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Trump Second Term: Legal Tracker

EXECUTIVE ORDER SEEKS TO IMPOSE FALSE CLAIMS ACT LIABILITY ON GOVERNMENT CONTRACTOR AND GRANTEE DEI PROGRAMS

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SUMMARY

On January 21, 2025, the Trump Administration issued an executive order entitled "Ending Illegal Discrimination and Restoring Merit Based Opportunity" ("EO"). The stated purpose of the EO is to direct the federal government to enforce the civil rights laws by taking action against "illegal" preferences and discrimination, including measures taking aim at private sector diversity, equity, and inclusion ("DEI") policies and programs. As we highlighted, the EO has significant implications for federal contractor affirmative action obligations and serves as a strong signal of the Trump administration's increased scrutiny toward private sector DEI programs. Importantly, the EO also seeks to impose False Claims Act liability on federal contractors and grant recipients who maintain DEI programs that run afoul of federal civil rights law.

SUMMARY OF THE FALSE CLAIMS ACT

The False Claims Act, 31 U.S.C. § 3729 *et seq.*, is an antifraud statute that imposes civil liability on contractors, subcontractors, and grantees (and anyone else) who knowingly submit, or cause to be submitted, a false claim for payment to the federal government. The *qui tam* provisions of the False Claims Act allow a private person — known as a "relator" — to file an action on behalf of the government. Relators are often, but need not be, "whistleblowers" who are employees of the defendant companies. If a suit is successful, the *qui tam* plaintiffs can be awarded as much as 30% of any amount recovered by the government. The False Claims Act also prohibits retaliation against employees who act as *qui tam* plaintiffs.

The consequences of violating the False Claims Act are severe and cannot be overstated. They can include treble damages, penalties of up to $28,619 per false claim, debarment and suspension from government procurement programs, and significant reputational damage. In appropriate cases, the government can and does seek individual civil liability. The conduct underlying a False Claims Act

violation also can form the basis for a parallel criminal investigation. This is in addition to the cost and distraction of responding to a False Claims Act suit or investigation.

FALSE CLAIMS ACT IMPLICATIONS OF THE EXECUTIVE ORDER

While the False Claims Act is a powerful tool for the government, it is not an all-purpose antifraud statute intended to reach all breaches of contract or violations of law, no matter how minor. Rather, it applies only to misrepresentations or omissions that are "material" to the government's decision to pay the claim. Complying with federal civil rights laws typically would not go to the "very essence of the bargain" of a government contract or grant and therefore would not be considered a material condition of payment for False Claims Act purposes.

The EO seeks to overcome this potential obstacle to establishing False Claims Act liability by instructing agencies to include a term in every federal government contract and grant that requires the contractor and grant recipient (1) "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 the False Claims Act and (2) "to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." In other words, once implemented, a contractor or grantee that falsely certifies that its DEI programs do not violate federal civil rights laws faces potential False Claims Act liability.

The EO tasks the U.S. Department of Justice ("DOJ") with delivering to the White House within 120 days of the date of the EO (i.e., by May 21, 2025) a report setting forth, among other things, a proposed enforcement plan for this initiative, which is to include a list of public companies and other institutions targeted for civil compliance investigations. The DOJ also is required to identify potential lawsuits, regulatory actions, and sub-regulatory guidance.

TAKEAWAYS

The EO has the potential to greatly increase the False Claims Act exposure of federal contractors who maintain DEI programs, especially from *qui tam* complaints filed by employees who allege discrimination as a result of an unlawful DEI program. But federal contractors also should be wary of suits from external "professional" relators, who have grown increasingly sophisticated at finding and aggregating publicly available statements and information from company websites, social media accounts, and other sources to generate lawsuits.

On the other hand, the EO leaves unanswered many important questions that are relevant to assessing the risk of liability. For example, it is not clear whether the EO applies to future contracts only or to existing contracts as well. If it does apply to existing contracts, the EO does not explain how the government would or could require contractors to adopt the amendments contemplated by the EO. The Federal Acquisition Regulation ("FAR"), which governs federal procurement contracts, limits unilateral contract modifications by the government to those that either do not materially affect the terms of the contract or those that are authorized by the contract's changes clause. And

any changes to the FAR itself would need to go through notice-and-comment rulemaking, pursuant to the Administrative Procedure Act.

Even if the government is able to insert the terms into the contract, it will face other obstacles. The Supreme Court made clear in *Universal Health Services, Inc. v. United States ex rel. Escobar* that "[a] misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." Rather, materiality is a "demanding" standard that requires the consideration of a number of factors. The EO states that it does not prevent federal contractors from engaging in First Amendment-protected speech but whether the EO implicates any constitutional rights will depend on the scope of its enforcement.

While the EO indicates that enforcement efforts will focus on programs or practices the government views as providing "race- and sex-based preferences," it does not otherwise elucidate what it would consider to be an "illegal" DEI program. Under the current law, DEI programs are not per se illegal. The Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcing most federal anti-discrimination laws, has historically taken the position that DEI programs seeking to ensure workers of all backgrounds are afforded equal opportunity in the workplace are lawful. It remains to be seen whether this position will change as the makeup of Commissioners shifts. A Democratic-appointed majority had been expected to last until 2026, but President Trump's recent firing of two Democratic-appointed Commissioners – the legality of which may be challenged – indicates that a Republican-appointed majority may soon be in place.

Any guidance issued by the EEOC or other agencies on the meaning of the federal civil rights and employment laws will not be entitled to judicial deference as a result of the Supreme Court's recent opinion in *Loper Bright Enterprises v. Raimondo*. That opinion eliminated a court's ability to apply the principles of *Chevron* deference to agency interpretations of ambiguous statutes.

CONCLUSION

Considering the uncertainties, federal contractors and grant recipients with DEI programs should nevertheless take appropriate steps to mitigate the risk of False Claims Act liability, including reviewing their DEI and supplier diversity programs and policies. BCLP's False Claims Act and Employment & Labor team will be closely monitoring developments related to the EO and are available to provide guidance.

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