due Process concerns."

ENFORCEMENT OF THE EOS

The Trump Administration, of course, has signaled its intention to adopt a broader interpretation of "illegality" than previous administrations. Further, by explicitly requiring any federal contractor or grant recipient to certify it does not operate "illegal DEI" programs, the Trump Administration has indicated that it intends to use the FCA as a tool for enforcing the EOs against federal contractors and grant recipients. EO 14173 specifically requires all federal contractors and grant recipients to certify that they do "not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws"[1] and 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 FCA.[2]

The FCA, which has long been the federal government's most effective tool in combating fraud and abuse in federal spending, imposes liability on any individual or organization receiving federal funds that submits or causes to be submitted a false claim or certification to the government. Critically, the EOs' compliance requirements apply to a contractor's entire organizational operations, not just the operations directly tied to the contract. In addition to enforcement by the Department of Justice, the FCA is frequently enforced in cases brought by whistleblowers (also referred to as relators)—which are called *qui tam* actions. *Qui tam* actions are often initiated by disgruntled employees, who are then able to receive between 15% and 30% of any recovery. In 2024 alone, civil FCA actions by the government and whistleblowers resulted in over $2.9 billion in penalties and judgments.

Damages under the FCA can be severe. The FCA provides for treble damages, and steep penalties for each claim submitted for payment (currently up to $28,619 per claim). When a case alleges that claims for payment were "tainted" by a defendant's violation of an underlying contractual or regulatory requirement, the contractor can expect the government (or relator) to seek the full value of the contract at issue under the "tainted damages" theory (which argues that a false claim "taints" the entire contract, leading to full contract value as damages). The FCA can also result in debarment or exclusion from participation in federal programs and contracts, as well as reputational harm.

While the EOs do not detail what constitutes "illegal DEI," the Fourth Circuit's decision creates imminent FCA exposure risk for all federal contractors and grant recipients. Therefore, organizations receiving federal funds should not wait for clear guidance on what qualifies as impermissible DEI before taking proactive measures in anticipation of enforcement activity. Recent messaging from various federal agencies provides some insight into the types of programs and initiatives that could be viewed as "illegal" by the Trump Administration:

- On February 5, 2025, the U.S. Office of Personnel Management (OPM) issued a memorandum to the heads and acting heads of all departments and agencies, "Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives," which calls for the termination of all "illegal" DEI programs that "unlawfully discriminate in any employment action or other term, condition, or privilege of employment, including but not limited to recruiting, interviewing, hiring, training or other professional development, internships, fellowships, promotion, retention, discipline, and separation" based on certain "protected characteristics." The memorandum also directs the federal agencies to end "diverse slate" policies regarding the composition of hiring panels and candidate pools.
- On February 14, 2025, the Acting Assistant Secretary for Civil Rights at the Department of Education released a "Dear Colleague" letter (DCL) detailing the Department's current interpretation of federal law as it pertains to DEI programs in education. Relying on the Supreme Court's recent decision in *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), the DCL directs that "educational institutions may neither separate or segregate students based on race, nor distribute benefits or burdens based on race." Among many other directives, the DCL

also mandates that educational institutions may not use “personal essays, writing samples, participation in extracurriculars, or other cues” as an alternative means of determining the race of candidates and utilizing that information in making admission decisions.

- On March 17, 2025, the U.S. Equal Employment Opportunity Commission (EEOC)—the federal agency mandated to enforce federal laws prohibiting employment discrimination and ensuing equal opportunities in the workplace—announced that it was seeking information from 20 law firms related to their DEI programs. Among other categories of information sought by the EEOC, the letters seek information regarding how DEI was considered in the following areas: (1) internships, fellowships, and scholarships; (2) hiring and compensation practices; (3) DEI-related actions (e.g., data disclosures, staffing decisions) taken in response to client requests; (4) policies and processes “incentivizing” decisions motivated by protected characteristics; and (5) partnership decisions.
- On March 19, 2025, the EEOC and DOJ together issued a joint statement announcing two guidance documents related to “illegal DEI” initiatives: (1) “What To Do If You Experience Discrimination Related to DEI at Work;” and (2) “What You Should Know About DEI-Related Discrimination at Work.” These two guidance documents—coming from the nation’s top law enforcement agency and the agency charged with enforcing the nation’s workplace discrimination laws—detail perhaps the clearest picture yet of what the Trump Administration may view as “illegal DEI.”

While a clear definition of “illegal DEI” applicable across all contracting agencies of the federal government remains forthcoming, these early communications interpreting the EOs indicate that any program or initiative that addresses issues of diversity, equity, or inclusion must be neutral and equally accessible by all, regardless of any protected characteristics.[3] The EEOC and DOJ joint guidance acknowledges that DEI is not a defined term, as it details the areas of focus for “illegal DEI” enforcement activity:

Diversity, Equity and Inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee’s race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise “balancing” a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following: [1] Disparate Treatment[;] [2] Limiting, Segregating, and Classifying[;] [3] Harassment[;] [and] [4] Retaliation[.]

Accordingly, any initiatives that give preferential treatment or access to one group over others will likely be viewed as “illegal DEI” by the Trump Administration.

However, while it is important for organizations to consider the Trump Administration’s view on DEI, it is equally important to consider that many states require certain DEI initiatives. On February 13, 2025, following the issuance of EOs 14151 and 14173, the Attorneys General of 16 states issued a Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives advising that states will continue to enforce state-level anti-discrimination laws, and that DEI practices help ensure companies remain compliant with state laws. The Guidance goes on to note that “well-designed” DEI practices are consistent with federal civil rights laws, and provides recommendations to help companies distinguish between lawful and unlawful DEI practices. Organizations should be mindful that even if certain behavior is permitted under the EOs, it may subject them to liability under state law, and vice versa. For example, while EO 14173 revokes EO 13672, which required government contracts to include a provision prohibiting discrimination based on sexual orientation or gender identity, many states still prohibit such discrimination, and an organization allowing such discrimination may be subject to state enforcement actions.

Because the anti-discrimination regulatory landscape is rapidly evolving, organizations considering how to ensure that their DEI programs are lawful and how to minimize the risk of FCA or other liability related to DEI programs, including how to comply with both federal and state anti-discrimination laws, should consider consulting counsel.

NEXT STEPS FOR GOVERNMENT CONTRACTORS AND GRANT RECIPIENTS

As DEI EOs are now enforceable and create substantial risk, all current or potential federal government contractors and grant recipients should take immediate steps to mitigate potential liability for failure to comply with the EOs and avoid potential FCA exposure. Government contractors and grant recipients should thoroughly review DEI initiatives, programs, plans, and policies to identify portions that could be considered unlawful under existing civil rights

statutes by the Trump Administration. As discussed above, initial guidance and messaging from federal agencies must be balanced against obligations under state law. In some instances, organizations may be able to retain legally compliant portions of their DEI programs while modifying or eliminating certain other parts of their programs that the Trump Administration may perceive as unlawful.

Government contractors and grant recipients should consider the following actions to ensure compliance with the EOs, and mitigate potential liability:

- Closely review all DEI policies and programs, as well as all hiring practices, training materials, human resource policies, and any other organizational policy or practice that could be perceived as pertaining to DEI, to identify any policy or practice that the Trump Administration could consider violative of federal civil rights law;
- Contact contracting officers for existing contracts to determine the compliance obligations under those contracts and provide context for any programs or policies that may be viewed as unlawfully discriminatory;
- Consider changing the name, description, stated goals, and other language relating to programs and policies from language that can be misinterpreted as reflecting unlawful DEI to language that emphasizes the lawful, non-discriminatory nature and purpose of the program or policy;
- When hiring, avoid policies that could be construed as unlawful set-asides, unlawful preferences, or quotas for specific demographic groups. Organizations seeking to minimize the risk of perceived discrimination under both federal and state anti-discrimination laws should instead utilize broad recruitment efforts to attract a larger pool of applicants, panel interviews to eliminate individual bias in hiring, and standardized evaluation criteria focused on skills and experience;
- If applicable, closely review public disclosures and regular reports (such as annually filed 10-Ks) to ensure they contain no language that could be perceived as describing a discriminatory program or practice;
- Update job postings and selection criteria to ensure language is compliant with the EOs;
- If applicable, ensure that hiring programs outline recruitment goals that document non-discriminatory business rationales, such as improving employee retention, increasing available skillsets and competitiveness, and facilitating innovation;
- Maintain affirmative action plans for qualifying veterans and individuals with disabilities to the extent these programs are required by federal statute;
- Create, maintain, and internally circulate to all employees procedures by which employees can report discrimination. Clear protocols will help ensure ongoing compliance with federal and state antidiscrimination laws. They will also provide a process by which potential whistleblowers can raise concerns internally;
- Maintain nondiscriminatory and fair employment policies, procedures, and training necessary to comply with both federal and state antidiscrimination laws;
- Develop procedures that monitor any potential discriminatory effects of seemingly neutral policies; and
- Ensure any trainings do not encourage preferences, but instead focus on creating a non-discriminatory environment.

TERMINATION RESPONSE

If a federal contractor or grant recipient communicates that it cannot make the certifications required by the EOs, or is found to have violated the EOs, the government will likely terminate the contract or grant. A federal contractor receiving notice of termination should reach out to the contracting officer to seek reconsideration, particularly if it seems the termination may not be based on any actual unlawful DEI policies. There have been anecdotal reports that contracts containing buzzwords perceived to be related to DEI––for example, contracts using the terms “private equity” or “home equity”––have been automatically terminated without further review into whether these contracts are actually unlawful under the EOs. A contractor may also contact the contracting officer to alter the scope of the contract, such that the agency only terminates the portion of the contract it considers impermissible, rather than terminating the contract altogether.

If the contract or grant is terminated, there are additional legal remedies available, as our team has previously written about in more detail. Under Federal Acquisition Regulation (FAR) Part 49, a contractor can challenge a termination if it believes the termination was unfair. When facing termination, contractors and grant recipients can usually recover costs and pursue other remedies. However, it is imperative the contractor or grant recipient move quickly after termination, because the right to recover costs and pursue other legal remedies is often time-limited.

CONCLUSION

The Trump Administration has indicated that it intends to aggressively use tools like the FCA to enforce the DEI EOs against government contractors and grant recipients. While legal challenges to the EOs have not yet been fully and finally decided, the Fourth Circuit's decision allows the EOs to be enforced in the meantime. Given the breadth and ambiguity of the EOs, contractors, grant recipients, and organizations applying for or receiving federal funding or entering into a new contract with the government should closely monitor ongoing developments and consider seeking legal counsel to help navigate the changing landscape.

If you have any questions regarding this or related subjects or if you need assistance, please contact the authors of this article, Larry Block, Suzanne Jaffe Bloom, Amandeep Sidhu, Cristina Calvar, Shane Blackstone, Winston Hu, and Allison Booth, members of our DEI Compliance Task Force; our Government Investigations, Enforcement, and Compliance Practice; or your Winston & Strawn relationship attorney. You can also visit our DEI Compliance Task Force webpage, our Government Investigations, Enforcement, and Compliance Practice webpage, our Government Investigations, Enforcement, and Compliance Alerts, our Government Contracts and Grants Practice webpage, and our Government Program Fraud, False Claims Act & Qui Tam Litigation Playbook for more information on this and related subjects.

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[1] EO 14173 § 3(b)(iv)(B).

[2] EO 14173 § 3(b)(iv)(A).

[3] Protected characteristics generally include race, color, religion, sex, pregnancy, sexual orientation, gender identity, national origin, age, disability, or age gender, sexual orientation.

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