Proskauer

DEI and Government Contractors: A High-Stakes Shift

Government Contractor Compliance & Regulatory Update on **February 12, 2025**

While much of the focus on President Trump's recent Executive Order on **Ending Illegal Discrimination and Restoring Merit-Based Opportunity** (the "EO") has been on its elimination of race and sex-based affirmative action requirements for federal contractors, another provides carries even greater potential implications. The EO also introduces new contractual obligations related to diversity, equity, and inclusion ("DEI") efforts and signals an intent to use the False Claims Act (FCA) as a tool to target government contractors for what it views as "illegal" DEI initiatives—potentially subjecting those companies to substantial financial and even criminal penalties.

Government contractors are no strangers to being test subjects for Executive policy initiatives. Past administrations have leveraged the federal government's immense purchasing power to enforce requirements that couldn't gain traction in Congress. From paid leave and minimum wage mandates to COVID-related requirements, federal contractors have consistently faced unique obligations and consequences that don't apply to their non-contractor counterparts. The same practice is playing out here.

Although the exact details of the new contractual requirements are still pending, government contractors are urged to begin preparations now to minimize potential business disruptions and significant liability risk. Below is a Q&A to further clarify these developments.

Q: What exactly is this new contractual requirement?

A: The EO includes a provision stating that "[t]he head of each agency shall include in every contract or grant award:

(A) 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 for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

So, breaking this down, there are two components at issue. First, contractors will have to certify to the federal government that they do not operate programs "promoting DEI" that violate federal anti-discrimination laws.

Second, contractors will have to agree in their contracts – either new contracts or potentially in modifications to existing contracts – that their compliance "in all respects" with all applicable federal anti-discrimination laws is "material" to their receipt of money from the federal government.

Taken together, this means contractors, as a condition of receiving federal funds from the federal government, will have to certify that any programs they have that "promote DEI" do not violate federal anti-discrimination laws.

Q: Why is this such a big deal?

A: The reference to the U.S. Code in the EO is to a provision of the False Claims Act ("FCA") which establishes liability for anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement ***material to an obligation to pay or transmit money or property to the Government***, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." (emphasis added).

So, the EO, by requiring contractors to agree that compliance with the terms of Federal anti-discrimination laws is material to the government's payment decisions, seeks to establish that a false DEI certification will constitute a false claim under the FCA and subject the contracting entity to the FCA's penalties.

Q: Can anyone besides the contractor be held liable for FCA violations?

A: Yes. In addition to the contractor, "any person" (*e.g.,* an employee) who makes a false certification, statement, or record, could be individually liable for FCA violations.

Q: What kind of penalties are involved?

A: Under the FCA, those submitting false statements are subject to a civil fine between $14,308 and $28,619 per violation, as well as "3 times the amount of damages which the Government sustains because of the act of that person."

Moreover, businesses and individuals can also be held criminally liable under the FCA. Potential penalties include prison sentences of up to 5 years, as well as fines of up to $250,000 for individuals and $500,000 for businesses for each felony offense, and $100,000 to $200,000 for misdemeanors.

Finally, as a result of an FCA violation, a contractor could face potential suspension or debarment from the federal contract award process.

Q: What damages could the government incur due to an inaccurate statement regarding a contractor's DEI efforts?

A: It appears that the current Administration is taking the position that any decision by the federal government to make a payment to a contractor is "influenced" (that's how "material" is defined by the FCA) by the contractor's compliance with federal anti-discrimination laws. As a recent GSA memorandum stated: "compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code." The EO provides that contractors will be required to agree that such compliance is a material to all payments.

It is possible the government will argue that damages should be measured based on the total value of the contract under the theory that the federal government was fraudulently induced into entering a contract, or continued to pay during the term of the contract, due to the contractor's misrepresentation about its DEI efforts and/or compliance with anti-discrimination laws.

Q: Is there much risk here? How does the government determine if a certification is false?

A: Well, among other ways, the FCA contains a bounty program. The law permits individuals to bring what are called "*qui tam*" actions on behalf of the government as *qui tam* "relators." To bring a *qui tam* suit, a plaintiff must file a complaint under seal in the name of the government. Within 60 days of receiving the complaint and any "material evidence and information," the government must decide whether to intervene in the action or pursue the claim through an alternative remedy (such as an administrative proceeding). If the government declines to intervene in the action, it must notify the court, "in which case the person bringing the action [will] have the right to conduct the action."

Individuals are incentivized to bring *qui tam* claims because they can personally receive a significant percentage – up to 30% – of the government's total recovery.

So, employees or others with non-public information who have a basis to assert a contractor's DEI efforts are discriminatory can bring a relator claim alleging that the contractor is promoting illegal DEI and is not in material compliance with federal anti-discrimination laws.

Q: What exactly will contractors be certifying?

A: That's a good question and something we won't know for sure until we see further government action. The EO isn't clear on what "programs promoting DEI" means, though it specifically calls out "preferences," "mandates," and "workforce balancing" as prohibited activities.

In another Executive Order, the Administration defined "Discriminatory equity ideology" as "an ideology that treats individuals as members of preferred or disfavored groups, rather than as individuals, and minimizes agency, merit, and capability in favor of immoral generalizations." A different Executive Order defined "DEI office" as one that is established for the purpose of "influencing hiring or employment practices at the institution with respect to race, sex, color, or ethnicity, other than through the use of color-blind and sex-neutral hiring processes." Other statements from the Administration indicate that DEI may be considered to mean any effort that could be seen as conferring some benefit or preference based in some part on a protected characteristic. For example, in a recent statement, the White House described DEI in hiring and promotion as relating to "factors that favor some Americans over others." In addition, on February 5, 2025, newly-appointed Attorney General Pam Bondi defined the term "illegal DEI and DEIA preferences, mandates, policies, programs" in a memorandum on "Ending Illegal DEI and DEIA Discrimination and Preferences" as "programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex."

Given that the EO requires agencies to submit a plan identifying potential "regulatory action and sub-regulatory guidance" to "encourage the private sector to end illegal discrimination and preferences, including DEI," we are likely to see agency guidance issued in the coming weeks or months that provides at least some clarity to contractors on the types of efforts that may be considered unlawful.

Q: How will contractors actually make this certification?

A: It hasn't been announced. In the past, contractors have used the OFCCP's Contractor Portal to certify compliance with various OFCCP obligations, but they also submit separate certifications through the Government's SAM system.

Q: Have these changes already taken effect?

A: No. Agency heads are ordered to include the new provisions in contracts and grant awards, but the provisions do not appear to have been developed yet. Typically such provisions are developed by the Federal Acquisition Regulatory Council.

It is also important to note that the EO speaks to including the new terms in "every contract or grant award." It is unclear whether this means the new provisions will apply only to future contracts, or if agencies will issue modifications to existing contracts as well.

Q: Are there additional risks posed by this EO?

A: Yes. Employees can bring claims under the FCA against an employer alleging they have been "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" because of their protected activity under the FCA, which includes taking acts in furtherance of an FCA action or other efforts to stop a violation of the FCA.

Successful claimants are entitled to remedies including (i) "reinstatement with the same seniority [the whistleblower] would have had but for the discrimination;" (ii) twice the amount of back pay and interest on the back pay; and (iii) compensation for "any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."

Accordingly, federal government contractors will have to be attuned to employee complaints about DEI efforts, understanding that, in addition to other concerns, they may constitute protected activity under the FCA and create additional liability risk.

Q: What should contractors do now?

A: Contractors would be well-advised to start preparing now for this new development. At a minimum, contractors should carefully account for and evaluate their DEI programs and initiatives to determine the risks attendant to each and ensure they feel comfortable certifying that those programs are in compliance with anti-discrimination laws. Contractors should consider conducting these assessments in consultation with legal counsel to preserve privilege associated with their review.

Contractors should also be sure to inform anyone at their companies who is involved in government contracting or who may receive a modification order of the new development and instruct them to look for and notify appropriate personnel should the new term be included in a new contract or modification order to avoid a circumstance where contractors become subject to the new requirements without full organizational knowledge and awareness.

View original.

Related Professionals

- **Guy Brenner**
  Partner