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BLOG

DEI and False Claims Act Liability: EO Highlights Potential Exposure

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AT A GLANCE

On March 26, 2026, President Trump signed a sweeping Executive Order titled "Addressing DEI Discrimination by Federal Contractors" (the EO) that attaches binding contractual consequences to diversity, equity, and inclusion (DEI) practices in federal contracting. By April 25, 2026, federal contractors, subcontractors, and lower-tier subcontractors should expect to be required to agree—as a term of their contracts—not to engage in "racially discriminatory DEI activities," to open its books and records to government compliance audits, and to acknowledge that any violation is material to the government's decision to pay—a critical element for False Claims Act (FCA) enforcement.

This EO marks yet another escalation from the Trump Administration's earlier executive actions. Prior orders eliminated DEI programs within the federal government and signaled enforcement intentions against specific private entities. This EO extends the prohibition to the entire federal contracting ecosystem and arms the government and private whistleblowers with concrete enforcement tools.

WHAT THE EO PROHIBITS

The EO targets what it defines as "racially discriminatory DEI activities"—disparate treatment based on race or ethnicity in any of the following areas:

- Recruitment and employment, including hiring and promotions.
- Contracting, including vendor agreements.
- Program participation, which is broadly defined to include training, mentoring, leadership development, educational opportunities, clubs, associations, and similar programs sponsored by the contractor or subcontractor.
- Allocation or deployment of an entity's resources.

Notably, the EO does not prohibit all DEI activities, only those involving disparate treatment based on race or ethnicity. However, the definitions are broad enough to potentially reach contractor diversity programs, employee resource groups, affinity networks, mentorship programs with race-based eligibility criteria, philanthropic giving, and community

investment initiatives. The breadth of the definitions and the severity of the enforcement mechanisms may effectively discourage a wider range of diversity-related programs and activities than the text of the EO alone would suggest.

WHAT THE EO REQUIRES

Within 30 days (by April 25, 2026), all federal agencies must incorporate a mandatory clause into contracts, contract-like instruments, subcontracts, and lower-tier subcontracts. The clause requires contractors to:

- **Certify compliance.** Agree not to engage in any racially discriminatory DEI activities.
- **Open their books.** Furnish all information and reports, and provide access to books, records, and accounts for compliance verification.
- **Police their subcontractors.** Report any subcontractor's "known or reasonably knowable" violations and take remedial actions directed by the contracting agency.
- **Report litigation.** Notify the agency of any subcontractor lawsuit that "puts at issue, in any way, the validity of this clause."
- **Accept FCA materiality.** Acknowledge that compliance is "material to the Government's payment decisions" under the FCA—the statutory predicate for treble damages and whistleblower suits.

The EO also directs the Federal Acquisition Regulatory Council to amend the FAR to incorporate the mandatory clause and to issue interim deviation guidance within 60 days (by May 25, 2026). There is a notable timing gap: agencies must include the clause in contracts before the FAR Council issues its interim guidance, which may create implementation uncertainty in the near term.

ENFORCEMENT: WHERE THE RISK IS GREATEST

The EO establishes an aggressive, multi-layered enforcement framework that contractors should not underestimate.

False Claims Act liability. The most significant enforcement risk stems from the mandatory clause's acknowledgment that compliance is material to the government's payment decisions. This language is designed to eliminate one of the most common defenses in FCA cases—the argument that the violated requirement was not material to the government's decision to pay. The Attorney General is directed to consider bringing FCA enforcement actions and, notably, to ensure "prompt review" of whistleblower *qui tam* suits, including by deciding on intervention "to the maximum extent practicable" within the 60-day seal period. Contractors should be aware that this creates a dual enforcement channel: the government itself may bring suit, and private whistleblowers—including disgruntled employees and competitors—may bring their own actions under the FCA's *qui tam* provisions.

Suspension and debarment. Agencies are directed to "take appropriate action to suspend and debar" noncompliant contractors and subcontractors. This language indicates the Trump Administration expects aggressive, not discretionary, use of these remedies. A government-wide debarment can effectively remove a company from the federal marketplace.

Contract termination. Contracting agencies are directed to cancel, terminate, or suspend contracts—in whole or in part—for violations.

Sector-specific scrutiny. The Office of Management and Budget, in coordination with the Attorney General, the EEOC Chairman, and the Assistant to the President for Domestic Policy, will identify "economic sectors that pose a particular risk" and issue additional compliance guidance for those sectors. Contractors in industries with prominent diversity programs, such as professional services, technology, healthcare, and financial services, should anticipate heightened scrutiny.

The EO represents a doubling-down by the Administration: DEI-related practices that were once encouraged—or even required—under prior administrations remain a high-priority basis for potential contract termination, debarment, and FCA liability. The compliance timeline is compressed, the definitions are broad, and the enforcement tools are potent. Contractors that act quickly to assess their exposure, adjust their programs, and prepare for the new

contractual requirements will be best positioned to manage the risks ahead. We will continue to monitor developments—including OMB guidance, FAR Council rulemaking, and sector-specific designations—and will provide updates as they occur.

If you have any questions or need assistance, please contact the authors or your Winston & Strawn relationship lawyer.

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