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Federal Contractors and Other Recipients of Federal Government Funds, Be Wary: DEI Initiatives May Lead to Liability Under the False Claims Act

On May 19, the U.S. Department of Justice (DOJ) announced the Civil Rights Fraud Initiative, a new enforcement campaign aimed at holding recipients of federal funds accountable for alleged civil rights violations under the False Claims Act (FCA). Introduced through a memorandum from Deputy Attorney General Todd Blanche, the initiative signals a significant expansion in how the DOJ interprets and enforces civil rights compliance and how the DOJ intends to combat allegedly "illegal diversity, equity and inclusion (DEI)." Specifically, the memo sets forth the DOJ's view that a federal contractor or other federal fund recipient may violate the FCA if it "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."

The FCA prohibits the knowing submission of false claims to the government. The new DOJ memo states that federal contractors or recipients of federal funds may violate the FCA by "certify[ing] compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, [sex], ethnicity, or national origin." The memo claims that "many corporations and schools continue to adhere to racist policies and preferences—albeit camouflaged with cosmetic changes that disguise their discriminatory nature," which the DOJ seeks to combat through use of the FCA.

The DOJ has tasked its Civil Rights Division and the Civil Division's Fraud Section to "aggressively pursue" the initiative and has asked each of the 93 U.S. Attorney's Offices to identify an Assistant United States Attorney to advance these efforts. The DOJ will partner with other federal agencies, and state and local law enforcement, underscoring the breadth of this initiative. The memo also references the *qui tam* provisions of the FCA and "strongly encourages" relators to come forward and "protect the public interest by filing lawsuits and litigating claims under the False Claims Act—and, if successful, sharing in any monetary recovery." Entities found liable under the FCA face mandatory treble damages, significant penalties, and potential exclusion from future federal funding.

Associated Risks

The DOJ's memo raises considerable legal and operational risks for a wide range of corporations and organizations that receive federal funds.

- Organizations that receive federal funding must now carefully evaluate whether their policies and practices—particularly those related to DEI—could be interpreted as noncompliant with federal civil rights legislation that has existed for 60+ years and that historically was used to promote DEI.
- Examples expressly cited in the DOJ memo for potential enforcement action include:
    - a university that accepts federal funds while encouraging antisemitism;
    - DEI initiatives that permit transgender individuals to use bathrooms other than the bathroom associated with the gender assigned to them at birth; or
    - DEI initiatives that allow transgender individuals to play sports other than against other individuals who share the gender assigned to them at birth.

- The DOJ's active encouragement of whistleblower (*qui tam*) actions is likely to significantly increase the volume of investigations and lawsuits under the FCA. In 2024, whistleblowers were awarded more than $400 million in FCA *qui tam* actions. The expansion of liability under the FCA to include civil rights fraud likely will lead to significant litigation especially since many companies have continued their DEI efforts in their pre-2025 form or renamed and reconstituted them, with a continued focus on promoting equity and inclusion for all, including for historically underrepresented groups.

Potential Defenses

Although the new initiative certainly creates significant and heightened risk, the DOJ or a relator will need to establish knowledge and materiality to hold an organization liable for an FCA violation. The DOJ's theory of FCA liability will likely be that, by receiving federal funds, an organization either expressly or impliedly certified its compliance with civil rights laws. In such cases, involving so-called "false certification" or "legal falsity," an entity may still be able to argue that it did not knowingly violate the law and that such certifications were not material to the government's payments.

Because a violation must be knowing, there may be good faith defenses regarding the correct interpretation of the applicable legal requirements and the organization's knowledge of its noncompliance with the correct interpretation. Under the Supreme Court's 2023 FCA decision in *SuperValu Inc.*, the DOJ would need to prove, at a minimum, that an organization acted with reckless disregard or "conscious of a substantial and unjustified risk that [its] claims [we]re false, but [it] submit[ted] the claims anyway."

Under the Supreme Court's 2016 decision in *Escobar*, there may also be a good faith defense that any noncompliance with applicable legal requirements was not "material" to the government's payment of federal funds. Under *Escobar*, "[t]he materiality standard is demanding" and would require the DOJ to prove that, had the government known about the noncompliance, it would not have provided the funding. Moreover, a mere assertion by the government that a particular representation is "material" (even if a recipient of federal funds acknowledges the government's view) does not necessarily establish materiality, which is ultimately an issue of law and fact for a court.

Practical Considerations for Federal Contractors and Fund Recipients

In light of the DOJ's expanded enforcement approach, federal contractors and other organizations receiving federal funding should take prompt and thorough steps to assess their compliance with applicable civil rights obligations. This includes:

- reviewing and, where appropriate, updating internal policies and procedures to ensure alignment with the DOJ's current interpretation of Title IV, Title VI, and Title IX of the Civil Rights Act of 1964;
- organizing internal briefings with management and staff that detail the DOJ's expanded approach, including the risks associated with improperly managed DEI programs, initiatives, and internal practices that could be construed as discriminatory;
- auditing the statements made in certifications and funding applications to confirm they accurately reflect current practices—particular attention should be given to DEI programs and related initiatives, with an eye toward identifying whether any of their features could pose potential exposure under the FCA;
- reviewing how DEI initiatives are described in public-facing materials such as websites, recruitment messaging, and policy statements—these descriptions should accurately reflect the organization's internal practices while accounting for legal obligations for civil rights compliance;
- preparing for the possibility that federal agencies may issue proposed certifications related to civil rights compliance in the context of contract modifications related to the procurement of goods and/or services through federal funds;
- providing managers and human resources professionals with clear guidance on how to handle questions or concerns about DEI programs and civil rights compliance, keeping in mind the FCA's anti-retaliation provisions;
- providing employees with access to safe and well-defined reporting channels so that employees can raise issues internally before resorting to litigation; and

- reviewing internal investigation protocols to ensure that appropriate procedures exist for receiving, addressing, escalating, and resolving such complaints.

Looking Forward

The Civil Rights Fraud Initiative reflects a significant shift in enforcement priorities and underscores the DOJ's willingness to use the FCA to "aggressively pursue" alleged civil rights law violations by recipients of federal funds. However, it is essential to recognize that not all DEI policies and practices are illegal. Many of these initiatives can be crafted and applied to expand access to opportunities, eliminate unnecessary barriers, and foster inclusive environments, all objectives that are consistent with civil rights laws, as currently interpreted. When designed with clear, nonpreferential, and merit-based criteria, these activities promote equity while adhering to current legal boundaries. Organizations that diligently document the purpose, methodology, and outcomes of their initiatives can demonstrate that these things serve as a tool for broadening opportunity for all rather than as a means for improperly assigning benefits or burdens on race, ethnicity, national origin, or gender-based preferences.

Organizations should remain attentive to further guidance and developments in this area, particularly as investigations and litigations begin to take shape.

Given the evolving risk environment, federal contractors and funding recipients are strongly encouraged to consult legal counsel to assess their current compliance posture and evaluate internal processes. Day Pitney is closely monitoring these developments and is available to assist clients in navigating the potential implications of this initiative.

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