

Understanding False Claims Act Exposure from DEI Programs

2025 UT-Battelle Labor & Employment Training
August 14, 2025

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Agenda

- What is the False Claims Act (FCA) and How does it work?
- What is Diversity Equity and Inclusion (DEI) and how did we get to the point that these to concepts intersect?
- What are the risks?
- How do we manage them?

False Claims Act Basics

Its origins/purpose have a history...

- The False Claims Act was enacted during the Civil War to combat the fraud perpetrated by companies that sold supplies to the Union Army.
- War profiteers were shipping boxes of sawdust instead of guns, for instance, and swindling the Union Army into purchasing the same cavalry horses several times. “You can sell anything to the government at almost any price if you’ve got the guts to ask,” boasted one profiteer who made millions unloading moth-eaten blankets to the military.
- President Abraham Lincoln strongly advocated passage of the False Claims Act
- It contained “qui tam” provisions that allowed private citizens to sue, on the government’s behalf, companies and individuals that were defrauding the government.
- First version of the statute was passed in 1863, and has been revised numerous times.

Why is it called “qui tam”?

- Qui tam laws originated in the Middle Ages in England, when the king did not have police to enforce the law. The king instead relied on private citizens as private prosecutors to bring qui tam cases and paid them a bounty if they won.
- “qui tam,” which is short for the Latin phrase *“qui tam pro domino rege quam pro se ipso in hac parte sequitur.”* That roughly translates to “he who brings an action for the king as well as for himself.”
- Those who filed lawsuits are known as “relators.”
- The claim belongs to “the king” or in this instance, the United States.
- A relator receives a “bounty” or as we call it now a “relator’s share.”

The False Claims Act is a federal statute

- **31 U.S.C. § 3729**
 - *(a) Liability for Certain Acts.—(1) In general.—Subject to paragraph (2), any person who—
(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.....*
- Jurisdiction is exclusively in Federal Court
- Federal Rule of Civil Procedure Apply

How does the process work?

- The filing of a complaint by the relator.
- Investigation by the government.
- Decision by the government on intervention or declination.
- Filing of compliant by the government or service of complaint by relator.
- Litigation.

What are the elements to Prove a False Claims Act Violation?

- To establish this type of False Claims Act violation, the plaintiff must show the following:
 1. A false claim.
 2. The false claim was made with the requisite scienter (or knowledge that it was false).
 3. The false claim is material to payment.
 4. The false claim caused the government to pay money.
- The Statute contains seven (7) types of conduct that can constitute a false claim.

Broad knowledge standard

- Liability under the FCA requires a defendant to act “knowingly,” which the statute defines broadly to include:
 - Actual knowledge.
 - Deliberate ignorance of the truth or falsity of the information.
 - Reckless disregard of the truth or falsity of the information.
- Specific intent to defraud is not required. 31 U.S.C. § 3729(b)(1).

False certification liability—*Escobar* precedent

Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016)

- Key issues: **implied certification & materiality**
- Implied certification liability does not depend on whether a requirement is labeled a condition of payment (overruling *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) and similar cases).
 - “What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government’s payment decision.” *Id.* at 1996.
 - But this knowledge of materiality need not be “actual knowledge.” *Id.* at 2001-02.
- Reaffirms “‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property” *Id.* at 2002
- Materiality can be objective OR subjective:
 - Would a reasonable person attach importance to it in deciding whether to pay?
 - Would the government attach importance to it in deciding whether to pay even if a reasonable person would not?

Investigation by the Government

- Government is REQUIRED to investigate allegations in the complaint.
- Sixty days to complete the investigation under seal—can be extended.
- Usually extended in six month increments.
- Often as long as two to three years under seal.
- Why remain under seal?
- Why do they take so long?
- The government has unique investigative tools specifically authorized in the False Claims Act. These are known as Civil Investigative Demands.
 - Document Requests
 - Depositions
 - Interrogatories
 - These are not normal “discovery” tools like civil litigation—these are investigative tools for the government.

Intervention/declination

- At the end of the investigation, the government decides whether to “intervene” or “decline to intervene”—what does that mean?
 - To intervene means that the government will essentially step into the shoes of the relator and pursue the case.
 - If the government “declines” the case—the relator has the option to continue litigating the case, but the government is not really “out” as the claim still belongs to the government.

What about “retaliation” claims?

- Often referred to as an “H” claims.
- This claim actually belongs to the relator, not the United States.
- Claims often rise and fall on whether there was “protected activity” as the definition is different in this context than other employment contexts
- Causation is always an issue

Negotiation

- Settlement is very common
- Timing can vary
- Objectives of the various parties (DOJ, OIG, MFCU (NAMFCU), relator, defendant)
- Key negotiating issues
 - Civil monetary damages
 - Scope of release
 - Administrative remedy
 - Relators' share
 - Attorneys' fees
- DOJ priorities
 - Make government whole
 - Deter fraud
 - Consider amount of defendant's cooperation

What kind of damages can the government recover?

- A company found in violation of the FCA is liable for:
 - The costs of bringing the civil action to recover penalties and damages.
 - A civil penalty in the amount between \$11,803 and \$23,607 (as adjusted from time to time), plus three times the amount of damages the government sustains.
 - How to calculate the “singles” is always in dispute
 - In settlement the multiplier range will be between 2-3. If a client wants a release under the FCA, there MUST be a multiplier.
- There is a circuit court split on the method used to calculate the doubling or trebling of damages when there are potential offsets. Courts use either:
 - Gross multiplier rule.
 - Net multiplier rule.

What kind of award can the relator recover?

- If the FCA case is successful, the relator stands to collect a percentage of any judgment or settlement regardless of whether the government intervenes in the action. The relator can collect:
 - Between 25% and 30% of the proceeds of any judgment or settlement if the government does not intervene.
 - Up to 25% of the proceeds if the government intervenes. The specific amount depends on the extent to which:
 - Relator counsel contributed to the prosecution of the action.
 - The action was based on disclosures and information provided by the relator.
- Reasonable expenses and attorneys' fees.
 - This is separately negotiated between defendant and Relator and not included in the settlement agreement

What are some examples of typical cases?

- Healthcare (e.g., Medicare, TRICARE)
 - Worthless Services
 - Anti-Kickback
 - Off-Label marketing
 - Up-coding
- Government contracts
 - Unqualified employees
 - Certifications on key FAR/Statutory provisions
 - Including costs
- Environmental regulations
 - Claims of compliance for grants/other funding

Certification of Compliance

- Is there Explicit or Implicit Certification of Compliance?
- Is the compliance term material to payment decision?
- Was the certification knowingly false at the time it was made?

The natural question: *what kinds of rules of compliance can be the subject of certification. That leads us to the question of Civil Rights compliance, and DEI*



DEI

Managing Risk in the Shadow of FCA Enforcement

HOW DID WE GET HERE?

Students for Fair Admissions v. Harvard

HELD: Colleges and universities cannot consider race when making student admissions decisions.



HOW DID WE GET HERE?

EEOC Statements

EEOC Response 2023

The Harvard decision does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background.

It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

Commissioner Andrea Lucas Response

Today's Supreme Court decision rejects diversity interests as justifications for race-based university admissions decisions. This brings the rules governing higher education into closer parallel with the more restrictive standards of federal employment law. Employers . . . are not permitted to take employment actions motivated by protected characteristics.

A general interest in diversity or "equity" is not sufficient to allow race- or sex-motivated employment actions. Nor are references to societal discrimination, or differences between the composition of a company's workforce and "society," or the company's customer base.



Mark Cuban · Jan 28, 2024

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I've never hired anyone based exclusively on race, gender, religion.

I only ever hire the person that will put my business in the best position to succeed.

And yes, race and gender can be part of the equation. I view diversity as a competitive advantage



Andrea R. Lucas

@andrealucasEEOC · [Follow](#)

@mcuban, EEOC Commissioner here. Unfortunately you're dead wrong on black-letter Title VII law. As a general rule, race/sex can't even be a "motivating factor"—nor a plus factor, tie-breaker, or tipping point. It's important employers understand the ground rules here.

10:31 AM · Jan 29, 2024



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1/21/25

- Says illegal DEI diminishes the importance of individual merit, aptitude, hard work, and determination when selecting people for jobs and services and discriminates in favor of historically disadvantaged groups and against white men.
- Interprets DEI programs & policies as “violating civil rights laws” and directs agencies to take enforcement action.
- Directs federal agencies to identify violators.
- Requires agencies to require contractors to: (1) agree that “that compliance with all applicable federal anti-discrimination laws is “material to the government’s payment decisions” for purposes of the FCA, and (2) certify that the counterparty or recipient does not operate “any programs promoting DEI that violate any applicable Federal anti-discrimination laws

EO 11473: ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT-BASED OPPORTUNITY

TRUMP ADMINISTRATION

DOJ/AG Memo – “Ending Illegal DEI and DEIA Discrimination and Preferences”

DOJ will investigate, eliminate, and penalize illegal DEI preferences, mandates, policies, programs, and activities in the private sector.

Focus is on programs that exclude or divide individuals based on race or sex and is NOT intended to prohibit educational, cultural or historical observances that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.

May 19, 2025 Memo from Deputy AG Todd Blanche

Promises “Vigorous Enforcement” of the FCA ~~Against~~ Those Who Violate the Civil Rights Laws in Two Instances:

Federal contractor or recipient of federal funds falsely certifies compliance with civil rights laws and violates those laws.

Contractors or grantees “certify compliance with civil rights laws while knowingly engaging in racist preferences, policies, programs, and activities, including through . . . DEI programs.”


AG Bondi July 29, 2025 Memo



Office of the Attorney General
Washington, D.C. 20530

July 29, 2025

MEMORANDUM FOR ALL FEDERAL AGENCIES

FROM: THE ATTORNEY GENERAL 
SUBJECT: GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING
REGARDING UNLAWFUL DISCRIMINATION

I. INTRODUCTION

One of our Nation's bedrock principles is that all Americans must be treated equally. Not only is discrimination based on protected characteristics illegal under federal law, but it is also dangerous, demeaning, and immoral. Yet in recent years, the federal government has turned a blind eye toward, or even encouraged, various discriminatory practices, seemingly because of their purportedly benign labels, objectives, or intentions. No longer. Going forward, the federal government will not stand by while recipients of federal funds engage in discrimination.

This guidance clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion ("DEI") programs.¹ Entities receiving federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race, color, national origin, sex, religion, or other protected characteristics—no matter the program's labels, objectives, or intentions. In furtherance of that requirement, this guidance identifies "Best Practices" as non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls; these are not mandatory requirements but rather practical recommendations to minimize the risk of violations.

Entities that receive federal financial assistance or that are otherwise subject to federal anti-discrimination laws, including educational institutions, state and local governments, and public and private employers, should review this guidance carefully to ensure all programs comply with their legal obligations.

¹ DEI programs go by other names as well, such as Diversity, Equity, Inclusion, and Accessibility ("DEIA") and Diversity, Equity, Inclusion, and Belonging ("DEIB").

Retaliation

Retaliation against non-minorities who complain about DEI and other civil rights violations is unlawful and violates the FCA.

Ensure your managers are trained to properly respond to complaints.

Likely Illegal DEI

- Employment decisions motivated in whole or in part by race, sex or other protected characteristics (preferences)
- Diversity related quotas or mandates
- Hiring or promotions that lower requirements for certain classes of people
- Hiring slates requiring certain numbers of candidates from different protected classes
- Hiring panels that require a certain number of interviewers from certain protected classes
- ERG/Affinity groups that limit access based on a protected characteristic (EVEN if the programming offered to all is the same)
- Separating employees into groups based on race, sex or other protected characteristics when administering DEI or other trainings
- Providing restricted access to mentoring, sponsorship or training/internship programs

Possibly Still Legal?

- Affinity/Employee Resource Groups open to all employees
- Using standardized criteria (education, skills, experience) for evaluating employees
- Defining the term “diversity” broadly and not focused on protected classes
- Conducting harassment and discrimination training that avoids stereotyping and presumptions about “implicit bias”
- Casting the net wide to ensure you are recruiting from a wide variety of backgrounds
- Tracking your employment data to gauge how you are doing

Recommendations

- Conduct privileged review/audit of DEI policies and programs
- Consult with counsel before making compliance certifications
- Carefully communicate changes.
- Develop an Investigation Protocol.
- Train HR and Managers on Handling DEI Opposition
- Document Employment Decisions Carefully
- Don't Overcorrect

Q&A DISCUSSION

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