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US President Donald Trump signs executive orders during an indoor inauguration parade at Capital One Arena on Jan. 20, 2025 in Washington, D.C. Donald Trump takes office for his second term as the 47th president of the United States. Photographer: Anna Moneymaker/Getty Images

Jan. 29, 2025, 4:00 AM CST

Trump's DEI Order Creates Murky Fraud Risks for Contractors

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- Order causes concerns of dual compliance, legal obligations
- Signals heightened focus on bias against 'majority' workers

Ambiguities in a Trump executive order are sowing compliance concerns among federal contractors, as the directive enables the novel potential prosecution of businesses with government pacts for fraud related to diversity practices deemed discriminatory.

President Donald Trump's sweeping Jan. 21 action revoked a decades-old executive order used to combat race and sex discrimination at federal contractor worksites and enforce affirmative action obligations.

But one of its most consequential aspects is a provision requiring private companies with federal contracts, which comprise some of the nation's largest employers like Deloitte LLP, JPMorgan Chase & Co., and Microsoft Corp., to certify that they don't have any programs "promoting" diversity, equity, and inclusion in a manner the administration believes is "illegal." Specifically, contractors and grantees must disclose that their 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.

The order opens the door to workers with inside knowledge to have the ability to sue contractors under the FCA on behalf of the US Justice Department, and seek triple damages and civil penalties if there's evidence that they defrauded the government by misrepresenting their compliance with anti-discrimination laws or Trump's executive order.

The administration could use the FCA in an unprecedented way to buttress its broader anti-bias enforcement priorities related to DEI-related practices, said Alex Hontos, a former DOJ trial attorney now a partner at Dorsey & Whitney LLP.

"That's not a statue that was typically used in that way in the past," he said. It "wasn't a viable theory" to "supercharge FCA enforcement of what you might call conventional discrimination claims" or what the government "views as discriminatory conduct."

Employment decisions explicitly based on race, gender, and other protected characteristics are illegal under Title VII of the 1964 Civil Rights Act and a patchwork of state anti-discrimination laws. However, the order's lack of specifics regarding what constitutes "promoting DEI" raises immediate concerns about dual compliance challenges and contractors' actual legal obligations, attorneys said.

"It's riddled with ambiguities" and has "no definition section," said Paul Schinner, a worker-side employment and FCA litigator at Halunen Law. "What jumped out is that the order uses buzzwords that Republicans have used" to attack DEI efforts.

New Litigation Route

Conservatives have long claimed workplace DEI initiatives boost representation of women and racial minorities at the expense of White, heterosexual men.

"I don't have inside baseball in terms of what actually they're thinking, but reading between the lines, I think it would empower the Justice Department to bring fraud claims when it comes to what it views as discriminatory conduct," said Hontos, who advises companies on FCA and federal investigation and contract issues.

The FCA could potentially be litigants preferred legal route, Schinner said.

Any worker bringing a Title VII bias claim must file a charge with the US Equal Employment Opportunity Commission or an equivalent state agency before suing in court.

Meanwhile, the FCA would direct those accusing a contractor of misrepresenting their compliance with anti-bias laws or Trump's executive order to sue under seal in federal court to protect their identities. The DOJ has up to 60 days to investigate the fraud claim and determine whether to take over the case.

If the DOJ doesn't intervene, the whistleblower can proceed in court independently.

Another benefit of the FCA is its damages cap, attorneys said.

Title VII has a \$300,000 compensatory and punitive damages cap for companies with over 500 employees. But an FCA case could result in triple damages, civil penalties, and potential debarment for enacting programs that allegedly violate federal anti-discrimination laws or the executive order. If successful, a private whistleblower suing on the government's behalf is legally entitled to receive between 15% and 30% of any recovery.

The damages available under the FCA are usually linked to the value of the government's contract.

These could "dwarf" those available "under a conventional discrimination" claim under federal or state law, Hontos said. "That's where this gets very serious" due to financial implications, he added.

Compliance Guidelines

The now-rescinded EO 11246 established key functions of the US Labor Department's Office of Federal Contractor Compliance Programs. It mandated contractors to set hiring placement goals, report pay and hiring data, and make outreach efforts to underrepresented workforce populations.

Bias findings occasionally lead to monetary settlements and litigation. Trump's order gutted the OFCCP's enforcement functions, however, and Acting Labor Secretary Vincent Micone directed the sub-agency Jan. 24 to end all pending cases, conciliation agreements, investigations, and complaints.

Contractors should review their programs to avoid exclusively considering protected traits and potentially rebrand existing initiatives to better align with the government's new focus, Schinner said.

"It's very possible to maintain some form of intentional effort to boost inclusivity without running afoul" of the new administration's order and the law, Schinner said.

Further guidance from the government is expected. Tony Torain, a partner at McDermott Will & Emery LLP, said the new layer of liability risks under the FCA creates an urgent need for compliance guidelines.

The urgency will only ramp up as the 90-day window for voluntary compliance with the previous Executive Order 11246—issued in 1965—is approaching, he said. Clarifying these issues will help courts evaluate which DEI-related claims can be pursued under the FCA and the potential damages that are recoverable, Torain said.

"We need to know what the swim lanes are so that we are complying but also not discriminating" against protected groups, he added.

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