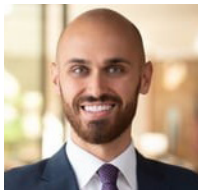
Strategy Considerations for Companies Assessing Risks of Fraud Liability for DEI Programs

A Practical Guidance® Article by by Lisa C. Dykstra, Sharon Perley Masling, Alexander B. Hastings, Bradie R. Williams, and Jonathan Wilt, Morgan Lewis & Bockius LLP

Lisa C. Dykstra
Morgan Lewis & Bockius LLP

Sharon Perley Masling
Morgan Lewis & Bockius LLP

Alexander B. Hastings
Morgan Lewis & Bockius LLP



Bradie R. Williams
Morgan Lewis & Bockius LLP

Jonathan Wilt
Morgan Lewis & Bockius LLP

On May 19, 2025, the US Department of Justice announced the establishment of the Civil Rights Fraud Initiative, which will "utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws." Recipients of federal funds should take stock of their policies and practices relating to DEI and be prepared with a strategy to protect themselves from this new risk.

As explained in our May 22, 2025 LawFlash on the US Department of Justice's establishment of the Civil Rights Fraud Initiative, the False Claims Act (FCA) is the DOJ's primary fraud enforcement tool. Per the May 19 memorandum announcing the new initiative, DOJ seeks to advance the use of the FCA as an enforcement tool to target "race- and sex- based preferences under the guise of so called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil-rights laws of this Nation."

The memo states that FCA liability "is implicated when a federal contractor or recipient of federal funds knowingly violates civil rights laws—including but not limited to Title IV, Title VI, and Title IX of the Civil Rights Act of 1964—and falsely certifies compliance with such laws." This statement is significant when considered in the light of President Trump's Executive Order 14173 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity), which mandates that federal agency heads require every contractual counterparty or grant recipient to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws" and include in every contract and grant award a "term requiring the contractual counterparty 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 decisions" under the FCA.

The administration has already initiated one investigation of this kind into an educational institution. On May 13, DOJ issued a civil investigative demand to Harvard University stating that DOJ was investigating the possibility of False Claims Act violations related to Harvard's compliance with the US Supreme Court's 2023 decision in *Students for Fair Admissions v. President and Fellows of Harvard College*. It is critical for any private recipients of federal funding, including corporations, foundations, and educational institutions, to be proactive and prepare for potential DOJ action.

Anticipating Potential Whistleblower Claims

In the memorandum, DOJ called for private enforcement of the initiative's goals through qui tam FCA actions, "strongly encourag[ing]" such filings and noting that "the whistleblower typically receives a portion of the monetary recovery."

The focus in the memorandum and press release on the importance of qui tam relators signals an understanding that internal whistleblowers likely will be key to future enforcement actions that advance the initiative's goals. This could come in the form of corporate or university insiders. However, the FCA does not require relators to be insiders or even individuals. Thus, qui tam FCA lawsuits could be brought by private organizations that support the administration's agenda. Similarly, outside ideological groups could work to draw DOJ attention to particular actors through press campaigns, investigation requests, or the like—seeking to prompt government investigations that could result in an FCA case.

The memorandum's focus on qui tam cases also suggests that the government may be more willing to intervene in such matters. Given uncertainty in the legal community regarding the viability of a hypothetical FCA-DEI action, the government has an incentive to identify and pursue cases it identifies as being "winnable," perhaps even where the potential monetary recovery would be relatively small.

Agreement Terms Already Being Proposed

Companies and institutions across the country are already encountering new agreement terms in response to the January 21 Executive Order "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (EO 14173) underlying the creation of the Civil Rights Fraud Initiative. We are aware of a variety of different terms implementing the EO's certification requirement that track the EO's language to greater or less degrees; there has been inconsistency in the terms added by different agencies and individual contracting/agreement officers. When these new terms appear in a solicitation or agreement modification, option exercise, or renewal, recipients of federal funds should carefully evaluate the terms and be particularly aware of the risks of potential actions.

Companies will have to bear in mind that, although the new, DEI-specific terms will only be in place prospectively, nothing prevents DOJ from bringing an FCA action for claims allegedly rendered false by a recipient's DEI programs *before* the executive order was implemented. In other words, if an agreement required compliance with federal laws and regulations (e.g., Title VII) while the funding recipient (e.g., a contractor or grant recipient) operated a DEI program, DOJ could potentially argue that the claims were rendered legally false by the discriminatory nature of the program, even though the agreement did not itself warn that DEI programs may violate Title VII. Such claims would face obstacles even more acute than post-EO 14173 actions, but the ideological backdrop and the problems that can be inflicted on an institution by an investigation on its own mean the threat of pre-2025 DEI-FCA liability must be considered.

What Recipients of Federal Funds Can Do Today

In light of these developments, recipients of federal funds should be prepared to reduce their risk.

Although there are multiple potential defenses and arguments that individuals and entities subject to DOJ enforcement actions for violating the FCA may raise, DOJ investigations and subsequent litigation, even in their early stages, are burdensome and expensive to defend. To best situate themselves in preparation for any potential investigation or litigation, federal contractors and other federal funding recipients should take additional immediate, strong actions to guard against FCA liability risk.

First, organizations should consider retaining labor and employment counsel to review their DEI-related policies and programs in a privileged audit to ensure compliance with civil rights and anti-discrimination laws. Counsel can then advise the organization on their conclusions. The results of this privileged audit should be documented in a privileged memorandum. The audit's findings should then separately be reviewed and documented in a *non*-privileged business assessment that can form the basis for go-forward good faith certifications. (We have recently advised multiple clients, including a large, global technology corporation, on this process.)

Second, organizations should review the process and controls in place to assure that new contract terms relating to compliance with DEI laws are reviewed and tracked.

Third, compliance systems must be evaluated to ensure they have mechanisms for identifying and addressing civil rights and discrimination concerns (including internal whistleblowers).

Fourth, funding recipients should consult counsel on compliance certifications and assessments.

Fifth, organizations should also develop a plan to respond to potential criminal or civil investigations.

Stay Informed

Visit our US Administration Policies and Priorities resource center and subscribe to our mailing list for the latest on programming, guidance, and current legal and business developments involving the Trump-Vance administration.

Related Content

Resource Kits

- Federal Government Contracting Resource Kit — False Claims Act
- Workplace Diversity, LGBTQ, and Racial and Social Justice Resource Kit

State Law Surveys & Regulatory Trackers

- Presidential Executive Actions Tracker
- Executive Orders, EEOC Letters, and Other Actions Concerning Law Firms Tracker

Lisa C. Dykstra, Partner, Morgan Lewis & Bockius LLP

Lisa C. Dykstra is an experienced litigator and trial attorney who represents pharmaceutical manufacturers, medical device companies, healthcare providers, and government contractors. Her practice focuses on internal and government investigations, criminal proceedings, complex and parallel civil litigation, regulatory enforcement proceedings, and government contracting disputes. As a key member of the firm's crisis management team, Lisa plays a vital role in developing and executing strategies to manage and resolve large-scale, high-profile crisis situations. Lisa's matters involve cases arising under the False Claims Act (FCA); the Federal Food, Drug, and Cosmetic Act (FDCA); the Anti-Kickback Statute (AKA); the Foreign Corrupt Practices Act (FCPA); Antitrust laws; and the Medicaid Rebate Statute.

Sharon Perley Masling, Partner, Morgan Lewis & Bockius LLP

Sharon Perley Masling, a co-leader of Morgan Lewis's culture and DEI: strategy, litigation, and investigations practice, helps employers create safe, respectful, diverse, and inclusive workplaces while mitigating legal risk. Recognized as an Employment and Discrimination Law Trailblazer by the *National Law Journal* for her ability to identify novel legal issues and develop innovative solutions, Sharon created and led the firm's DEI, Reproductive Rights, and Labor and Employment COVID-19 Task Forces. Given her former role as chief of staff and senior counsel to a commissioner at the Equal Employment Opportunity Commission (EEOC), Sharon also provides strategic advice and insight on the enforcement of all employment civil rights laws.

Alexander B. Hastings, Partner, Morgan Lewis & Bockius LLP

Alex Hastings advises companies of all sizes that interact with US federal, state, and local government agencies. He focuses his practice on counseling government contractors in the defense, technology, energy, life sciences, and commercial sectors. Alex has a deep background advising clients in complex government contract M&A deals and routinely guides clients in regulatory matters facing companies that provide goods or services to government agencies, accept government funding, or otherwise collaborate with government entities.

Bradie R. Williams, Associate, Morgan Lewis & Bockius LLP

Bradie R. Williams defends clients in high-stakes litigation and sensitive government investigations across a range of industries. Bradie defends companies and individuals in enforcement actions and whistleblower litigation alleging violations of federal law, complex parallel civil litigation, criminal investigations, state attorney general investigations, and business and corporate disputes. Bradie maintains an active pro bono practice, representing clients in voting rights matters and individuals seeking asylum in the United States.

Jonathan Wilt, Associate, Morgan Lewis & Bockius LLP

Jonathan "JC" Wilt is part of the firm's litigation team and represents clients in diverse areas, including complex commercial disputes, government investigations, and white collar litigation. After law school, he clerked for Judge Marjorie O. Rendell of the US Court of Appeals for the Third Circuit and Judge Paul S. Diamond of the US District Court for the Eastern District of Pennsylvania.