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Continuing Legal Education Division

New False Claims Act Implications for Employer's DEI Programs

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CLE Materials

For Educational Purposes Only

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The WHITE HOUSE

PRESIDENTIAL ACTIONS

ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT-BASED OPPORTUNITY

The White House

January 21, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. Longstanding Federal civil-rights laws protect individual Americans from discrimination based on race, color, religion, sex, or national origin. These civil-rights protections serve as a bedrock supporting equality of opportunity for all Americans. As President, I have a solemn duty to ensure that these laws are enforced for the benefit of all Americans.

Yet today, roughly 60 years after the passage of the Civil Rights Act of 1964, critical and influential institutions of American society, including the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called "diversity, equity, and inclusion" (DEI) or "diversity, equity, inclusion, and accessibility" (DEIA) that can violate the civil-rights laws of this Nation.

Illegal DEI and DEIA policies not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit,

and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system. Hardworking Americans who deserve a shot at the American Dream should not be stigmatized, demeaned, or shut out of opportunities because of their race or sex.

These illegal DEI and DEIA policies also threaten the safety of American men, women, and children across the Nation by diminishing the importance of individual merit, aptitude, hard work, and determination when selecting people for jobs and services in key sectors of American society, including all levels of government, and the medical, aviation, and law-enforcement communities. Yet in case after tragic case, the American people have witnessed first-hand the disastrous consequences of illegal, pernicious discrimination that has prioritized how people were born instead of what they were capable of doing.

The Federal Government is charged with enforcing our civil-rights laws. The purpose of this order is to ensure that it does so by ending illegal preferences and discrimination.

Sec. 2. Policy. It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.

Sec. 3. Terminating Illegal Discrimination in the Federal Government. (a) The following executive actions are hereby revoked:
(i) Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);
(ii) Executive Order 13583 of August 18, 2011 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);
(iii) Executive Order 13672 of July 21, 2014 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity); and

(iv) The Presidential Memorandum of October 5, 2016 (Promoting Diversity and Inclusion in the National Security Workforce).

(b) The Federal contracting process shall be streamlined to enhance speed and efficiency, reduce costs, and require Federal contractors and subcontractors to comply with our civil-rights laws. Accordingly:

(i) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), is hereby revoked. For 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.

(ii) The Office of Federal Contract Compliance Programs within the Department of Labor shall immediately cease:

(A) Promoting "diversity";

(B) Holding Federal contractors and subcontractors responsible for taking "affirmative action"; and

(C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.

(iii) In accordance with Executive Order 13279 of December 12, 2002 (Equal Protection of the Laws for Faith-Based and Community Organizations), the employment, procurement, and contracting practices of Federal contractors and subcontractors shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws.

(iv) The 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.

(c) The Director of the Office of Management and Budget (OMB), with the assistance of the Attorney General as requested, shall:

(i) Review and revise, as appropriate, all Government-wide processes, directives, and guidance;

(ii) Excise references to DEI and DEIA principles, under whatever name they may

appear, from Federal acquisition, contracting, grants, and financial assistance procedures to streamline those procedures, improve speed and efficiency, lower costs, and comply with civil-rights laws; and

(iii) Terminate all "diversity," "equity," "equitable decision-making," "equitable deployment of financial and technical assistance," "advancing equity," and like mandates, requirements, programs, or activities, as appropriate.

Sec. 4. Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences. (a) The heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order.

(b) To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall submit a report to the Assistant to the President for Domestic Policy containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying:

(i) Key sectors of concern within each agency's jurisdiction;

(ii) The most egregious and discriminatory DEI practitioners in each sector of concern;

(iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated "DEI" or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars;

(iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws;

(v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and

(vi) Potential regulatory action and sub-regulatory guidance.

Sec. 5. Other Actions. Within 120 days of this order, the Attorney General and the Secretary of Education shall jointly issue guidance to all State and local educational agencies that receive Federal funds, as well as all institutions of higher education that receive Federal grants or participate in the Federal student loan assistance program under Title IV of the Higher Education Act, 20 U.S.C. 1070 et seq., regarding the measures and practices required to comply with Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

Sec. 6. Severability. If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

Sec. 7. Scope. (a) This order does not apply to lawful Federal or private-sector employment and contracting preferences for veterans of the U.S. armed forces or persons protected by the Randolph-Sheppard Act, 20 U.S.C. 107 et seq.
(b) This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech.
(c) This order does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:
(i) the authority granted by law to an executive department, agency, or the head thereof; or
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
(c) This order is not intended to and does not create any right or benefit, substantive

or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 21, 2025.

1600 Pennsylvania Ave NW
Washington, DC 20500

WH.GOV

Presidential Documents

Executive Order 14168 of January 20, 2025

Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7301 of title 5, United States Code, it is hereby ordered:

Section 1. *Purpose.* Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women's domestic abuse shelters to women's workplace showers. This is wrong. Efforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and well-being. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system. Basing Federal policy on truth is critical to scientific inquiry, public safety, morale, and trust in government itself.

This unhealthy road is paved by an ongoing and purposeful attack against the ordinary and longstanding use and understanding of biological and scientific terms, replacing the immutable biological reality of sex with an internal, fluid, and subjective sense of self unmoored from biological facts. Invalidating the true and biological category of ''woman'' improperly transforms laws and policies designed to protect sex-based opportunities into laws and policies that undermine them, replacing longstanding, cherished legal rights and values with an identity-based, inchoate social concept.

Accordingly, my Administration will defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male.

Sec. 2. *Policy and Definitions.* It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality, and the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy:

(a) ''Sex'' shall refer to an individual's immutable biological classification as either male or female. ''Sex'' is not a synonym for and does not include the concept of ''gender identity.''

(b) ''Women'' or ''woman'' and ''girls'' or ''girl'' shall mean adult and juvenile human females, respectively.

(c) ''Men'' or ''man'' and ''boys'' or ''boy'' shall mean adult and juvenile human males, respectively.

(d) ''Female'' means a person belonging, at conception, to the sex that produces the large reproductive cell.

(e) ''Male'' means a person belonging, at conception, to the sex that produces the small reproductive cell.

(f) ''Gender ideology'' replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true.

Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.

(g) ''Gender identity'' reflects a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex.

Sec. 3. *Recognizing Women Are Biologically Distinct From Men.* (a) Within 30 days of the date of this order, the Secretary of Health and Human Services shall provide to the U.S. Government, external partners, and the public clear guidance expanding on the sex-based definitions set forth in this order.

(b) Each agency and all Federal employees shall enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes. Each agency should therefore give the terms ''sex'', ''male'', ''female'', ''men'', ''women'', ''boys'' and ''girls'' the meanings set forth in section 2 of this order when interpreting or applying statutes, regulations, or guidance and in all other official agency business, documents, and communications.

(c) When administering or enforcing sex-based distinctions, every agency and all Federal employees acting in an official capacity on behalf of their agency shall use the term ''sex'' and not ''gender'' in all applicable Federal policies and documents.

(d) The Secretaries of State and Homeland Security, and the Director of the Office of Personnel Management, shall implement changes to require that government-issued identification documents, including passports, visas, and Global Entry cards, accurately reflect the holder's sex, as defined under section 2 of this order; and the Director of the Office of Personnel Management shall ensure that applicable personnel records accurately report Federal employees' sex, as defined by section 2 of this order.

(e) Agencies shall remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology, and shall cease issuing such statements, policies, regulations, forms, communications or other messages. Agency forms that require an individual's sex shall list male or female, and shall not request gender identity. Agencies shall take all necessary steps, as permitted by law, to end the Federal funding of gender ideology.

(f) The prior Administration argued that the Supreme Court's decision in *Bostock* v. *Clayton County* (2020), which addressed Title VII of the Civil Rights Act of 1964, requires gender identity-based access to single-sex spaces under, for example, Title IX of the Educational Amendments Act. This position is legally untenable and has harmed women. The Attorney General shall therefore immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock* v. *Clayton County* (2020) to sex-based distinctions in agency activities. In addition, the Attorney General shall issue guidance and assist agencies in protecting sex-based distinctions, which are explicitly permitted under Constitutional and statutory precedent.

(g) Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.

Sec. 4. *Privacy in Intimate Spaces.* (a) The Attorney General and Secretary of Homeland Security shall ensure that males are not detained in women's prisons or housed in women's detention centers, including through amendment, as necessary, of Part 115.41 of title 28, Code of Federal Regulations and interpretation guidance regarding the Americans with Disabilities Act.

(b) The Secretary of Housing and Urban Development shall prepare and submit for notice and comment rulemaking a policy to rescind the final rule entitled ''Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs'' of September 21, 2016, 81 FR 64763, and shall submit for public comment a policy protecting women seeking single-sex rape shelters.

(c) The Attorney General shall ensure that the Bureau of Prisons revises its policies concerning medical care to be consistent with this order, and shall ensure that no Federal funds are expended for any medical procedure, treatment, or drug for the purpose of conforming an inmate's appearance to that of the opposite sex.

(d) Agencies shall effectuate this policy by taking appropriate action to ensure that intimate spaces designated for women, girls, or females (or for men, boys, or males) are designated by sex and not identity.

Sec. 5. *Protecting Rights.* The Attorney General shall issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964. In accordance with that guidance, the Attorney General, the Secretary of Labor, the General Counsel and Chair of the Equal Employment Opportunity Commission, and each other agency head with enforcement responsibilities under the Civil Rights Act shall prioritize investigations and litigation to enforce the rights and freedoms identified.

Sec. 6. *Bill Text.* Within 30 days of the date of this order, the Assistant to the President for Legislative Affairs shall present to the President proposed bill text to codify the definitions in this order.

Sec. 7. *Agency Implementation and Reporting.* (a) Within 120 days of the date of this order, each agency head shall submit an update on implementation of this order to the President, through the Director of the Office of Management and Budget. That update shall address:

(i) changes to agency documents, including regulations, guidance, forms, and communications, made to comply with this order; and

(ii) agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order.

(b) The requirements of this order supersede conflicting provisions in any previous Executive Orders or Presidential Memoranda, including but not limited to Executive Orders 13988 of January 20, 2021, 14004 of January 25, 2021, 14020 and 14021 of March 8, 2021, and 14075 of June 15, 2022. These Executive Orders are hereby rescinded, and the White House Gender Policy Council established by Executive Order 14020 is dissolved.

(c) Each agency head shall promptly rescind all guidance documents inconsistent with the requirements of this order or the Attorney General's guidance issued pursuant to this order, or rescind such parts of such documents that are inconsistent in such manner. Such documents include, but are not limited to:

(i) ''The White House Toolkit on Transgender Equality'';

(ii) the Department of Education's guidance documents including:

(A) ''2024 Title IX Regulations: Pointers for Implementation'' (July 2024);

(B) ''U.S. Department of Education Toolkit: Creating Inclusive and Nondiscriminatory School Environments for LGBTQI+ Students'';

(C) ''U.S. Department of Education Supporting LGBTQI+ Youth and Families in School'' (June 21, 2023);

(D) ''Departamento de Educación de EE.UU. Apoyar a los jóvenes y familias LGBTQI+ en la escuela'' (June 21, 2023);

(E) ''Supporting Intersex Students: A Resource for Students, Families, and Educators'' (October 2021);

(F) ''Supporting Transgender Youth in School'' (June 2021);

(G) ''Letter to Educators on Title IX's 49th Anniversary'' (June 23, 2021);

(H) ''Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families'' (June 2021);

(I) ''Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County'' (June 22, 2021);

(J) ''Education in a Pandemic: The Disparate Impacts of COVID–19 on America's Students'' (June 9, 2021); and

(K) ''Back-to-School Message for Transgender Students from the U.S. Depts of Justice, Education, and HHS'' (Aug. 17, 2021);

(iii) the Attorney General's Memorandum of March 26, 2021 entitled ''Application of *Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972''; and

(iv) the Equal Employment Opportunity Commission's ''Enforcement Guidance on Harassment in the Workplace'' (April 29, 2024).

Sec. 8. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

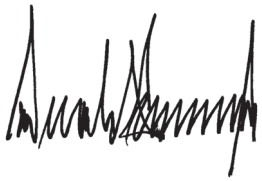
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.



THE WHITE HOUSE,
January 20, 2025.

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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.

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

II. EXECUTIVE SUMMARY

This guidance emphasizes the significant legal risks of initiatives that involve discrimination based on protected characteristics and provides non-binding best practices to help entities avoid the risk of violations. Key points include:

- **Statutory nondiscrimination requirements:** Federal law prohibits discrimination based on protected characteristics like race, sex, color, national origin, or religion.

- **Legal pitfalls of DEI Programs:** The use of terms such as "DEI," "Equity," or other euphemistic terms does not excuse unlawful discrimination or absolve parties from scrutiny regarding potential violations.

- **Prohibition on Protected Characteristics as Criteria:** Using race, sex, or other protected characteristics for employment, program participation, resource allocation, or other similar activities, opportunities, or benefits, is unlawful, except in rare cases where such discrimination satisfies the relevant level of judicial scrutiny.

- **Importance of Sex-Separated Intimate Spaces and Athletic Competitions:** Compelling employees to share intimate spaces with the opposite sex or allowing men to compete in women's athletic competitions would typically be unlawful.

- **Unlawful Proxy Discrimination:** Facially neutral criteria (e.g., "cultural competence," "lived experience," geographic targeting) that function as proxies for protected characteristics violate federal law if designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics.

- **Scrutiny of Third-Party Funding:** Recipients of federal funds should ensure federal funds do not support third-party programs that discriminate.

- **Protection Against Retaliation:** Individuals who object to or refuse to participate in discriminatory programs, trainings, or policies are protected from adverse actions like termination or exclusion based on that individual's opposition to those practices.[2]

III. KEY FEDERAL ANTIDISCRIMINATION PROVISIONS AND LAW

Federal antidiscrimination laws prohibit discrimination on the basis of protected characteristics, including race, color, religion, sex, and national origin. The U.S. Supreme Court has consistently held that policies or practices based upon protected characteristics are subject to

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[2] Unlawful retaliation occurs when a federally funded entity takes adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws.

rigorous judicial scrutiny. Race-based classifications are subject to strict scrutiny, requiring a compelling governmental interest and narrowly tailored means to achieve that interest.[3] Sex-based classifications are subject to heightened scrutiny, requiring an exceedingly persuasive justification and substantial relation to an important governmental objective.[4] Discrimination based on other protected characteristics, such as religion, is also evaluated under analogous standards.[5] Entities receiving federal funds must comply with applicable civil rights laws, including:

- **Title VI of the Civil Rights Act of 1964:** Prohibits discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance. This includes most educational institutions, healthcare providers, and state and local government agencies.

- **Title VII of the Civil Rights Act of 1964:** Prohibits employment discrimination based on, or motivated by, race, color, religion, sex, or national origin, in any terms, conditions, or privileges of employment, including hiring, promotion, demotion, termination, compensation, job transfers, training, or access to employment privileges and benefits.

- **Title IX of the Education Amendments of 1972:** Prohibits discrimination based on sex in education programs or activities receiving federal financial assistance. Title IX protections extend beyond athletics and include addressing sexual harassment, sex-based harassment, admissions policies, and equal access to resources and programs.

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[3] *See, e.g.*, *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 214 (2023) (holding racial classifications by public institutions are subject to strict scrutiny and racial classifications by private institutions can serve as basis for revoking funding under Title VI); *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) ("[E]xpress, race-based decision-making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."); *see also Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (holding grant program with race and sex preferences is unlawful under Equal Protection Clause).

[4] *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996).

[5] *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 479 (2020) ("The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status . . . . [S]trict scrutiny applies . . . because Montana's no-aid provision discriminates based on religious status"); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (holding discriminating against individual for exercising fundamental constitutional rights is subject to heightened scrutiny), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (relying on Equal Protection principles in holding intentional discrimination against exercise of religion is subject to strict scrutiny).

- **Equal Protection Clause of the Fourteenth Amendment:** Prohibits States from denying any person the equal protection of the laws, relevant in the context of discrimination claims involving state or local government actions.

IV. UNLAWFUL DISCRIMINATORY POLICIES AND PRACTICES

The following is a non-exhaustive list of unlawful practices that could result in revocation of grant funding. Federal funding recipients may also be liable for discrimination if they knowingly fund the unlawful practices of contractors, grantees, and other third parties.

A. Granting Preferential Treatment Based on Protected Characteristics

1. What Constitutes Unlawful Preferential Treatment?

Preferential treatment occurs when a federally funded entity provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons, including such practices portrayed as "preferential" to certain groups. Such practices violate federal law unless they meet very narrow exceptions.

2. Examples of Unlawful Practices

Race-Based Scholarships or Programs: A university's DEI program establishes a scholarship fund exclusively for students of a specific racial group (e.g., "Black Student Excellence Scholarship") and excludes otherwise qualified applicants of other races, even if they meet academic or financial need criteria. This extends to any race-exclusive opportunities, such as internships, mentorship programs, or leadership initiatives that reserve spots for specific racial groups, regardless of intent to promote diversity. Such race-exclusive programs violate federal civil rights law by discriminating against individuals based solely on their race or treating people differently based on a protected characteristic without meeting the strict legal standards required for race-conscious programs.

Preferential Hiring or Promotion Practices: A federally funded entity's DEI policy prioritizes candidates from "underrepresented groups" for admission, hiring, or promotion, bypassing qualified candidates who do not belong to those groups, where the preferred "underrepresented groups" are determined on the basis of a protected characteristic like race.

Access to Facilities or Resources Based on Race or Ethnicity: A university's DEI initiative designates a "safe space" or lounge exclusively for students of a specific racial or ethnic group.

B. Prohibited Use of Proxies for Protected Characteristics

1. What Constitutes Unlawful Proxies?

Unlawful proxies occur when a federally funded entity intentionally uses ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics. While these criteria may appear facially neutral, they become legally problematic under any of the following circumstances:

- They are selected because they correlate with, replicate, or are used as substitutes for protected characteristics.
- They are implemented with the intent to advantage or disadvantage individuals based on protected characteristics.

2. Examples of Potentially Unlawful Proxies

"Cultural Competence" Requirements: A federally funded university requires job applicants to demonstrate "cultural competence," "lived experience," or "cross-cultural skills" in ways that effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications. This includes selection criteria that advantage candidates who have experiences the employer associates with certain racial groups. For instance, requiring faculty candidates to describe how their "cultural background informs their teaching" may function as a proxy if used to evaluate candidates based on race or ethnicity.

Geographic or Institutional Targeting: A federally funded organization implements recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition rather than other legitimate factors.

"Overcoming Obstacles" Narratives or "Diversity Statements": A federally funded program requires applicants to describe "obstacles they have overcome" or submit a "diversity statement" in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics, using the narrative as a proxy for advantaging that protected characteristic in providing benefits.

C. Segregation Based on Protected Characteristics

1. What Constitutes Unlawful Segregation?

Segregation based on protected characteristics occurs when a federally funded entity organizes programs, activities, or resources—such as training sessions—in a way that separates or restricts access based on race, sex, or other protected characteristics. Such practices generally violate federal law by creating unequal treatment or reinforcing stereotypes, regardless of the stated goal (e.g., promoting inclusion or addressing historical inequities). Exceptions are narrow

and include only cases where federal law expressly permits race-based remedies for specific, documented acts of past discrimination by the institution itself, or in specialized contexts such as correctional facilities where courts have recognized compelling institutional interests.

While compelled segregation is generally impermissible, failing to maintain sex-separated athletic competitions and intimate spaces can also violate federal law. Federally funded institutions that allow males, including those self-identifying as "women," to access single-sex spaces designed for females—such as bathrooms, showers, locker rooms, or dormitories—undermine the privacy, safety, and equal opportunity of women and girls. Likewise, permitting males to compete in women's athletic events almost invariably denies women equal opportunity by eroding competitive fairness. These policies risk creating a hostile environment under Title VII, particularly where they compromise women's privacy, safety, or professional standing, and can violate Title IX by denying women access to the full scope of sex-based protections in education. To ensure compliance with federal law and to safeguard the rights of women and girls, organizations should affirm sex-based boundaries rooted in biological differences.

2. Examples of Unlawful Practices

Race-Based Training Sessions: A federally funded university hosts a DEI training program that requires participants to separate into race-based groups (e.g., "Black Faculty Caucus" or "White Ally Group") for discussions, prohibiting individuals of other races from participating in specific sessions. In contrast, a "Faculty Academic Support Network" open to all faculty interested in promoting student success avoids reliance on protected characteristics and complies with federal law.

Segregation in Facilities or Resources: A college receiving federal funds designates a "BIPOC-only study lounge," facially discouraging access by students of other races. Even if access is technically open to all, the identity-based focus creates a perception of segregation and may foster a hostile environment. This extends to any resource allocation—such as study spaces, computer labs, or event venues—that segregates access based on protected characteristics, even if intended to create "safe spaces." This does not apply to facilities that are single-sex based on biological sex to protect privacy or safety, such as restrooms, showers, locker rooms, or lodging.

Implicit Segregation Through Program Eligibility: A federally funded community organization hosts a DEI-focused workshop series that requires participants to identify with a specific racial or ethnic group (e.g., "for underrepresented minorities only") or mandates sex-specific eligibility, effectively excluding others who meet objective program criteria. Use of Protected Characteristics in Candidate Selection

3. What Constitutes Unlawful Use of Protected Characteristics?

Unlawful use of protected characteristics occurs when a federally funded entity or program considers race, sex, or any other protected trait as a basis for selecting candidates for employment

(e.g., hiring, promotions), contracts (e.g., vendor agreements), or program participation (e.g., internships, admissions, scholarships, training). This includes policies that explicitly mandate representation of specific groups in candidate pools or implicitly prioritize protected characteristics through selection criteria, such as "diverse slate" requirements, diversity decision-making panels, or diversity-focused evaluations. It also includes requirements that contracting entities utilize a specific level of working hours from individuals of certain protected characteristics to complete the contract. Such practices violate federal law by creating unequal treatment or disadvantaging otherwise qualified candidates, regardless of any intent to advance diversity goals.

4. Examples of Unlawful Practices

Race-Based "Diverse Slate" Policies in Hiring: A federally funded research institute adopts a policy requiring that all interview slates for faculty positions include a minimum number of candidates from specific racial groups (e.g., at least two "underrepresented minority" candidates), rejecting otherwise qualified candidates who do not meet this racial criterion. This extends to any policy that sets racial benchmarks or mandates demographic representation in candidate pools, such as requiring a certain percentage of finalists to be from "diverse" backgrounds.

Sex-Based Selection for Contracts: A federally funded state agency implements a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses without preferred group status. This includes any contract selection process that uses sex or race as a tiebreaker or primary criterion, such as policies favoring "minority- or women-owned" businesses without satisfying the appropriate level of judicial scrutiny.

Race- or Sex-Based Program Participation: A federally funded university's internship program requires that 50% of selected participants be from "underrepresented racial groups" or female students, rejecting equally or more qualified applicants who do not meet these demographic criteria. This extends to any program—such as scholarships, fellowships, or leadership initiatives—that uses race, sex, or any other protected characteristic as a selection criterion, even if framed as addressing underrepresentation.

D. Training Programs That Promote Discrimination or Hostile Environments

1. What Constitutes Unlawful DEI Training Programs?

Unlawful DEI training programs are those that—through their content, structure, or implementation—stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment. This includes training that:

- Excludes or penalizes individuals based on protected characteristics.

- Creates an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.

2. Examples of Unlawful Practices

Trainings That Promote Discrimination Based on Protected Characteristics: A federally funded school district requires teachers to complete a DEI training that includes statements stereotyping individuals based on protected characteristics—such as "all white people are inherently privileged," "toxic masculinity," etc. Such trainings may violate Title VI or Title VII if they create a hostile environment or impose penalties for dissent in ways that result in discriminatory treatment.[6]

E. Recommendations on Best Practices

Ensure Inclusive Access: All workplace programs, activities, and resources should be open to all qualified individuals, regardless of race, sex, or other protected characteristics. Avoid organizing groups or sessions that exclude participants based on protected traits. Some sex separation is necessary where biological differences implicate privacy, safety, or athletic opportunity.

Focus on Skills and Qualifications: Base selection decisions on specific, measurable skills and qualifications directly related to job performance or program participation. For example, rather than asking about "cultural competence," assess specific skills such as language proficiency or relevant educational credentials. Criteria like socioeconomic status, first-generation status, or geographic diversity must not be used if selected to prioritize individuals based on racial, sex-based, or other protected characteristics.

Prohibit Demographic-Driven Criteria: Discontinue any program or policy designed to achieve discriminatory outcomes, even those using facially neutral means. Intent to influence demographic representation risks violating federal law. For example, a scholarship program must not target "underserved geographic areas" or "first-generation students" if the criteria are chosen to increase participation by specific racial or sex-based groups. Instead, use universally applicable criteria, such as academic merit or financial hardship, applied without regard to protected characteristics or demographic goals.

Document Legitimate Rationales: If using criteria in hiring, promotions, or selecting contracts that might correlate with protected characteristics, document clear, legitimate rationales unrelated to race, sex, or other protected characteristics. Ensure these rationales are consistently applied and are demonstrably related to legitimate, nondiscriminatory institutional objectives.

Scrutinize Neutral Criteria for Proxy Effects: Before implementing facially neutral criteria, rigorously evaluate and document whether they are proxies for race, sex, or other protected

[6] Federal law allows for workplace harassment trainings that are focused on preventing unlawful workplace discrimination and that do not single out particular groups as inherently racist or sexist.

characteristics. For instance, a program targeting "low-income students" must be applied uniformly without targeting areas or populations to achieve racial or sex-based outcomes.

Eliminate Diversity Quotas: Focus solely on nondiscriminatory performance metrics, such as program participation rates or academic outcomes, without reference to race, sex, or other protected traits. And discontinue policies that mandate representation of specific racial, sex-based, or other protected groups in candidate pools, hiring panels, or final selections. For example, replace a policy requiring "at least one minority candidate per slate" with a process that evaluates all applicants based on merit.

Avoid Exclusionary Training Programs: Ensure trainings are open to all qualified participants, regardless of protected characteristics. Avoid segregating participants into groups based on race, sex, or other protected characteristics. Trainings should not require participants to affirm specific ideological positions or "confess" to personal biases or privileges based on a protected characteristic.

Include Nondiscrimination Clauses in Contracts to Third Parties and Monitor Compliance: Incorporate explicit nondiscrimination clauses in grant agreements, contracts, or partnership agreements, requiring third parties to comply with federal law, and specify that federal funds cannot be used for programs that discriminate based on protected characteristics. Monitor third parties that receive federal funds to ensure ongoing compliance, including reviewing program materials, participant feedback, and outcomes to identify potential discriminatory practices. Terminate funding for noncompliant programs.

Establish Clear Anti-Retaliation Procedures and Create Safe Reporting Mechanisms: Implement and communicate policies that prohibit retaliation against individuals who engage in protected activities, such as raising concerns, filing complaints, or refusing to participate in potentially discriminatory programs. Include these policies in employee handbooks, student codes of conduct, and program guidelines. Provide confidential, accessible channels for individuals to report concerns about unlawful practices.

V. CONCLUSION

Entities are urged to review all programs, policies, and partnerships to ensure compliance with federal law, and discontinue any practices that discriminate on the basis of a protected status. The recommended best practices provided in this guidance are non-binding suggestions to assist entities in avoiding legal pitfalls and upholding equal opportunity for all. By prioritizing nondiscrimination, entities can mitigate the legal, financial, and reputational risks associated with unlawful DEI practices and fulfill their civil rights obligations.

Trump Dismantles Key Affirmative Action and DEI Standards for Federal Contractors: Top 3 Takeaways

Insights
1.22.25

Many federal contractors and subcontractors have long been required to create affirmative action plans and have also promoted diversity, equity, and inclusion – practices that some see as necessary to create equal employment opportunities and others criticize as discriminatory. President Trump quickly delivered on his promise to unravel such programs late last night by revoking an executive order that mandated certain aspects of the affirmative action requirements, barring "illegal" DEI programs, and signing an executive order that promotes "colorblind equality" and merit-based opportunity. While there are still many unanswered questions about this new direction – and legal challenges are expected – here's what federal contractors need to know now about this major shift in direction for the Office of Federal Contract Compliance Programs (OFCCP) and how it may impact your operations.

1. Longstanding Affirmative Action Requirements Revoked

Employers who are federal contractors had been required to engage in affirmative action since 1965 under Executive Order 11246, which covers women and minorities. In this context, "affirmative action" means that federal contractors had to analyze their workforce data to determine whether goals for women and/or minorities should be set and to engage in good faith efforts to ensure they were providing equal employment opportunities for all.

Contractors measured equal employment opportunity (EEO) levels by comparing their current workforce to the availability of women and minorities externally (using local and/or national data) and internally (based on employees eligible for promotion). Where goals were established, federal contractors were required to make good faith efforts to cast a wide net to diversify the applicant pool with the goal of providing the best opportunity for diversifying the workplace. It did not, however, require employers to replace their merit-based selection processes, participate in quotas, or "set aside" jobs for women and/or minorities.

President Trump's January 21 executive order revokes the 1965 order and replaces it with a directive for the OFCCP to immediately cease "holding federal contractors and subcontractors responsible for taking affirmative action."

Practical Pointer: It's important to remember that affirmative action in the employment context never allowed employers to make employment decisions based on protected characteristics, such as race and gender. So, that hasn't changed. Federal contractors, and employers in general, are prohibited from taking race (as well as gender, color, national origin, and other protected characteristics) into account when making decisions related to hiring, promotions, terminations, and other terms and conditions of employment.

However, the new executive order will clearly impact federal contractor and subcontractor practices and reporting requirements and will likely alleviate some administrative burdens. While the details are not yet known, the order allows contractors to continue complying with the prior rules for 90 days, and we expect to learn more details from the OFCCP in the coming days and months. So, stay tuned.

2. OFCCP Barred from Allowing or Encouraging DEI Programs

The order also puts existing DEI programs on the chopping block and delivers on President Trump's promise to "terminate DEI in the federal government." DEI programs in the public and private sector will be impacted by this order. Notably for federal contractors, it bars the OFCCP from promoting "diversity" or "allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin."

Moreover, federal agencies were instructed to require every contractor and grant recipient to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

According to a White House fact sheet, the order "requires simple and unmistakable affirmation that contractors will not engage in illegal discrimination, including illegal DEI."

The order also impacts private employers by directing federal officials to take "appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI."

Practical Pointer: Questions remain as to what constitutes "illegal" DEI, so you should watch for new developments from the OFCCP on regulatory changes. Work with your legal counsel to assist with revising policies and programs as needed and ensure your objectives and employee education efforts are in compliance with evolving rules.

As noted above, employers have been and are still prohibited from taking race, gender, and other protected characteristics into account when making employment decisions.

3. Veteran and Disability Affirmative Action Still Required

Notably, the new executive order does not end affirmative action requirements for covered federal contractors under two laws aimed at protecting veterans and individuals with disabilities: the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act. These programs are enforced by the OFCCP and require covered federal contractors to engage in affirmative action outreach efforts for protected veterans and individuals with disabilities, as well as creating affirmative action plans.

Practical Pointer: Federal contractors must stay the course as it relates to these obligations. Contractors should continue outreach efforts and anti-harassment obligations for protected veterans and individuals with disabilities.

What Should Federal Contractors Do Now?

- **Keep Informed:** Over the next 90 days, we expect to receive more information from the OFCCP about how this new direction will impact federal contractors and subcontractors. Sign up to receive Fisher Phillips' insights to stay up to date on the latest developments.
- **Continue Other Compliance Efforts**: Federal contractors and subcontractors will continue to have obligations related to federal and state laws, such as EEO-1 and VETS-4212 filings, and state pay data reporting requirements (including in California), as applicable. Continue to participate in these required compliance filings.
- **Track Legal Challenges:** We anticipate that civil rights groups will challenge the new executive order, but these lawsuits may take considerable time to resolve, so you'll want to understand your real-time compliance obligations and track any potential changes.
- **Work with Legal Counsel:** In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements, especially if you have a pending audit before the OFCCP.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our Affirmative Action and Federal Contractor Compliance Practice Group.

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Trump Orders Feds to Combat "Illegal" Corporate DEI Programs: 5 Takeaways for Private-Sector Employers + What You Should Do Now

Insights
1.23.25

President Trump just issued a far-reaching executive order related to diversity, equity, and inclusion (DEI) initiatives in not only the federal government but also the private sector. The order directs federal agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities" and to encourage private employers to instead implement the Trump administration's policy of "individual initiative, excellence, and hard work." While the order creates many unanswered questions and will likely face legal challenges, this Insight will explain what private employers need to know about these new federal anti-DEI initiatives and what you should do now.

5 Takeaways for Private-Sector Employers

Here's how Trump's January 21 executive order impacts employers in the private sector. (To read about the order's sweeping impact on federal contractors and subcontractors, click here.)

1. Employers Are Under Federal Pressure to End Certain DEI Programs

The order directs all federal agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities" and to take all appropriate action to advance the order's policy of "individual initiative, excellence, and hard work" among private employers. It's not yet clear how agencies might carry out this directive, but the order gives federal officials broad authority to do so.

2. Uncertainty Over What Constitutes "Illegal DEI"

Questions remain as to what constitutes "illegal DEI" – an undefined phrase that is used throughout the executive order. Arguably, the order defines prohibited conduct as: (1) illegal discrimination and preferences; and (2) workforce balancing based on race, color, sex, sexual preference, religion, or national origin. This would be no different from existing federal law, because quotas have always been unlawful under Title VII.

However, the Trump administration has indicated that its objectives go beyond reinforcing Title VII. For example, the executive order broadly paints all DEI policies as part of an "unlawful, corrosive, and pernicious identity-based spoils system," and in the government context it even goes so far as

to ban the Office of Federal Contractor Compliance Programs – the agency tasked with ensuring federal contractors comply with nondiscrimination rules – from promoting diversity at all.

Further, the new Acting Chair of the U.S. Equal Employment Opportunity Commission (EEOC), Commissioner Andrea Lucas, said in a Jan. 21 press release that her "priorities will include rooting out unlawful DEI-motivated race and sex discrimination." This sharply contrasts with the stance taken by Charlotte Burrows, the former EEOC Chair and current Commissioner, who confirmed in a 2023 press release that, despite the Supreme Court's ruling on college affirmative action programs, 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."

While it is generally lawful for employers to address biases and barriers to provide a level playing field for employees and job candidates, we expect to see the Trump administration aggressively pursue new ways of challenging DEI efforts in the workplace.

3. Federal Officials Must Submit Recommendations to End Illegal DEI Practices

The order also requires federal officials (including the attorney general and all agency heads) to, within 120 days, prepare and submit a report that the Trump administration will use to establish new "civil rights" policies against corporate DEI programs. The report must include recommended measures to encourage the private sector to "end illegal discrimination and preferences, including DEI," as well as a proposed strategic enforcement plan.

The enforcement plan must identify various data points, such as key sectors of concern and the "most egregious and discriminatory DEI practitioners" in each of those sectors, as well as:

- a plan of specific steps or measures to deter DEI programs or principles, regardless of whether they are actually given a "DEI" label, that constitute illegal discrimination or preferences;
- other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all federal civil rights laws;
- litigation that would be potentially appropriate for federal lawsuits, intervention, or statements of interest; and
- potential regulatory action and sub-regulatory guidance.

4. Some Private Businesses Could Face Civil Compliance Investigations

As part of the report described above, each federal agency will identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of $500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over $1 billion.

5. No Impact on Veteran and Disability Preferences

The order does **not** apply to private-sector employment and contracting preferences for military veterans and individuals with disabilities.

What Should Private Employers Do Now?

- **Review Your DEI Initiatives**. Well-designed DEI programs are not illegal. Review or assess your hiring, training, and promotion practices in light of Trump's executive order. While the order sends a clear warning to private businesses whose workplace policies do not align with the administration's anti-DEI initiatives, it merely "encourages" the private sector to end DEI efforts that do not fall in line – at least until a federal enforcement plan is released. Now is a good time to consider measuring the effectiveness of your DEI program and enhancing your organization's awareness of DEI strategies (studies have shown the value of diversity in the workplace – including higher performing teams, better bottom lines, and stronger leadership). If your business could be subject to a civil investigation, you should weigh any potential exposure against any proven benefits of continuing your DEI program.
- **Stay Tuned.** After May 2025, we expect to receive more meaningful information from the Trump administration about how its aim to end DEI programs will impact employers in the private sector. Sign up to receive Fisher Phillips' insights to stay up to date on the latest developments.
- **Work with Legal Counsel.** In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements. We anticipate that once federal enforcement guidance is released, it will face court challenges. But these lawsuits could take considerable time to resolve, so you'll want to understand your real-time compliance obligations and work with counsel on any potential changes.

Conclusion

If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney or the authors of this Insight. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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New Administration Resource Center for Employers

What Does the White House's Executive Order on Gender + New EEOC Acting Chair Mean for Employers? 5 Key Takeaways

Insights
1.24.25

A pair of back-to-back moves from the new Trump administration demonstrates a clear shift in the way the federal government will approach EEO and anti-bias laws over the course of the next several years. On his first day in office, President Trump issued an executive order announcing that the federal government will recognize only two sexes while rolling back Biden-era EEO workplace guidance on LGBTQ+ harassment. And the next day, Trump appointed EEOC Commissioner Andrea Lucas – a vocal critic of DEI programs and other Biden administration policies – as Acting Chair of the Commission. What do you need to know about these actions, and what are the five key takeaways for your workplace?

"Gender Ideology" Executive Order

Signed within hours after Trump took office, the executive order is officially titled, "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." It mandates that the federal government recognize only two biological sexes, male and female, as determined at conception. Among other things, the order:

- directs all federal agencies to replace the term "gender" with "sex" in official documents;
- ensures that government-issued identification (like passports) reflect the biological sex assigned at birth;
- requires the Attorney General to guide federal agencies to reverse any policies that allowed gender-identity-based access to single-sex spaces (like bathrooms);
- orders the EEOC, Department of Labor, and other agencies to "prioritize investigations and litigation to enforce the rights and freedoms identified" in the order; and
- rescinds a slew of Biden-era guidance documents, including the 2024 EEOC workplace harassment guidance that, among other updates to its longstanding harassment guidance, incorporated the agency's analysis of Title VII protections for LGBTQ+ workers based on the Supreme Court's holding in *Bostock v. Clayton County*.

Andrea Lucas as Acting EEOC Chair

Having served on the Commission since 2020, Andrea Lucas now occupies the role of Acting Chair according to Trump's January 21 announcement. She made clear her position right off the bat. "In

according to Trump's January 21 announcement. She made clear her position right off the bat: "In recent years, this agency has remained silent in the face of multiple forms of widespread, overt discrimination. Consistent with the President's Executive Orders and priorities, my priorities will include:

- rooting out **unlawful DEI-motivated** race and sex discrimination;
- protecting American workers from **anti-American national origin** discrimination;
- defending the biological and binary reality of **sex and related rights**, including women's rights to single-sex spaces at work;
- protecting workers from **religious bias and harassment**, including antisemitism; and
- remedying other areas of recent under-enforcement."

Lucas has twice been a dissenting voice against EEOC actions that helped shape the last several years of workplace law:

- the EEOC workplace harassment guidance that focused on LGBTQ+ workers; and
- the finalized rules regulating the Pregnant Worker Fairness Act (PWFA).

The move installing Lucas into power doesn't change the fact that she will be outnumbered on the EEOC by Democratic appointees for the next two years. Commissioners serve five-year staggered terms, and the opportunity for Trump to completely shift the five-member leadership team to a Republican majority will not arrive until 2026. Until then, Democrats will retain majority voting power.

But that's not to say that Lucas will be without power. In conjunction with the Commission's General Counsel – a role that is expected to be filled by a Trump appointee in the near future – Lucas can help guide the EEOC on which kinds of lawsuits the agency will file and other procedural steps it will take.

What Do These Moves Mean for Employers? 5 Key Takeaways

1. Stay Tuned for New EEO-1 and Other Government Forms

Under 2023 filing instructions, the EEO-1 form only provided binary options for reporting the sex of your employees – but allowed employers to voluntarily report non-binary employee demographic data in the comments section of the report. You should assume that will change for the next reporting year.

2. A New Era of Gender Identity Discrimination?

Trump's executive order proclaims that "'sex' is not a synonym for and does not include the concept of 'gender identity'." However, this stance runs counter to the Supreme Court's *Bostock* ruling,

which explicitly determined that "sex" as defined by Title VII includes "gender identity." The Court has tilted right since that 6-3 decision, however, so it's possible that the interpretation could change if the issue were teed up before SCOTUS in the future – which appears to be a distinct possibility. No doubt this issue will be the subject of frequent litigation in the coming months and years, but you should recognize that discrimination against transgender and non-binary/gender non-conforming people remains illegal under federal law.

3. Expect Litigation Over Bathroom Access

Andrea Lucas has made clear her stance on gender-affirming bathroom access: "Every female worker has privacy and safety rights that necessitate access to single-sex workplace bathrooms limited to biological women," she said while voting against the EEOC's most recent workplace harassment guidance. And we know where the President stands given his executive order.

Practically speaking, employers could be between a rock and a hard place on this issue: do you permit transgender and non-binary/gender nonconforming employees to use the bathroom that aligns with gender identity and risk EEOC enforcement action, or prohibit such conduct in alignment with the executive order and risk gender discrimination claims in court?

Unfortunately, the Supreme Court decision discussed above specifically avoided the bathroom issue, saying it did "not purport to address bathrooms, locker rooms, or anything else of the kind." And Trump's executive order requires the Department of Justice to "correct" misapplications of that SCOTUS decision. Which means we'll be seeing lots of litigation over this issue – and perhaps a return trip to the Supreme Court.

4. Religious Accommodation Requests May Need to Be Considered Anew

The EEOC's most recent workplace harassment guidance said that employers did not need to grant religious accommodations to employees if the accommodations would create a hostile environment. For example, employers did not have to permit employees to deliberately misgender people because their religious beliefs ran counter to certain gender identity issues, or permit hostility towards LGBTQ+ workers because of an employee's religiously held belief. But with the guidance now rescinded, the matter is sure to be tested out in litigation, as some employees may now claim their religious beliefs do not permit them to follow gender-identity or sexual orientation-related policies or practices.

5. Longer Term: Expect the Pregnancy Accommodation Rules to Be Rescinded

The most controversial aspect of the April 2024 PWFA rules is the requirement that employers accommodate applicants and workers who need time off or other workplace modifications for an abortion procedure. Given that Lucas voted against the rules at the time because they would "broaden the statute in ways that, in my view, cannot reasonably be reconciled with the text," we

expect the Commission to rescind the PWFA rules shortly after Republicans assume control in 2026.

Want to Understand More About DEI?

Both the Trump executive order and Andrea Lucas's nomination statement take an aggressive stance against corporate DEI programs. To understand how to respond to this development, read our recent Insight: Trump Orders Feds to Combat "Illegal" Corporate DEI Programs: 5 Takeaways for Private-Sector Employers + What You Should Do Now.

Conclusion

If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney or the authors of this Insight. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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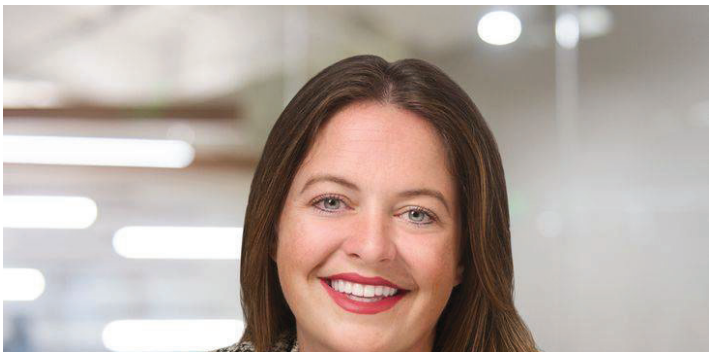

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New Administration Resource Center for Employers

Feds Halt All Affirmative Action Enforcement Activity: What Federal Contractors Need to Know

Insights
1.27.25

Just days after President Trump issued an executive order dismantling the race and gender affirmative action obligations that have applied to federal contractors since the 1960s, the Labor Department announced on Friday that it was ceasing all pending investigations and enforcement activity. This means employers subject to pending cases, conciliation agreements, investigations, and complaints related to the now-rescinded Executive Order 11246 have now received a reprieve. What do federal contractors and subcontractors need to know about this development?

What Happened?

Acting Secretary of Labor Vince Micone ordered all OFCCP employees to cease and desist any and all investigative and enforcement activity under the rescinded Executive Order 11246 and the regulations promulgated under it. His January 24 order applies to all DOL employees, including administrative law judges (ALJs) and review board members. According to Micone, "the department no longer has any authority under the rescinded Executive Order 11246 or its regulations."

What's Next?

- The Acting Secretary's order requires OFCCP officials to notify all federal contractors and subcontractors subject to open reviews or cases related to EO 11246 affirmative action obligations by January 31 that their reviews or cases are **closed**.
- By January 31, the OFCCP must also notify federal contractors and subcontractors subject to open reviews or cases related to Section 503 (disability) or VEVRAA (veterans) matters that their cases are being **held in abeyance** "pending further guidance."

What Should You Do?

- **Coordinate With Counsel:** If you are a federal contractor or subcontractor with an active case, conciliation agreement, investigation, or complaint related to race or gender affirmative action obligations, coordinate immediately with your FP attorney to determine your next steps.
- **Stay Tuned:** If you have an active case, conciliation agreement, investigation, or complaint related to disability or veteran status, stand by for more information from the agency. OFCCP

released a statement last week that Section 503 and VEVRAA obligations "remain in effect" despite Trump's executive order, so we expect further clarification shortly.

- **Keep Informed**: Make sure you understand the contours of Trump's Executive Order by reading our Insight here. And sign up to receive Fisher Phillips' insights to stay up to date on the latest developments.
- **Continue Other Compliance Efforts:** Federal contractors and subcontractors continue to have obligations related to federal and state laws, such as EEO-1 and VETS-4212 filings, not to mention state pay data reporting requirements (including in California), as applicable. Continue to participate in these required compliance filings.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our Affirmative Action and Federal Contractor Compliance Practice Group.

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New Lawsuit Takes on Trump's Anti-DEI Actions: What Employers Need to Know

Insights
2.05.25

A new lawsuit is challenging the Trump administration's executive orders that take aim at DEI efforts in the private sector and in the federal government, calling them a "crusade to erase diversity, equity, inclusion, and accessibility from our country." A group of plaintiffs – including chief diversity officers, professors, a restaurant group, and the city of Baltimore – filed a complaint in a Maryland federal court on Monday that claims that recent executive actions taken by President Trump and his administration are unconstitutional and that Trump "cannot…silence those who disagree with him by threatening them with the loss of federal funds and other enforcement actions." We'll explain everything employers need to know about the lawsuit and what to expect next.

Quick Background

The new Trump administration has taken aim at DEI initiatives within both the federal government and the private sector and took a series of dramatic steps related to DEI programs in the first weeks after assuming power. Here are a few key examples:

- Trump issued an executive order directing federal agencies to combat "illegal" corporate DEI programs and dismantling key affirmative action and DEI standards for federal contractors.
- Trump installed Andrea Lucas – an avowed opponent of DEI – as Acting Chair of the Equal Employment Opportunity Commission (EEOC) and ousted two Democratic Commissioners. These moves have set the stage for the agency to soon be in a position to take further action with respect to DEI programs at private organizations.

The administration has not provided a clear definition of "illegal DEI" and has indicated that its objectives go beyond reinforcing existing federal anti-discrimination laws.

New Lawsuit Challenges Trump Administration's Actions Against DEI

Who's Suing Who?

A group of plaintiffs – including the National Association of Diversity Officers in Higher Education, the American Association of University Professors, Restaurant Opportunities Centers United, and the Mayor and City Council of Baltimore, Maryland – filed suit against President Trump and a long list of

federal agencies and government officials, including the Department of Labor and the Department of Education and each one's Acting Secretary.

What's Under Challenge?

The Feb. 3 complaint, which was filed in a federal court in Maryland, challenges two executive orders issued by President Trump within his first 48 hours back in the White House, including:

- a January 20 order (Executive Order 14151) titled "Ending Radical Government DEI Programs and Preferencing;" and
- a January 21 order (Executive Order 14173) titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which we previously covered here (private sector impact) and here (impact on federal contractors and subcontractors).

What Are the Specific Arguments?

The plaintiffs claim that DEIA principles are critical to their missions, programs, and work in service of students, research and academic inquiry, restaurant workers, and everyday citizens, and that, "to Defendants, DEI is an ideology that they do not define but nonetheless want to crush, whether it manifests itself through lawful speech and actions or through actual violations of law." They claim that both executive orders (listed above) violate the Constitution.

Regarding Executive Order 14173, the complaint alleges that:

- the sections impacting the private sector (Section 4) and federal contractors and subcontractors (Section 3) **violate the First Amendment**, because, among other reasons, the threat of civil compliance investigations impermissibly restricts the exercise of constitutionally protected speech based on its content and viewpoint;
- **Section 4 is unconstitutionally vague in violation of due process rights**, because it fails to define material terms (such as "illegal DEIA and DEIA policies") that determine whether certain plaintiffs "will be subject to civil investigation, civil enforcement, claw back of funding, or other enforcement actions by the federal government;" and
- **Section 3 violates the separation of powers**, because the "President and the executive branch have no authority to dictate government spending or place conditions on the spending power that is vested in the legislative branch."

The plaintiffs ultimately claim that, without court intervention, the executive orders and their implementation will cause them to suffer irreparable harm. They've asked the court to declare both orders as unconstitutional and to temporarily and permanently block the federal government, other than the President, from enforcing the orders.

What Does This Mean for Employers?

You should stay tuned for updates as this lawsuit plays out in court. It's possible that a judge could ultimately halt Executive Orders 14151 and 14173. In the meantime, you should consider taking the action steps we laid out here (private sector) and here (federal contractors and subcontractors).

And remember, correctly designed DEI programs have never been inherently illegal and remain viable even in the face of recent events – but they must comply with anti-discrimination laws such as Title VII. In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Affirmative Action and Federal Contract Compliance Practice Group. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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Service Focus

Affirmative Action and Federal Contract Compliance

Corporate Compliance and Governance

Counseling and Advice

Employment Discrimination and Harassment

Government Relations

What Businesses Need to Know About DEI in the Trump Era: FAQs for Employers

Insights
2.07.25

Last Updated February 7, 2025

The whirlwind first few weeks of the second Trump administration have left private employers with concerns and questions related to Diversity, Equity, and Inclusion (DEI) programs. In order to dispel myths and provide practical answers about your legal risks, FP's DEI and Equal Employment Opportunity Compliance Team has assembled the following series of questions and answers.

TABLE OF CONTENTS

General Update on DEI Development Under Trump

How has the federal stance on DEI changed under the Trump administration?

The new Trump administration has taken aim at DEI initiatives within both the federal government and the private sector and took a series of dramatic steps related to DEI programs in the first weeks after assuming office. Here are a few key examples:

- Trump issued an executive order directing federal agencies to combat "illegal" corporate DEI initiatives.
- Trump installed Andrea Lucas – an avowed opponent of illegal DEI – as Acting Chair of the Equal Employment Opportunity Commission (EEOC) and ousted two Democratic Commissioners. These two moves have set the stage for the agency to focus on DEI programs at private organizations.
- For federal contractors, Trump revoked an executive order that mandated affirmative action requirements for federal contractors and subcontractors through the Office of Federal Contract Compliance Programs (OFCCP) and promoted DEI programs. You can read more about this below in the section titled "Federal Contractor Considerations."

What is "illegal DEI" as defined by the Trump administration?

What is "illegal DEI" as defined by the Trump administration?

The administration has not provided a clear definition of "illegal DEI." Trump's January 21 executive order defines prohibited conduct as:

- illegal discrimination and preferences; and
- workforce balancing based on race, color, sex, sexual preference, religion, or national origin.

However, this type of conduct has long been prohibited by existing federal law (discrimination and quotas have always been unlawful under Title VII of the Civil Rights Act and other statutes), Stay tuned--the Trump administration has indicated that its objectives go beyond reinforcing Title VII.

What does the DEI executive order actually mean to employers in the private sector?

Trump's January 21 executive order, which you can read here, does the following with respect to private sector employers:

- Instructs federal officials, including the attorney general and all agency heads to prepare and submit a report that the administration will use to establish new "civil rights" policies against corporate DEI programs within 120 days – or by May 21. The report must include recommended measures to encourage the private sector to "end illegal discrimination and preferences, including DEI," as well as a proposed strategic enforcement plan.
- Directs all federal agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities" and to take all appropriate action to advance the order's policy of "individual initiative, excellence, and hard work" among private employers.
- The order does **not** apply to private-sector employment and contracting preferences for military veterans and individuals with disabilities.

Are DEI programs illegal now?

Correctly designed DEI programs have never been inherently illegal, and remain viable even in the face of recent events – but they must comply with anti-discrimination laws such as Title VII. Just as under any prior presidential administration, employers must ensure their initiatives do not involve:

- quotas;
- set-asides; or
- policies that explicitly favor or disadvantage employees based on race, gender, or other protected characteristics.

Didn't the Supreme Court strike down affirmative action programs a few years ago?

No – not as they relate to private sector employers. In 2023, SCOTUS ruled that the use of race in college admission decisions violated the Equal Protection Clause of the Fourteenth

Amendment. Employer DEI programs were not directly addressed by the Court's decision.

How should employers respond to state-level DEI bans or restrictions that conflict with federal anti-discrimination laws?

There are state laws promoting and restricting DEI programs in employment, creating a complex compliance landscape. Employers operating in multiple jurisdictions should work closely with legal counsel to develop a unified strategy that aligns with both state and federal requirements. Adjusting programs to emphasize broad-based inclusion, fairness, and equal opportunity rather than identity-specific preferences can help navigate these legal conflicts.

What role does AI play in DEI, and what legal risks does it present?

AI is increasingly used in hiring, performance evaluations, and promotions, but its application presents risks if algorithms reinforce existing biases. The EEOC signaled a willingness to scrutinize AI systems that result in disparate impact claims under the Biden administration, and even if the new-look EEOC offers less attention to this area, there's no doubt that state agencies and plaintiffs' attorneys will be doing so. Employers should regularly audit AI-based hiring tools, ensure transparency in algorithmic decision-making, and provide alternative assessment methods for candidates who may be disadvantaged by automated systems.

Legal Risks and Compliance Strategies

What are the biggest legal risks for employers implementing DEI programs?

Given the latest developments, you need to recognize that even well-constructed DEI programs could run some risk for your organization. The risks include:

- Increased risk of **discrimination** lawsuits alleging DEI-related unlawful discrimination from employees who feel disadvantaged.
- **Scrutiny from federal and state agencies** such as the EEOC, OFCCP, State AGs, and DOJ – including potential agency audits.
- **Internal employee complaints**, spurred on by messaging from the White House and external advocacy groups encouraging employees to take action.
- **Public scrutiny** from employees and members of the public, amplified by social media and other news outlets.
- **Potential conflicts** between federal restrictions and state/local laws that mandate diversity initiatives.

Have there been recent examples of companies facing legal scrutiny because of DEI programs?

Yes, at least three recent examples (which you can read about here):

- A venture capital firm ended a grant contest for Black women business owners as part of a settlement agreement it entered into in September 2024 to resolve claims that the contest unlawfully excluded white and Asian-American women. The 11th Circuit Court of Appeals held that this program likely violated a federal anti-discrimination law and was unlikely to enjoy First Amendment protection, leading the firm to end its contest.
- The 4th U.S. Circuit Court of Appeals agreed that an employer committed unlawful discrimination against a former executive – a white man who claimed his employer fired him and replaced him with a Black woman amidst the company's widescale diversity and inclusion initiative, which had an express goal of "adding dimensions of diversity to the executive and senior leadership teams." The appeals court set aside the jury's award of $10 million in punitive damages in March 2024 and reduced them to $300K.
- Another case involved a white man who claimed that his former employer, the Colorado Department of Corrections, subjected him to a hostile work environment by implementing a mandatory DEI training. Specifically, he claimed the training "demeaned him of his race and promoted divisive racial and political theories that would harm his interaction with other corrections' personnel and inmates." The 10th U.S. Circuit Court of Appeals agreed with a lower court that dismissed the case, concluding the allegations were too speculative "at this time" to survive the employer's motion to dismiss. However, it noted that the employer's race-based training program was "troubling on many levels" and that such programs can create hostile work environments and set the stage for actionable misconduct by organizations employing them "when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment."

What types of DEI practices are most likely to come under scrutiny?

While the following actions have always been risky, they are especially likely to come under fire given recent events:

- Hiring or promotion policies that give explicit preference to certain demographic groups.
- Internships or mentoring programs that give explicit preference to certain demographic groups.
- Employee training that includes race- or gender-based stereotyping.
- Affinity group policies that exclude employees based on protected characteristics.
- Supplier diversity initiatives that mandate racial or gender-based quotas.
- Policies that limit speech or expression in a manner perceived as restricting certain viewpoints.
- AI-driven hiring or evaluation tools that unintentionally embed or reinforce bias.

Are there benefits to maintaining a DEI program?

Many employers recognize that the benefits of diversity in the workplace go beyond brand recognition and increased profits. When businesses ensure they are building their workforces with employees of different backgrounds and perspectives, multiple studies have proven that DEI programs can increase productivity, improve decision-making, and foster greater innovation. A diverse workplace may also increase employee engagement and morale while decreasing turnover. A 2021 Glassdoor Diversity Hiring Survey showed that more than 3 out of 4 job seekers and employees (76%) consider a diverse workforce to be an important factor when evaluating companies and job offers.

What steps should employers take to ensure existing DEI initiatives comply with the law?

- Conduct an **attorney-client privileged legal review** of DEI programs and related training materials with your FP counsel.
- Ensure hiring, promotion, and compensation decisions are **transparent and well-documented**.
- **Train hiring managers and HR personnel** on legally compliant DEI practices and such practices that support your business objectives.
- Reframe DEI efforts **to emphasize workplace culture, leadership development, and equitable access to opportunities** as sustainable business practices rather than preferential treatment.

Are there best practices to deploy if we want to ensure we create a lawful diverse, equitable, and inclusive work environment?

- **Review Your Recruiting:** Efforts to expand the applicant pool should remain acceptable, even in the current environment. You should continue outreach to diverse sources for applicants including high schools in diverse communities, HBCUs, and organizations that promote women, minorities, veterans, disabled individuals, and other underrepresented groups. Consider including socioeconomic and geographic diversity as other potential factors aligned with underrepresentation in your company in the outreach strategy.

- **Avoid Improper (and Illegal) Considerations When Hiring and Promoting:** Just as before, private employers are prohibited from using race (and other protected characteristics) when making employment decisions such as hiring and promotions. Avoid doing so now just as then. Implement objective, merit-based employment practices that emphasize equal opportunity for all candidates.
- **Reconsider Race-Based Goals:** Quotas have always been unlawful for private employers under Title VII. It is likely that race-based objectives also remain problematic. More general statements such as "being representative of the community" or achieving a higher percentage of diversity among the management team may also be challenged – so work with your legal counsel to ensure your objectives are appropriate.
- **Provide DEI Training – But Make Sure It Stays in Bounds:** DEI training initiatives remain a beneficial aspect of your development plans – but you should review them to ensure the content

beneficial aspect of your development plans – but you should review them to ensure the content is legally appropriate. Focus on the benefits of diversity and inclusion in the workplace. Inclusion should be highlighted as a tool to achieve your business objectives (such as getting the most out of all employees) rather than promoting targets or quotas. It is imperative you continue training to eliminate unlawful harassment and discrimination in the workplace by training all employees, including specialized training for managers and supervisors. (Be mindful of specific state laws that might impact DEI training, so check with your legal counsel.)

- **Retain – But Consider Retooling – Internship and Mentoring Programs:** Existing internship and mentoring programs that promote career development are generally legal and you should continue them to enhance your company's development efforts. However, programs should be open to all candidates and employees regardless of race or other protected category. Review and update them as needed to ensure they stay within the bounds of the current state of the law.
- **Open Your Employee Resource Groups:** These groups – sometimes known as Business or Affinity Groups – remain legal just as they were before the Trump administration's actions. But you should review membership guidelines to ensure they are open to anyone interested in the topic and not limited by sex, race, or any other protected category.
- **Focus on Inclusivity**: Your DEI program should highlight the benefits of inclusion and diversity in the workplace and how these initiatives serve as a tool for achieving your business objectives. Initiatives aimed at making workplaces more inclusive — such as employee resource groups or educational campaigns — can be impactful in this arena.
- **Don't Make Assumptions:** Your DEI program should not include assumptions about groups of people (such as assumptions based on race or sex) or repeatedly offer stereotypes. For example, in the 10th Circuit case mentioned above, the court frowned upon training that allegedly critiqued a "fakequity" belief that "white allies" are "an exception to white racism" that "perpetuates white supremacy." The court said, "If not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging." You should also consider gathering information from your employees about their perceptions and experiences related to DEI in your workplace and training your employees on fact-based decision techniques to avoid making decisions based on faulty assumptions and biases.

What should employers do if an employee files a discrimination claim related to DEI?

Discrimination claims involving diversity practices are on the rise and require careful handling. Just as with any claim or threatened claim, you should immediately conduct an internal review, consult legal counsel, and ensure that hiring and promotion decisions and the availability of career opportunities were based on clear, objective, and legally defensible criteria. A proactive approach, including maintaining thorough documentation of employment decisions, can help mitigate litigation risks.

Note that the Supreme Court will soon hear a discrimination case that will resolve a disagreement among federal appeals courts regarding whether a majority-group plaintiff must show, in addition to the other elements of a Title VII claim, "background circumstances to support the suspicion that the

the other elements of a Title VII claim," "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." We will track developments in *Ames v. Ohio Department of Youth Services* as they unfold, so stay tuned for updates.

Looking to the Near Future

What can we expect next from the federal government?

The DEI executive order instructs each federal agency, by May 21, to identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of $500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over $1 billion. You can expect to see investigations launched against organizations with DEI programs, and perhaps litigation as well.

What does FP predict will happen at the federal level with respect to DEI?

Once EEOC Acting Chair Lucas has a quorum in the agency (which will happen when Trump appoints and the Senate confirms at least one more Commissioner), you can expect to see immediately technical assistance guidance documents from the agency cracking down on illegal DEI programs, and the beginning of regulatory rulemaking along those same lines. Of course, Trump's unprecedented terminations of two Democrat EEOC Commissioners to free up room to create this Republican quorum will most likely come under legal attack and could throw any subsequent moves by the EEOC into question.

Federal Contractor Considerations

How have DEI policies changed for federal contractors and subcontractors?

President Trump's January 21 executive order rescinded affirmative action requirements for federal contractors under Executive Order 11246. This eliminates the requirement to analyze workforce data and create affirmative action plans. The OFCCP was directed to cease enforcement of these obligations, and the Labor Department announced within a week that it was ceasing all pending investigations and enforcement activity.

Is there a grace period?

The order allows contractors to continue complying with the prior rules for 90 days, or until April 21. We expect to hear more information about the wind-down process in advance of that date and this FAQ will be updated accordingly.

Are there affirmative reporting obligations for contractors?

The order also directs federal agencies to require every contractor and grant recipient to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." According to a White House fact sheet, the order "requires simple and unmistakable affirmation that contractors will not engage in illegal discrimination, including illegal DEI." If you have not yet been asked to make such an affirmation, you might soon receive such a request.

How should we respond to such a demand for an affirmation?

Federal contractors and subcontractors should have never taken any actions that violate any federal anti-discrimination laws, even before the White House's order. Contractors should carefully review the requested affirmation and future definition of "illegal DEI" to ensure they can make the requested affirmation.

Can federal contractors still have DEI programs?

Yes, but they must be structured carefully. As noted above, federal contractors must now certify that they do not operate DEI programs that involve illegal discrimination. While voluntary diversity efforts remain permissible, explicit racial, gender, or other preference-based initiatives could lead to compliance challenges – just as they always have.

What about affirmative action obligations for veterans and individuals with disabilities?

Notably, the executive order does not end affirmative action requirements for covered federal contractors under two laws aimed at protecting veterans and individuals with disabilities: the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act. These programs are enforced by the OFCCP and require covered federal contractors to engage in affirmative action outreach efforts for protected veterans and individuals with disabilities, and to create affirmative action plans. Despite the fact that OFCCP released a statement that Section 503 and VEVRAA obligations "remain in effect" despite Trump's executive order, the White House ordered the OFCCP to notify all federal contractors and subcontractors subject to open reviews or cases related to Section 503 or VEVRAA matters that their cases are being held in abeyance "pending further guidance" by January 31. We expect to receive more guidance on this issue soon, at which point we will update this FAQ document.

What should federal contractors do in response to these changes?

- **Keep Informed:** Over the next 90 days, we expect to receive more information from the OFCCP about how this new direction will impact federal contractors and subcontractors. Sign up to receive Fisher Phillips' Insights to stay up to date on the latest developments.
- **Continue Other Compliance Efforts:** Federal contractors and subcontractors will continue to have obligations related to federal and state laws, such as EEO-1 and VETS-4212 filings, and

state pay data reporting requirements (including in California), as applicable. Continue to participate in these required compliance filings.

- **Recalibrate Your Efforts:** Adjust recruiting and outreach efforts to maintain diversity without violating new restrictions.
- **Work with Legal Counsel:** In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements, especially if you have a pending audit before the OFCCP.

Conclusion

This FAQ will be updated as new legal developments emerge. Bookmark this resource and check back often to stay ahead of compliance risks.

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New Administration Resource Center for Employers

States Take Stand Against Trump's Anti-DEI Actions: What Employers Need to Know

Insights
2.17.25

Sixteen Democratic state attorneys general just issued joint guidance reaffirming their position that workplace diversity, equity, inclusion (DEI) initiatives remain legal – and important to the modern workplace. The February 13 guidance, signed by AGs from traditionally "blue" states such as Massachusetts, Illinois, California, and New York, directly responds to the Trump administration's recent executive orders and other actions taking aim at corporate DEI programs. The AGs' message is clear: Well-structured DEI programs remain lawful and play a crucial role in fostering fair, compliant, and productive workplaces. This article breaks down the guidance, its implications for employers, and recommended next steps.

What the AGs Letter Says

The letter, issued by Andrea Joy Campbell (Mass.) and Kwame Raoul (Ill.), serves as both a legal clarification and a practical guide for employers. You can read the guidance here, but key points include:

- **DEI Programs Are Legal:** The AGs reiterate that DEI initiatives designed to create inclusive work environments are consistent with Title VII of the Civil Rights Act and state-level anti-discrimination laws, and are therefore legal. Courts have long recognized that monitoring demographic trends and ensuring equal opportunity is not discriminatory – so long as it is done properly and carefully.
- **Clarifying Misconceptions:** The AGs argue that recent federal executive orders inaccurately portray all DEI programs as unlawful. They emphasize the difference between illegal actions – like quotas, preferences, workforce balancing – and lawful practices – such as broad outreach efforts, anti-bias training, and the use of data to identify potential disparities.
- **Business Benefits:** The letter highlights evidence that diverse, inclusive workplaces perform better, with lower turnover, stronger innovation, and greater market competitiveness. "Promoting a diverse and inclusive workforce isn't just the right thing to do," the letter says, "it's also more profitable."

Why the AGs Issued This Guidance

The AGs' letter follows recent White House executive orders instructing federal agencies to investigate private-sector DEI practices for potential violations. While these orders have generated uncertainty, the AGs contend that they don't change existing anti-discrimination laws.

The February 13 letter seeks to reassure employers that legal, well-structured DEI programs remain permissible. In fact, the AGs stress that businesses often have an affirmative duty to monitor workforce demographics to prevent discrimination – and that properly created DEI programs can mitigate legal risks in potential investigations.

State-Federal Tensions May Increase

While federal enforcement may rise, states with supportive AGs are likely to defend employers adhering to best practices. Meanwhile, we have already seen actions taken by conservative state attorneys general taking aim at private employers' DEI programs, and last week's letter from the Democratic AGs will not slow down those efforts. Multistate employers should track both federal developments and evolving state-level positions to navigate the fine line between these positions.

What Employers Should Expect

The AGs have pledged ongoing support for businesses maintaining lawful DEI programs. As federal scrutiny increases, you should expect:

- **Increased State Agency Attention:** Particularly for companies with federal contracts.
- **Further State-Level Guidance:** Other states may follow the lead of these 16 AGs – while we can expect opposing states to issue their own contrary version in the near future.
- **Evolving Best Practices:** Regularly review policies to align with both developing federal requirements and state-level protections.

Recommended Next Steps for Employers

- **Audit and Adjust Policies:** Review your DEI programs to ensure compliance with federal and state law. If necessary, add language demonstrating that your company does not enforce quotas or identity-based preferences, as those have always been illegal under federal law and never should have existed in the first place.
- **Document Compliance Efforts:** Maintain records of DEI-related decisions and their business justifications. Track training participation and demographic monitoring practices.
- **Review Your DEI Training Programs:** If you offer training on unconscious bias, inclusive leadership, or legal DEI parameters, make sure your trainers explain DEI goals in clear, lawful terms – or consider using well trained professional trainers that know the legal landscape.
- **Communicate Consistently:** Update internal messaging to reflect a commitment to both fairness and legal compliance. Reassure employees that DEI efforts aim to create opportunity for all, not

favoritism for any specific group or groups.

- **Stay Informed:** Read our ***What Businesses Need to Know About DEI in the Trump Era: FAQs for Employers*** Insight, and make sure you are subscribed to Fisher Phillips' Insight Systemto gather the most up-to-date information.
- **Utilize Attorney-Client Privilege:** Review your DEI and related programs with your experienced DEI attorney to receive the benefit of attorney-client privilege.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our DEI and EEO Compliance Team. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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New Administration Resource Center for Employers

Federal Court Halts Enforcement of DEI Executive Orders: What Employers Need to Know + 5 Steps to Take Next

Insights
2.26.25

President Trump issued two anti-DEI executive orders at the start of his second term that shook up the workplace and left federal contractors and private employers wondering how to comply. Employers grappled with understanding what was meant by "illegal DEI" programs that could lead to a loss of federal funding or future enforcement activities. A recent lawsuit filed in Maryland federal court argued that the orders were vague and that the key terms were undefined – and the court agreed. The judge issued an order on February 21 temporarily blocking enforcement of the executive orders while the lawsuit plays out. What does this mean for employers' diversity, equity, inclusion, and accessibility (DEIA) programs? Here's what federal contractors and other private employers need to know about this development and five steps you should consider taking next. **[Update: The 4th U.S. Circuit Court of Appeals lifted the ban on March 14, giving the administration the green light to proceed with its direction while the lawsuit plays out.]**

How Did We Get Here?

During the first two days of the new administration, President Trump issued two executive orders aimed at curtailing "illegal DEI" in the federal government, as well as with federal contractors, federal grant recipients, and private employers. The executive orders contained three main provisions, which the Maryland court summarized as follows:

- **The Termination Provision** directed all executive agencies to terminate "equity related grants or contracts."
- **The Certification Provision** directed all executive agencies to "include in every contract or grant award a certification, enforceable through the False Claims Act, that the contractor grantee does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."
- **The Enforcement Threat Provision** directed the Attorney General to take appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI, to "deter" such "programs or principles" and to identify "potential civil compliance investigations" to accomplish such "deterrence."

Based on these orders, federal agencies took early steps to comply, including advising contractors and grantees that there would be an evaluation and subsequent termination of contracts and grants.

Additionally, the Attorney General issued a memo stating that the government intended to begin its evaluation of enforcement mechanisms against private sector companies engaging in "Illegal DEI."

Federal contractors, federal grantees, and private-sector employers scrambled to "read the tea leaves" regarding the compliance requirements under the vague new policy objectives for equal employment opportunity and DEI initiatives outside of the federal government. This became more daunting as the executive branch appeared to take inconsistent positions regarding "illegal DEI".

Continued uncertainty prompted the National Association of Diversity Officers in Higher Education and other groups to challenge the constitutionality of the executive orders in a lawsuit filed on Feb. 3 in a Maryland federal court. The plaintiffs also argued that DEIA principles are critical to their missions, programs, and work in service of students, research and academic inquiry, restaurant workers, and everyday citizens. The outcome is a nationwide injunction for specific parts of the executive orders.

What Did the Court Say?

The Maryland federal district court agreed with the plaintiffs that certain parts of the executive orders were unconstitutional, and they were ultimately likely to succeed on the merits of their claims. Here are some of the court's key findings:

- **Termination Provision:** The plaintiffs argued that the termination provision violates the Spending Clause and the President cannot unilaterally terminate contracts. The court agreed. Additionally, the court said the phrases "DEIA," "equity," and "equity-related" were unconstitutionally vague because the term "equity-related contracts or grants" can lead to arbitrary and discriminatory enforcement. Moreover, the court said there was insufficient notice to current grantees about whether and how they can adapt their conduct to avoid termination of their contracts and grants. Further, the court noted, "equity" often transcends issues of diversity, inclusion, and accessibility, and extends beyond areas of anti-discrimination efforts and civil rights laws.
- **Certification Provision:** The plaintiffs argued that the certification provision was unconstitutional viewpoint discrimination because the purpose was to restrict speech related to topics such as equity, inclusion, and diversity. The court agreed, noting that "the express language of the Certification Provision demands that federal contractors and grantees essentially certify that there is no 'DEI' (whatever the executive branch decides that means) in *any* aspect of their functioning, regardless of whether the DEI-related activities occur outside the scope of the federal funding." Under long-standing precedent, the court said, the government can choose to fund one activity or another and define the limits of the government spending program, but it may not punish government contractors and grantees because of their speech on matters of public concern. Further, the court stated the Certification Provision was likely to have the effect of inducing contractors and grantees to apply an over-inclusive definition of "illegal DEI."
- **Enforcement Threat Provision:** The plaintiffs argued that this provision, too, was unconstitutionally vague. The court agreed, noting that contractors were left to guess whether

unconstitutionally vague. The court agreed, noting that contractors were left to guess whether they would be terminated and did not have guidance on how to conform their policies and procedures for compliance. The court observed that the possibilities for the government to deem "equity-related" activities as prohibited "are almost endless, and many are pernicious." The court held that "the government cannot rely on the threat of invoking legal sanctions and other means of coercion to suppress disfavored speech." The court also found that the provisions unconstitutionally curbed freedom of speech.

The associations also demonstrated that the executive orders would result in irreparable harm, including loss of funds, uncertainty regarding future operations, loss of reputation, and chilled speech, according to the court. Although enforcement proceedings are enjoined, the court did not stop the Attorney General from preparing a report of investigation targets or engaging in investigations for potential enforcement actions.

The court did not address any of the other provisions of the executive orders, including the revocation of Executive Order 11246, which had been in place since 1965 and mandated certain aspects of the affirmative action requirements.

Notably, the district court's preliminary injunction is not the final decision in the litigation. The case may proceed to trial to determine whether a permanent injunction will be ordered or the government may immediately appeal the injunction order. However, the order blocking the executive orders pending a trial provides some breathing room for federal contractors, federal grantees, and private-sector companies.

You should also note that a group of Democrat state attorneys general issued joint guidance earlier this month reaffirming their position that workplace DEI initiatives remain legal – and important to the modern workplace.

What Are the Top 5 Steps You Can Take Next?

1. **Continue to Evaluate DEI Programs.** It is abundantly clear that the new administration is heavily focused on eradicating "illegal DEI" in the workforce. The administration has made clear that it's not the DEI label that matters, rather it is the content of the programs, policies, or procedures. Employers should continue to conduct privileged audits of their DEI programs and initiatives. While "illegal DEI" is a vague and undefined term, DEI programs and initiatives should never — even before the executive orders — violate Title VII of the Civil Rights Act or any other federal or state anti-discrimination law. Correctly designed DEI programs have never been inherently illegal and remain viable even in the face of recent events – but they must comply with anti-discrimination laws.
2. **Track Developments from the Courts, Executive Branch, and State Attorneys General.** The White House may provide clarifying formal DEI policy guidance in May 2025 or later. In the meantime, various agencies, departments, and offices of the federal government have started to release internal communications applicable to federal employees and guidance for various

sectors on DEI directives. For example, the Office of Personnel Management (OPM) released a memo related to DEI on February 5 that discusses unlawful discrimination practices for hiring, benefits, retention and training. The OPM memo and a Department of Justice memo on the same day also describe permissible DEI activities for events that celebrate diversity and that involve employee resource groups. Additionally, the Department of Education published a "Dear Colleague Letter" on February 14 warning educational institutions against even race-neutral practices. Based on the DOE's interpretation of the Supreme Court's 2023 ruling concerning college admissions decisions, race cannot be used in decisions in any aspect of academic and campus life. You can read more about the SCOTUS decision here.

3. **Recognize that Employees and Job Applicants Can Challenge DEI Programs and Practices.** The court's order applies only to the new administration's executive orders. Employees and job applicants are still permitted to bring administrative actions or private lawsuits if they believe a company's DEI programs violate federal or state anti-discrimination laws. Employers should ensure that their programs remain compliant with existing laws.
4. **Bookmark Our DEI FAQs for the Trump Era.** In order to dispel myths and provide practical answers about your legal risks, we have assembled a series of questions and answers, which you can access here. We will continue to update these FAQs as appropriate, so be sure to bookmark them and check back frequently.
5. **Reach Out to Legal Counsel.** In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements. Our DEI and Equal Employment Opportunity Compliance Team helps businesses design, administer, and continually evaluate legally sound, effective DEI policies and initiatives that align with federal and state requirements while advancing workplace culture and business objectives.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our DEI and EEO Compliance Team. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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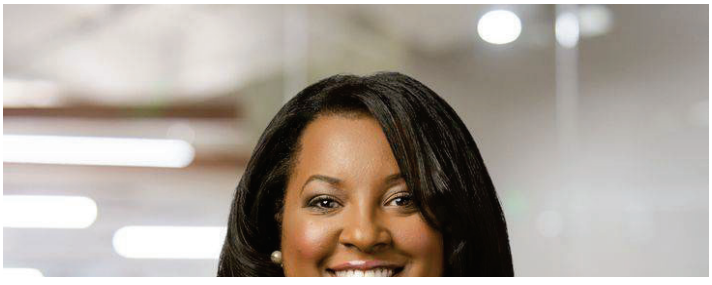

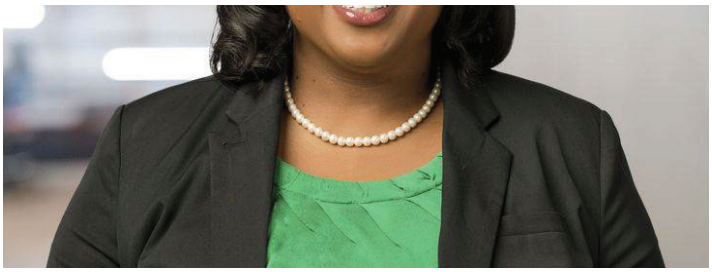

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New Administration Resource Center for Employers

EEOC Issues Guidance on Unlawful Workplace DEI Programs: Top Takeaways for Employers

Insights
3.21.25

Employers just received some clarity on what type of workplace DEI programs may be risky under President Trump's recent executive orders relating to illegal diversity, equity, and inclusion practices. The Equal Employment Opportunity Commission (EEOC) issued guidance on Wednesday specifically on what constitutes "unlawful discrimination" related to DEI in the workplace. While the guidance notes the type of conduct that has long been prohibited by existing federal law, it also provides a roadmap for employers to ensure their programs don't run afoul of new directives. Here's what you need to know about the EEOC's March 19 DEI guidance and how it may impact your workplace.

How We Got Here

First, let's briefly discuss the recent actions from the new administration leading up to this development.

Spotlight on DEI initiatives. As you are likely aware, the Trump administration has taken aim at DEI initiatives within both the federal government and the private sector and took a series of dramatic steps related to DEI programs in the first weeks after assuming office. Here are a few key examples:

- Trump issued an executive order directing federal agencies to combat "illegal" corporate DEI initiatives.
- Trump installed Andrea Lucas – an avowed opponent of illegal DEI – as Acting Chair of the Equal Employment Opportunity Commission (EEOC) and ousted two Democratic Commissioners. These two moves set the stage for the agency to focus on DEI programs at private organizations.
- For federal contractors, Trump revoked an executive order that mandated affirmative action requirements for federal contractors and subcontractors through the Office of Federal Contract Compliance Programs (OFCCP) and promoted DEI programs.

Uncertainty for employers. Notably, the executive orders did not provide a clear definition of "illegal DEI." Trump's January 21 executive order defines prohibited conduct as:

- illegal discrimination and preferences; and
- workforce balancing based on race, color, sex, sexual preference, religion, or national origin.

This type of conduct has long been prohibited by existing federal law (discrimination and quotas have always been unlawful under Title VII of the Civil Rights Act and other statutes.)

Courts review Trump's DEI orders. Although a federal judge in Maryland temporarily blocked parts of Trump's DEI order in February, an appeals court just lifted the ban on March 14, giving the administration the green light to proceed with its direction while the lawsuit plays out. The appeals court said Trump's orders "do not purport to establish the illegality of all efforts to advance diversity, equity or inclusion, and they should not be so understood." One judge noted, however, that he would "reserve judgment on how the administration enforces these executive orders." We will continue to monitor this lawsuit, as well as other related actions, and provide updates as warranted, so make sure you are subscribed to the Fisher Phillips Insight System.

Key Points in New Guidance

The EEOC – along with the Department of Justice – released two new technical assistance documents on March 19 providing some clarity for employers grappling with DEI compliance issues. Here are the key takeaways you should note from the guidance:

- **Reminder on the scope of Title VII protections.** The guidance reminds employers that Title VII prohibits employment discrimination based on protected characteristics, including race, color, national origin, sex, and religion. The agency explained that the law protects against such discrimination "no matter which employees are harmed," and noted that Title VII's protections "apply equally to all racial, ethnic, and national origin groups, as well as both sexes."
- **No 'reverse' discrimination.** "The EEOC's position is that there is no such thing as 'reverse' discrimination," according to the guidance, which also emphasized that Title VII's protections do not only apply to individuals who are part of a "minority group." Rather, they apply to "majority groups" as well. Title VII's protections apply equally to all workers, and the EEOC does not require a higher showing of proof for so-called "reverse" discrimination claims. You should note that this issue is also before the Supreme Court this term. We predict that the outcome will align with EEOC guidance, with the Justices ruling that majority-group plaintiffs must meet the same pre-trial evidentiary burden applicable to minority-group plaintiffs – and nothing more – under Title VII. You can read more about the case here.
- **No "business necessity" exception for DEI programs.** Title VII allows for a bona fide occupational qualification (BFOQ) in very limited circumstances to excuse hiring or classifying an individual based on religion, sex, or national origin – but this exception excludes race and color. The EEOC's new guidance highlights that Title VII does not provide any "diversity interest" exception to these rules. "No general business interests in diversity and equity (including perceived operational benefits or customer/client preference) have ever been found by the Supreme Court or the EEOC to be sufficient to allow race-motivated employment actions."
- **Covered workers.** The EEOC added that Title VII protects employees, potential and actual applicants, interns, and training program participants.

Examples of Potentially Unlawful DEI Practices

The agency said DEI policies, programs, or practices may be unlawful under Title VII if they involve "an employment action **motivated** – in whole or in part – by an employee's race, sex, or another protected characteristic." Unlawful DEI-related discrimination might include:

- **Quotas and other "balancing" practices** based on race, sex, or other protected characteristics.
- **Disparate treatment,** which means taking an employment action that is motivated (in whole or in part) by a protected characteristic. Examples of employment actions include firing, promoting, demoting, and compensating employees; providing access to fringe benefits; excluding individuals from training, mentoring or sponsorship programs, or fellowships; and making selections for interviews.
- **Limiting, segregating, and classifying** employees based on protected characteristics in a way that affects their status or deprives them of employment opportunities. This includes limiting membership in workplace groups, such as affinity groups, and separating employees into groups based on protected characteristics for DEI or other workplace trainings, even if the content is the same.
- **Harassment during DEI training**, which may lead to a hostile work environment claim, depending on the facts. Harassment is illegal when it results in an adverse change to a term, condition or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive.
- **Retaliation** for objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge. "Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII," according to the guidance.

What Employers Should Do Now

- **Assess your programs** for DEI practices that are likely to come under scrutiny. While the following actions have always been risky or straight-out illegal, they are especially likely to come under fire given recent events:
    - Hiring or promotion policies that give explicit preference to certain demographic groups.
    - Internships or mentoring programs that give explicit preference to certain demographic groups.
    - Employee training that includes race- or gender-based stereotyping.
    - Affinity group policies that exclude employees based on protected characteristics.
    - Supplier diversity initiatives that mandate racial or gender-based quotas or are limited to certain demographic groups.

    - Policies that limit speech or expression in a manner perceived as restricting certain viewpoints.
    - AI-driven hiring or evaluation tools that unintentionally embed or reinforce bias.
- **Conduct an attorney-client privileged legal review** of DEI programs and related training materials with your FP counsel.
- Ensure hiring, promotion, and compensation decisions are **transparent and well-documented**.
- **Train hiring managers and HR personnel** on legally compliant practices and the practices that support your business objectives. Communicate diversity initiatives to **emphasize workplace culture, professional development, and inclusive merit-based access to opportunities** as sustainable business practices.
- Read our detailed FAQs here, including best practices to deploy if you want to ensure you create a lawful diverse, equitable, and inclusive work environment.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney or the authors of this Insight. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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New Administration Resource Center for Employers

Trump's OFCCP Pick Vows to Combat Illegal DEI By Reviewing Prior Affirmative Action Plans: Here's What Federal Contractors Need to Know

Insights
3.27.25

Federal contractors have been grappling with big changes from the new administration – and you'll want to pay close attention as new leadership takes shape at the Office of Federal Contract Compliance Programs (OFCCP). On Monday, President Trump appointed Houston attorney Catherine Eschbach to lead the agency and "oversee its transition to its new scope of mission." The administration's new direction includes limiting affirmative action requirements to veterans and individuals with disabilities and combating illegal DEI programs – but the new OFCCP leader said she also wants to review mandatory affirmative action plans submitted prior to the new administration for potential longstanding discriminatory practices. "As director, I'm committed to carrying out President Trump's executive orders, which will restore a merit-based system to provide all workers with equal opportunity," Eschbach said. Here's what federal contractors need to know about her appointment and what you can expect next.

How Did We Get Here?

President Trump has made clear that his administration is focused on combating diversity, equity, and inclusion (DEI) practices that are illegal under federal employment laws. On his first day of the new term, the President issued a sweeping executive order ending certain affirmative action standards for federal contractors, barring the OFCCP from allowing or encouraging DEI programs, and directing federal agencies to combat "illegal" corporate DEI programs in the private sector. You can read more about the order here.

Prior to the executive action, employers who are federal contractors had been required for sixty years to engage in affirmative action under Executive Order 11246, which covers women and minorities. In this context, "affirmative action" meant that federal contractors had to analyze their workforce data to determine whether goals for women and/or minorities should be set and to engage in good faith efforts to ensure they were providing equal employment opportunities for all.

President Trump eliminated this mandate while retaining affirmative action requirements related to veterans and individuals with disabilities. To comply, covered contractors have been preparing to wind down their gender- and race-related affirmative action plans within 90 days of the order.

How Will the New OFCCP Director Impact the Agency?

It's no surprise that Eschbach is committed to carrying out President Trump's executive orders. What's surprising, however, is that she wants to review prior submissions to the agency required by Executive Order 11246 for potential discrimination. "The reality is, most of what OFCCP had been doing was out of step, if not flat out contradictory, to our country's laws, and all reform options are on the table," Eschbach said in an internal OFCCP email, according to The Wall Street Journal (paywall).

The director's email said the OFCCP would be verifying whether contractors have actually "wound down" the use of affirmative action plans and would be reviewing prior plan submissions to assess whether they "indicate the presence of longstanding unlawful discrimination," according to Bloomberg Law (paywall).

It is not yet clear if or how these reviews will be conducted, or which federal contractors or subcontractors will be affected. We will track additional guidance from the OFCCP and keep you updated. In the meantime, you will want to work with experienced legal counsel to prepare an action plan to comply with the agency's new direction.

What Should Federal Contractors Do Now?

- **Keep Informed:** We expect to receive more information from the OFCCP about how this new direction will impact federal contractors and subcontractors. We also expect more changes as the agency moves forward with plans to reduce its workforce by up to 90% while significantly narrowing its focus to veteran and disability discrimination. Sign up to receive Fisher Phillips' Insights to stay up to date on the latest developments.
- **Continue Other Compliance Efforts**: Federal contractors and subcontractors continue to have obligations related to federal and state laws, such as EEO-1 and VETS-4212 filings, and state pay data reporting requirements (including in California), as applicable. Continue to participate in these required compliance filings.
- **Be Aware of Court Decisions:** Although a federal judge in Maryland temporarily blocked parts of Trump's DEI order in February, an appeals court just lifted the ban on March 14, giving the administration the green light to proceed with its direction while the lawsuit plays out. The appeals court said Trump's orders "do not purport to establish the illegality of all efforts to advance diversity, equity or inclusion, and they should not be so understood." One judge noted, however, that he would "reserve judgment on how the administration enforces these executive orders."
- **Look for Guidance from EEOC and Other Agencies:** The OFCCP may refer discrimination matters to the Equal Employment Opportunity Commission, which has also recently shined a spotlight on DEI programs. The EEOC issued guidance on this topic last week, which you can read about here.
- **Work with Legal Counsel:** In this time of uncertainty, you should consider reaching out to your attorney to develop a game plan to comply with evolving requirements.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our Affirmative Action and Federal Contractor Compliance Practice Group.

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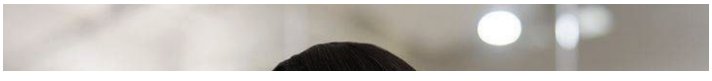

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New Administration Resource Center for Employers

SCOTUS Scraps Extra Hurdle in Majority-Group Bias Claims: 5 Ways That Things Will Change for Employers

Insights
6.05.25

The US Supreme Court just unanimously ruled that plaintiffs alleging workplace discrimination under Title VII are not required to meet a heightened evidentiary standard just because they have "majority-group" status. Today's landmark decision in *Ames v. Ohio Department of Youth Services* eliminates the additional requirements previously imposed by several federal appellate courts that made it harder for majority-group plaintiffs, such as heterosexual or White workers, to prove discrimination. This significant decision, which does away with extra steps for so-called "reverse" discrimination claims, will most likely result in an increase in workplace bias claims in many parts of the country. What are the five ways that things will change in this new era of discrimination litigation?

Allegations in a Nutshell

- Marlean Ames, a heterosexual woman, was employed for roughly 15 years by the Ohio Department of Youth Services (DYS), the state's juvenile corrections system.
- In 2019, Ames applied for a promotion, but DYS instead hired a gay woman for the role.
- DYS also demoted her and reduced her wages by nearly $20 per hour, replacing her with a gay man.
- Both of these decisions were made by heterosexual individuals.
- After filing a discrimination charge with the Equal Employment Opportunity Commission, Ames filed a Title VII lawsuit against the Ohio DYS, alleging discrimination based on sexual orientation.

What Do You Need to Know About Title VII?

- You probably already know that Title VII bars discrimination against workers because of race, color, religion, national origin, and sex. The Supreme Court's 2020 decision in *Bostock v. Clayton County* held that "because of . . . sex" includes discrimination based on an individual's sexual orientation or gender identity.
- Typically, workers only need to show the following four steps to advance the ball in a Title VII claim: (1) they are a member of a **protected class**, (2) they were subject to an **adverse employment decision**, (3) they were **qualified** for the relevant position, and (4) their

employer **treated more favorably a similarly qualified person who was not a member of the same protected class**.

- But some federal appellate courts (the 6th, 7th, 8th, 10th, and D.C. Circuits) required majority-group plaintiffs – those advancing what some call "reverse" discrimination claims – to jump over an additional hurdle. In those circuits, such plaintiffs must also show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."

SCOTUS Scraps Additional Hurdle, Opens Door for More Litigation

Both the lower court and the 6th Circuit Court of Appeals dismissed Ames's claim, citing her failure to demonstrate those "background circumstances" that would have suggested that DYS was an unusual employer that discriminated against majority-group members.

Justice Ketanji Brown Jackson, writing for a unanimous Court, overturned the 6th Circuit's decision.

- The Court held that Title VII's text does not support imposing a higher burden on majority-group plaintiffs. "Congress left no room for courts to impose special requirements on majority-group plaintiffs alone," Jackson wrote.
- SCOTUS emphasized that the "background circumstances" requirement is inconsistent with the language of the statute and the Court's prior precedents, which caution against inflexible applications of the legal standard. "Our case law thus makes clear that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group. … The 'background circumstances' rule flouts that basic principle."
- Title VII prohibits discrimination against "any individual" based on protected characteristics, without distinction between majority and minority groups. "We conclude that Title VII does not impose such a heightened standard on majority-group plaintiffs," said the Court.

How'd We Do With Our Predictions?

Both of our case preview authors predicted a unanimous 9-0 decision scrapping the heightened burden standard for majority-group plaintiffs. Neither expected Justice Jackson to author the unanimous opinion, however.

Our authors also predicted that the Court may tackle a long-simmering issue concerning the proper use and application of the decades-old *McDonnell-Douglas* standard created by the Supreme Court to analyze Title VII claims. The majority did not do so, but Justice Thomas' concurring opinion, joined by Justice Gorsuch, was focused precisely on that issue. The Court denied certiorari in the other case to present an opportunity to opine on *McDonnell-Douglas* (with Justice Thomas dissenting in that decision), so Justices Thomas and Gorsuch will have to wait for an appropriate case to persuade their colleagues that it is time to revisit that more than 50-year-old precedent.

Implications for Employers

This decision has significant implications for employers nationwide, but the change in the 6th, 7th, 8th, 10th, and D.C. Circuits is especially pronounced.

- **States That Will See a Change**: Employers with operations in states falling within those circuit jurisdictions will now see a new standard – Arkansas, Colorado, D.C., Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming.
- **Increased Litigation Risk**: We expect to see an uptick in discrimination claims from majority-group members, given that the bar for bringing such claims has been lowered.
- **Amplified Attention**: Even if you operate in jurisdictions that didn't have the additional hurdles present for majority-group plaintiffs, this case will draw significant media attention and could educate workers about the possibility of claims that they didn't realize existed.
- **Uniform Standard**: All US employees, regardless of majority or minority status, are now subject to the same evidentiary standards when bringing Title VII discrimination claims.
- **Policy Review**: You should review your employment policies and practices to ensure they are applied consistently and do not inadvertently disadvantage any group. Using transparent qualification standards and legal review for major decisions such as promotions, demotions, and involuntary transfers are keys to reducing risk.
- **DEI in Focus**: You should pay particular attention to your diversity, equity, and inclusion practices in light of this ruling. In his concurring opinion, Justice Thomas took aim squarely at such programs, highlighting what he described as prominent businesses' "obsession" with DEI.
- **Training and Compliance**: It's crucial to provide training to HR personnel and management on unbiased decision-making and to reinforce compliance with equal employment opportunity laws for *all employees*.

Conclusion

We will continue to monitor developments related to this issue and provide an update when SCOTUS issues further workplace-related opinions, so make sure you subscribe to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney or the authors of this Insight.

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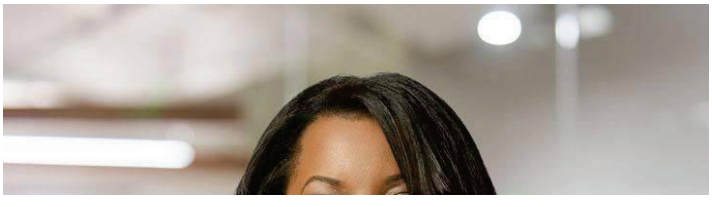

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New Civil Rights Fraud Initiative Puts More Pressure on Higher Ed and K-12 Schools Receiving Federal Funding: What to Do in Response

Insights
5.21.25

Federal officials on Monday launched a new Civil Rights Fraud Initiative aimed at schools receiving federal funding, the next step in the Trump administration's aggressive enforcement posture against transgender rights, DEI, and campus antisemitism. The Department of Justice's (DOJ's) Civil Fraud and Civil Rights Divisions will lead the Initiative, using the False Claims Act (FCA) to investigate and pursue claims against recipients of federal funds that knowingly violate federal civil rights laws. The result? Aggrieved individuals – or simply those who believe a school has run afoul of the administration's policies – are now able to file their own federal lawsuits against higher education institutions and K-12 schools for alleged violations. What should you school do to respond to this new development?

The Basics of the Initiative

Speaking about the Initiative, Attorney General Pamela Bondi stated that "institutions that take federal money only to allow anti-Semitism and promote divisive DEI policies are putting their access to federal funds at risk." Deputy Attorney General Todd Blanche stated, "Colleges and universities cannot accept federal funds while discriminating against their students," citing civil rights laws such as Title IV, Title VI, and Title IX of the Civil Rights Act of 1964.

In a memorandum published on Monday, Blanche instructed the DOJ that a school accepting federal funds could violate the False Claims Act if it:

- encourages antisemitism
- refuses to protect Jewish students
- allows men to intrude into women's bathrooms
- requires women to compete against men in athletic competitions

More specifically, the memo says the FCA is implicated "whenever federal-funding recipients . . . certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin."

Why Your School Needs to Take This Seriously

The stakes are high. As part of the Initiative, the DOJ has stated that it strongly encourages anyone with knowledge of such discrimination to consider filing a "qui tam" action under the FCA – potentially opening the door to a flood of private litigation against educational institutions.

- Qui tam actions are lawsuits brought by private individuals on behalf of the government, generally against someone who has allegedly defrauded the government.
- They differ from agency enforcement actions because they are initiated by private individuals, not the government, and can proceed even if the government declines to participate.
- Under the new Initiative, these lawsuits don't even need to be filed by students or families educated by these institutions – they could simply be filed by an individual who has purported "knowledge" of the school's alleged violation.
- The government then has a set time period during which it decides whether to intervene in the lawsuit.
- The individual filing the action often is entitled to a share of any recovered funds and/or a reward.
- Violations of the FCA can result in treble damages and significant penalties.

The DOJ also is encouraging anyone with knowledge of discrimination to file a report to federal authorities. The agency's announcement reminded the public that it maintains a website for individuals to make such a report.

What Your School Should Do Right Now

Blanche further stated that "many corporations and schools continue to adhere to racist policies and preferences-albeit camouflaged with cosmetic changes that disguise their discriminatory nature." So it might not be enough to re-name programs or initiatives at your institution and carry on as usual. This development should cause you to look anew at the substance of your activities.

- For K-12 independent schools who have not determined whether they receive federal financial assistance, you should be having those detailed discussions with legal counsel regarding your specific funds.
- To the extent you have not already done so, schools that receive federal funding should review all of their DEI policies and programs with legal counsel to ensure that they are lawful and identify any potential conflicts with state or local laws.
- You also should encourage any employees or students with concerns regarding these issues to speak with a point person at your school who can respond to any concerns.
- You should also review our Insight about three things to do to ensure you don't lose federal funding in the wake of the administration's new efforts.

Conclusion

Please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Education Team or Higher Education Team to obtain practical advice and guidance related to this new Initiative. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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FP's Trump Administration Resource Center for Employers

Federal Judge Scraps Biden EEOC's Gender Identity Guidance: Here's What It Means for the Workplace

Insights
5.16.25

A federal judge in Texas just ruled that the Equal Employment Opportunity Commission (EEOC) exceeded its authority by issuing enforcement guidance requiring bathroom, dress, and pronoun accommodations. In yesterday's order striking down relevant parts of the Biden-era guidance, the judge said it was inconsistent with Supreme Court precedent, as well as the text and history of the federal civil rights law at issue. The news comes after President Trump and the new EEOC Acting Chair already vowed to remove gender ideology from agency materials. Here's what employers need to know about the latest developments and how they impact your workplace.

Quick Refresher

We've seen a flurry of activity in recent years on workplace protections based on sexual orientation and gender identity. Here's a brief timeline of the major actions:

- **2020:** The Supreme Court issued a **groundbreaking decision** in *Bostock v. Clayton County*, holding that sexual-orientation discrimination and gender identity/transgender discrimination are forms of "sex" discrimination under Title VII of the Civil Rights Act.
- **2021:** The EEOC **issued a technical assistance document** concerning sexual orientation and gender identity discrimination, which said employers cannot deny employees equal access to bathrooms, locker rooms, or showers that correspond to their gender identity. The same federal court in Texas blocked this guidance.
- **2024:** The EEOC updated its enforcement guidance on harassment in the workplace for the first time in 30 years. Notably, the agency said **harassment of LGBTQ+ workers – particularly transgender employees – can be considered a Title VII violation.** The EEOC concluded that this was a natural extension of the Supreme Court's *Bostock.*
- The State of Texas and a conservative think tank sued the EEOC and asked a federal court to vacate and set aside the 2024 guidance (*Texas v. EEOC*).
- **2025:** President Trump issued an executive order announcing **that the federal government will recognize only two sexes** while rolling back Biden-era EEO workplace guidance on LGBTQ+ harassment.
- And the next day, **he appointed EEOC Commissioner Andrea Lucas –** a vocal critic of Biden administration policies – as Acting Chair of the Commission. Lucas said she aims to "defend the

biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work."

- **Ongoing:** Various court battles have been playing out that **challenge both Biden-era and new Trump administration actions –** creating confusion for employers when it comes to their compliance efforts and best practices. There is still another challenge to the EEOC's 2024 guidance pending in a federal court in Tennessee that was brought by a group of states. **We may see this issue reach the Supreme Court**, with the Justices revisiting the scope of *Bostock*. We will continue to monitor developments and provide updates when warranted. You can subscribe to receive FP Insights directly to your inbox.

Why a Federal Court Still Stepped In

You may be understandably a little confused. Didn't President Trump rescind Biden-era guidance documents? While this is true, the Trump administration hit a roadblock:

- After **President Trump rescinded** the 2024 EEOC workplace harassment guidance, the three Democrat-appointed EEOC Commissioners reaffirmed their commitment to the principles in the guidance.
- Trump then fired two of the Democrat commissioners, which left only Acting Chair Lucas and one remaining Democrat, Commissioner Kalpana Kotagal. This means Lucas still needs at least one more Commissioner to join her in order to form **a three-member quorum** and accomplish significant actions, such as rescinding or adopting legal guidance.
- The EEOC issued a statement in January explaining, "Based on her existing authority**, the Acting Chair cannot unilaterally remove or modify** certain gender identity-related documents subject to the President's directives in the executive order."
- The 2024 EEOC guidance therefore **remained active policy –** and the *Texas v. EEOC* case lived on.

Key Takeaways from the *Texas v. EEOC* Ruling

Judge Matthew Kacsmaryk of the U.S. District Court for the Northern District of Texas reviewed the guidance and **formally vacated relevant parts of it on May 15**, finding that they exceeded the EEOC's authority. He noted the following points in his order:

- The guidance **impermissibly expanded the scope of "sex" under Title VII** beyond the biological binary.
- The guidance contravened Title VII by **defining "discriminatory harassment"** to include failure to accommodate a transgender employee's bathroom, pronoun, and dress preferences.

Kacsmaryk's order deemed unlawful parts of the guidance that defined "sexual orientation" and "gender identity" as protected categories under Title VII.

gender identity" as protected categories under Title VII.

What Employers Should Do Now

Consider taking the flowing steps in light of the latest developments:

- **Continue to Combat Unlawful Workplace Bias:** Recent guidance from the Trump administration reminds employers that Title VII prohibits employment discrimination based on protected characteristics, including race, color, national origin, sex, and religion. The EEOC has explained that the law protects against such discrimination "no matter which employees are harmed," and noted that Title VII's protections "apply equally to all racial, ethnic, and national origin groups, as well as both sexes."
- **Keep Informed**: We expect more court decisions, as well as federal and state guidance, on hot topics impacting workplace anti-discrimination policies.
- **Review State and Local Rules:** The major shift from the federal government will certainly cause confusion for employers that must comply with varying federal, state, and local anti-discrimination laws. You should note that many states and localities still have laws prohibiting workplace discrimination based on sexual orientation and gender identity. A best practice is to make objective decisions based on clear, job-related criteria, and ensuring equal opportunity for all employees.
- **Create a Plan:** These can be challenging times for employers, but this is also a great opportunity to propel your organization further. You can take this opportunity to reexamine your organizational culture and ensure you are providing a safe and professional working environment for everyone in your service. Reach out to your Fisher Phillips attorney to help prepare your compliance plan.

Conclusion

If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney or the authors of this Insight. Visit our New Administration Resource Center for Employers to review all our thought leadership and practical resources, and make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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Litigation and Trials

Trending

FP's Trump Administration Resource Center for Employers

United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle III. Financial Management
Chapter 37. Claims (Refs & Annos)
Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3729

§ 3729. False claims

Currentness

(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;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) 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,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.--If the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.--A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.--For purposes of this section--

(1) the terms “knowing” and “knowingly” --

(A) mean that a person, with respect to information--

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term “claim”--

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure.--Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub.L. 103-272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621.)

Notes of Decisions (2338)

Footnotes

1 So in original. Probably should read "Public Law 101-410".

31 U.S.C.A. § 3729, 31 USCA § 3729
Current through P.L. 119-36. Some statute sections may be more current, see credits for details.

End of Document

31 USCS § 3730, Part 1 of 2

Current through Public Law 119-36, approved September 5, 2025.

United States Code Service > TITLE 31. MONEY AND FINANCE (§§ 101 — 9705) > Subtitle III. Financial Management (Chs. 31 — 39) > CHAPTER 37. Claims (Subchs. I — III) > Subchapter III. Claims Against The United States Government (§§ 3721 — 3733)

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729 [*31 USCS § 3729*]. If the Attorney General finds that a person has violated or is violating section 3729 [*31 USCS § 3729*], the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 [*31 USCS § 3729*] for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) [Rule 4(i)] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to *Rule 4 of the Federal Rules of Civil Procedure.*

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided

by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 [*31 USCS § 3729*] upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729 [*31 USCS § 3729*], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 13103(f) of title 5 [*5 USCS § 13103(f)*].

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) [(ii)] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions.

(1) In general. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter [*31 USCS §§ 3721* et seq.].

(2) Relief. Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on bringing civil action. A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

History

HISTORY:

Sept. 13, 1982, *P.L. 97-258*, § 1, *96 Stat. 978*; Oct. 27, 1986, *P. L. 99-562*, §§ 3, 4, *100 Stat. 3154*, 3157; Nov. 19, 1988, *P. L. 100-700*, § 9, *102 Stat. 4638*; May 4, 1990, *P. L. 101-280*, § 10(a), *104 Stat. 162*; July 5, 1994, *P. L. 103-272*, § 4(f)(1)(P), *108 Stat. 1362*; May 20, 2009, *P. L. 111-21*, § 4(d), *123 Stat. 1624*; March 23, 2010, *P. L. 111-148*, Title X, Subtitle A, § 10104(j)(2), *124 Stat. 901*; July 21, 2010, *P. L. 111-203*, Title X, Subtitle G, § 1079A(c), *124 Stat. 2079*; Dec. 27, 2022, *P.L. 117-286*, § 4(c)(36), *136 Stat. 4358*.

End of Document

31 USCS § 3731

Current through Public Law 119-36, approved September 5, 2025.

United States Code Service > TITLE 31. MONEY AND FINANCE (§§ 101 — 9705) > Subtitle III. Financial Management (Chs. 31 — 39) > CHAPTER 37. Claims (Subchs. I — III) > Subchapter III. Claims Against The United States Government (§§ 3721 — 3733)

§ 3731. False claims procedure

(a) A subpena [subpoena] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [*31 USCS § 3730*] may be served at any place in the United States.

(b) A civil action under section 3730 [*31 USCS § 3730*] may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 [*31 USCS § 3729*] is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under [section] 3730(b) [*31 USCS § 3730(b)*], the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) [*31 USCS § 3730(b)*] to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730 [*31 USCS § 3730*], the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730 [*31 USCS § 3730*].

History

HISTORY:

Sept. 13, 1982, *P.L. 97-258*, § 1, *96 Stat. 979*; Oct. 27, 1986, *P. L. 99-562*, § 5, *100 Stat. 3158*; May 20, 2009, *P. L. 111-21*, § 4(b), *123 Stat. 1623*.

End of Document

31 USCS § 3732

Current through Public Law 119-36, approved September 5, 2025.

United States Code Service > TITLE 31. MONEY AND FINANCE (§§ 101 — 9705) > Subtitle III. Financial Management (Chs. 31 — 39) > CHAPTER 37. Claims (Subchs. I — III) > Subchapter III. Claims Against The United States Government (§§ 3721 — 3733)

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 [*31 USCS § 3730*] may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 [*31 USCS § 3729*] occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under State law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730 [*31 USCS § 3730*].

(c) Service on State or local authorities. With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) [*31 USCS § 3730(b)*] shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

History

HISTORY:

Added Oct. 27, 1986, *P. L. 99-562*, § 6(a), *100 Stat. 3158*; May 20, 2009, *P. L. 111-21*, § 4(e), *123 Stat. 1625*.

End of Document

31 USCS § 3733

Current through Public Law 119-36, approved September 5, 2025.

United States Code Service > TITLE 31. MONEY AND FINANCE (§§ 101 — 9705) > Subtitle III. Financial Management (Chs. 31 — 39) > CHAPTER 37. Claims (Subchs. I — III) > Subchapter III. Claims Against The United States Government (§§ 3721 — 3733)

§ 3733. Civil investigative demands

(a) In general.

(1) Issuance and service. Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) [*31 USCS § 3730(a)*] or other false claims law, or making an election under section 3730(b) [*31 USCS § 3730(b)*], issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act [law] investigation.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) Protected material or information.

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later

date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the

testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 [*18 USCS §§ 6001* et seq.].

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to

an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under

subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions. For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732 [*31 USCS § 3729*–*3732*]; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A); and

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

History

HISTORY:

Added Oct. 27, 1986, *P. L. 99-562*, § 6(a), *100 Stat. 3159*; May 20, 2009, *P. L. 111-21*, § 4(c), *123 Stat. 1623*.

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	340	31	86,479,949	0	0	0	86,479,949	0	0	0
1988	199	53	173,287,663	2,309,354	33,750	2,343,104	175,630,767	88,750	8,438	97,188
1989	215	94	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970
1990	232	83	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606
1991	232	87	270,530,467	70,384,431	69,500	70,453,931	340,984,398	10,667,537	18,750	10,686,287
1992	282	116	137,958,206	133,949,447	994,456	134,943,903	272,902,109	24,121,648	259,784	24,381,432
1993	304	138	181,945,576	183,643,787	6,603,000	190,246,787	372,192,363	27,576,235	1,766,902	29,343,137
1994	279	216	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,350	838,896	70,292,246
1995	232	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096
1996	185	340	247,357,271	124,361,203	13,522,433	137,883,636	385,240,908	22,119,619	3,731,978	25,851,597
1997	182	548	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	65,857,419	1,658,485	67,515,904
1998	119	468	151,435,794	438,834,846	30,248,075	469,082,921	620,518,715	70,264,372	8,486,645	78,751,017
1999	141	493	245,390,485	482,565,233	5,067,503	487,632,736	733,023,221	63,018,064	1,374,487	64,392,552
2000	94	363	367,887,197	1,208,370,688	1,688,957	1,210,059,645	1,577,946,841	183,679,377	375,143	184,054,520
2001	85	314	494,496,974	1,215,525,916	128,587,151	1,344,113,067	1,838,610,042	187,590,470	30,701,881	218,292,350
2002	61	319	119,598,292	1,078,174,023	25,786,140	1,103,960,162	1,223,558,454	161,377,822	4,582,319	165,960,141
2003	94	334	711,098,299	1,534,862,352	5,185,911	1,540,048,263	2,251,146,563	337,307,857	1,382,741	338,690,598
2004	112	432	115,656,023	561,717,502	9,261,879	570,979,382	686,635,404	110,224,220	2,376,128	112,600,348
2005	107	407	276,914,983	1,149,047,524	7,481,593	1,156,529,117	1,433,444,099	168,580,543	2,031,695	170,612,237

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2006	76	385	1,712,459,257	1,491,105,499	22,711,363	1,513,816,862	3,226,276,119	219,976,072	5,647,836	225,623,908
2007	146	365	564,826,844	1,251,726,955	160,246,894	1,411,973,849	1,976,800,693	194,463,212	4,616,899	199,080,111
2008	166	379	312,193,480	1,103,918,516	12,678,936	1,116,597,452	1,428,790,932	208,432,587	2,997,615	211,430,202
2009	134	433	470,685,686	1,964,005,251	33,776,480	1,997,781,730	2,468,467,417	249,567,135	9,684,147	259,251,282
2010	144	576	649,300,368	2,279,055,248	109,778,613	2,388,833,862	3,038,134,230	379,518,436	30,915,991	410,434,427
2011	136	634	241,365,995	2,656,802,414	173,888,703	2,830,691,117	3,072,057,112	525,035,022	49,041,606	574,076,628
2012	158	655	1,612,212,862	3,376,995,169	90,248,343	3,467,243,512	5,079,456,374	440,072,456	24,861,743	464,934,199
2013	117	757	188,376,772	2,818,607,362	203,992,659	3,022,600,021	3,210,976,794	513,347,278	51,197,091	564,544,369
2014	119	716	1,677,608,226	4,390,679,739	91,136,701	4,481,816,440	6,159,424,665	703,127,381	17,615,475	720,742,857
2015	129	639	738,442,487	1,898,041,298	516,875,695	2,414,916,993	3,153,359,480	344,293,369	139,015,177	483,308,546
2016	184	710	1,929,556,062	2,928,674,132	108,298,069	3,036,972,202	4,966,528,263	525,393,509	29,658,600	555,052,108
2017	176	681	283,626,021	2,555,280,735	602,682,052	3,157,962,787	3,441,588,807	412,076,224	135,360,010	547,436,234
2018	133	648	769,596,453	1,998,130,585	210,796,053	2,208,926,638	2,978,523,091	328,088,091	37,505,357	365,593,449
2019	150	637	852,782,697	1,912,589,545	305,554,613	2,218,144,158	3,070,926,855	290,613,360	75,143,367	365,756,728
2020	261	676	547,903,198	1,536,464,401	193,883,475	1,730,347,877	2,278,251,075	280,178,891	51,274,154	331,453,044
2021	212	598	3,993,418,820	1,210,916,864	482,504,272	1,693,421,136	5,686,839,956	201,302,446	62,812,398	264,114,843
2022	304	659	250,337,200	807,053,802	1,189,419,176	1,996,472,978	2,246,810,178	147,540,269	350,218,543	497,758,812
2023	505	713	363,694,220	1,956,813,447	466,884,196	2,423,697,644	2,787,391,864	361,510,926	88,785,693	450,296,620
2024	423	979	502,887,566	2,199,885,934	217,965,112	2,417,851,046	2,920,738,612	344,841,553	59,129,896	403,971,450

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	7,168	16,945	23,069,658,542	49,816,050,060	5,438,406,957	55,254,457,018	78,324,115,560	8,224,505,503	1,285,562,540	9,510,068,042

NOTES:

1. New Matters refers to newly received referrals, investigations, and qui tam actions.
2. Settlements and judgments include common law recoveries arising out of our False Claims Act investigations.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relators' claims, which may be less than the total settlement or judgment, and are paid based on the amount collected on the settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. 3730(h).
4. Historically, non qui tam settlements and judgments did not include matters separately handled by the United States Attorneys' Offices, as the Civil Division did not maintain that data. However, beginning October 1, 2019, non qui tam settlements and judgments include settlements and judgments occurring on or after October 1, 2019 in matters separately handled by the United States Attorneys' Offices when those settlements and judgments have been reported to the Civil Division.

FRAUD STATISTICS - HEALTH AND HUMAN SERVICES**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	12	3	11,361,826	0	0	0	11,361,826	0	0	0
1988	5	7	2,182,675	355,000	0	355,000	2,537,675	88,750	0	88,750
1989	19	16	350,460	5,099,661	0	5,099,661	5,450,121	50,000	0	50,000
1990	27	11	10,327,500	903,158	0	903,158	11,230,658	119,474	0	119,474
1991	19	12	8,670,735	5,420,000	0	5,420,000	14,090,735	861,401	0	861,401
1992	26	15	9,821,640	2,192,478	0	2,192,478	12,014,118	446,648	0	446,648
1993	22	38	12,523,165	151,760,404	0	151,760,404	164,283,569	22,946,101	0	22,946,101
1994	42	75	381,470,015	6,280,815	240,000	6,520,815	387,990,830	1,113,597	72,000	1,185,597
1995	26	87	96,290,779	84,061,789	1,620,000	85,681,789	181,972,568	14,337,982	465,800	14,803,782
1996	20	177	63,059,873	49,236,698	2,340,000	51,576,698	114,636,572	8,707,168	667,400	9,374,568
1997	48	269	351,440,027	578,987,081	92,500	579,079,581	930,519,608	58,852,605	20,250	58,872,855
1998	35	276	40,107,920	251,824,167	2,526,075	254,350,242	294,458,162	46,863,357	187,015	47,050,372
1999	28	315	88,000,792	396,402,128	1,366,699	397,768,827	485,769,619	45,174,556	317,829	45,492,385
2000	35	212	208,899,015	723,152,746	333,457	723,486,203	932,385,218	115,397,403	87,343	115,484,746
2001	34	181	435,849,179	931,262,922	14,991,554	946,254,475	1,382,103,654	143,904,700	3,735,500	147,640,200
2002	22	194	74,454,427	937,841,186	23,407,571	961,248,757	1,035,703,184	150,280,717	4,008,686	154,289,403
2003	27	215	541,929,810	1,304,920,314	2,880,785	1,307,801,099	1,849,730,909	284,074,368	722,233	284,796,601
2004	28	273	34,816,447	470,335,081	5,775,062	476,110,142	510,926,589	95,920,149	1,625,129	97,545,278
2005	35	270	204,821,548	906,656,836	6,671,593	913,328,429	1,118,149,977	120,989,298	1,900,095	122,889,393

FRAUD STATISTICS - HEALTH AND HUMAN SERVICES**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2006	19	216	1,050,520,714	1,227,114,221	16,229,540	1,243,343,761	2,293,864,475	163,167,984	3,921,996	167,089,981
2007	30	199	465,052,993	929,615,846	152,456,640	1,082,072,486	1,547,125,480	157,860,623	2,497,177	160,357,799
2008	64	231	162,972,022	1,005,797,375	6,852,571	1,012,649,946	1,175,621,969	192,433,605	1,522,164	193,955,770
2009	36	279	240,061,424	1,368,411,522	30,283,452	1,398,694,974	1,638,756,398	155,440,550	8,669,822	164,110,372
2010	42	385	549,097,732	1,955,805,336	16,366,232	1,972,171,568	2,521,269,301	335,084,132	4,639,804	339,723,936
2011	42	417	178,287,545	2,183,142,674	88,291,393	2,271,434,067	2,449,721,612	446,890,505	24,055,563	470,946,068
2012	31	417	561,373,967	2,581,755,899	37,838,668	2,619,594,567	3,180,968,534	296,968,575	10,598,793	307,567,368
2013	30	504	61,354,329	2,575,656,951	122,854,972	2,698,511,924	2,759,866,253	475,354,113	29,569,605	504,923,718
2014	34	471	89,054,490	2,282,799,137	75,322,326	2,358,121,462	2,447,175,952	385,057,130	13,397,186	398,454,316
2015	27	426	160,758,915	1,492,103,005	477,123,065	1,969,226,070	2,129,984,985	272,916,832	133,278,440	406,195,271
2016	95	504	97,407,797	2,552,466,698	75,145,688	2,627,612,387	2,725,020,184	464,489,816	20,481,847	484,971,663
2017	70	494	32,627,357	1,676,043,191	446,222,506	2,122,265,697	2,154,893,054	303,068,111	123,637,553	426,705,663
2018	61	447	568,069,015	1,866,262,636	172,958,622	2,039,221,258	2,607,290,272	302,832,476	27,091,647	329,924,123
2019	59	449	700,838,735	1,623,506,829	284,366,591	1,907,873,420	2,608,712,154	231,904,954	69,037,315	300,942,269
2020	121	458	402,745,794	1,308,863,256	180,079,049	1,488,942,305	1,891,688,099	233,406,379	48,094,625	281,501,003
2021	102	389	3,591,206,587	1,047,269,163	455,894,509	1,503,163,672	5,094,370,259	168,456,855	55,261,327	223,718,182
2022	100	371	110,945,182	670,449,478	1,013,430,856	1,683,880,334	1,794,825,516	120,843,612	298,530,981	419,374,593
2023	95	349	242,448,647	1,367,262,078	250,595,454	1,617,857,532	1,860,306,179	253,939,993	35,608,251	289,548,244
2024	85	370	224,465,398	1,261,905,095	189,582,215	1,451,487,310	1,675,952,708	210,305,585	50,903,353	261,208,937

FRAUD STATISTICS - HEALTH AND HUMAN SERVICES**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	1,653	10,022	12,065,666,476	37,782,922,855	4,154,139,644	41,937,062,499	54,002,728,975	6,280,550,102	974,606,728	7,255,156,830

NOTES:

** The information reported in this table covers matters in which the Department of Health and Human Services is the primary client agency.

1. New Matters refers to newly received referrals, investigations, and qui tam actions.
2. Settlements and judgments include common law recoveries arising out of our False Claims Act investigations.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relators claims, which may be less than the total settlement or judgment, and are paid based on the amount collected on the settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. 3730(h).
4. Historically, non qui tam settlements and judgments did not include matters separately handled by the United States Attorneys' Offices, as the Civil Division did not maintain that data. However, beginning October 1, 2019, non qui tam settlements and judgments include settlements and judgments occurring on or after October 1, 2019 in matters separately handled by the United States Attorneys' Offices when those settlements and judgments have been reported to the Civil Division.

FRAUD STATISTICS - DEPARTMENT OF DEFENSE**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	236	21	27,897,128	0	0	0	27,897,128	0	0	0
1988	117	33	149,136,213	0	33,750	33,750	149,169,963	0	8,438	8,438
1989	115	36	154,588,297	10,002,058	0	10,002,058	164,590,355	1,394,770	0	1,394,770
1990	69	46	117,115,978	21,630,713	69,000	21,699,713	138,815,691	3,776,850	18,870	3,795,720
1991	78	45	227,898,245	57,200,000	42,000	57,242,000	285,140,245	8,625,800	10,500	8,636,300
1992	73	61	62,603,695	127,700,000	994,456	128,694,456	191,298,151	23,540,000	259,784	23,799,784
1993	93	53	83,742,840	24,000,000	5,707,641	29,707,641	113,450,481	3,280,425	1,671,498	4,951,923
1994	62	80	222,799,421	369,136,206	1,530,000	370,666,206	593,465,627	67,712,678	451,200	68,163,878
1995	54	88	110,459,386	140,548,237	15,000	140,563,237	251,022,623	28,348,711	0	28,348,711
1996	44	75	78,085,099	55,908,927	5,924,726	61,833,653	139,918,752	10,825,550	1,696,923	12,522,473
1997	45	79	30,734,273	35,090,213	1,513,700	36,603,913	67,338,186	6,018,810	379,435	6,398,244
1998	29	61	71,063,139	122,463,185	27,717,000	150,180,185	221,243,324	12,213,171	8,298,630	20,511,801
1999	33	66	30,522,711	15,114,509	745,137	15,859,646	46,382,357	2,684,186	179,750	2,863,936
2000	9	40	53,007,693	95,607,325	505,500	96,112,825	149,120,518	15,668,259	122,800	15,791,059
2001	10	41	17,472,751	30,030,696	88,083,098	118,113,794	135,586,545	5,955,566	19,451,866	25,407,432
2002	16	41	15,017,365	18,057,658	1,350,000	19,407,658	34,425,022	2,576,196	381,000	2,957,196
2003	11	36	107,337,000	204,884,468	0	204,884,468	312,221,468	48,592,795	0	48,592,795
2004	16	49	10,098,491	21,581,366	0	21,581,366	31,679,857	3,031,610	0	3,031,610
2005	16	49	19,049,935	101,125,200	0	101,125,200	120,175,135	21,428,085	0	21,428,085

FRAUD STATISTICS - DEPARTMENT OF DEFENSE**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2006	14	68	586,550,385	52,480,219	1,520,203	54,000,421	640,550,806	11,128,675	299,986	11,428,661
2007	26	50	16,400,000	36,230,796	496,909	36,727,705	53,127,705	4,983,718	126,419	5,110,137
2008	28	43	70,756,834	60,468,116	5,701,365	66,169,481	136,926,315	11,891,101	1,439,451	13,330,552
2009	17	51	21,739,266	416,852,869	140,000	416,992,869	438,732,135	64,469,853	26,600	64,496,453
2010	25	56	29,581,482	231,354,446	9,473,700	240,828,146	270,409,628	28,632,565	2,833,839	31,466,404
2011	19	45	29,484,345	113,130,570	0	113,130,570	142,614,915	23,428,627	0	23,428,627
2012	19	59	2,000,000	167,886,739	307,000	168,193,739	170,193,739	21,077,673	70,000	21,147,673
2013	16	78	4,869,169	47,118,462	154,000	47,272,462	52,141,631	7,246,939	41,580	7,288,519
2014	13	44	14,102,250	51,734,251	9,014,000	60,748,251	74,850,501	9,439,658	2,693,500	12,133,158
2015	8	36	109,991,660	145,989,076	26,572,197	172,561,273	282,552,933	24,600,368	2,561,920	27,162,288
2016	8	32	60,625,089	47,939,275	13,715,000	61,654,275	122,279,365	9,837,392	3,928,000	13,765,392
2017	22	29	13,528,713	209,117,135	3,162,577	212,279,712	225,808,425	42,795,778	800,644	43,596,422
2018	15	34	11,765,439	46,056,955	16,700,000	62,756,955	74,522,394	9,709,444	4,592,500	14,301,944
2019	13	40	65,852,842	190,394,081	350,000	190,744,081	256,596,922	41,904,151	101,500	42,005,651
2020	32	35	31,213,617	51,415,401	5,709,798	57,125,199	88,338,817	11,743,785	934,905	12,678,690
2021	26	27	21,778,471	98,491,421	35,000	98,526,421	120,304,892	20,062,097	10,150	20,072,247
2022	26	40	47,879,577	27,136,293	28,675,000	55,811,293	103,690,871	6,817,050	8,583,125	15,400,175
2023	28	40	55,610,491	389,053,395	112,227,532	501,280,927	556,891,418	71,911,897	32,489,621	104,401,518
2024	26	34	8,045,579	71,238,356	14,000,000	85,238,356	93,283,935	14,212,559	4,200,000	18,412,559

FRAUD STATISTICS - DEPARTMENT OF DEFENSE**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	1,507	1,841	2,790,404,870	3,904,168,616	382,185,288	4,286,353,905	7,076,758,774	701,566,791	98,664,434	800,231,225

NOTES:

** The information reported in this table covers matters in which the Department of Defense is the primary client agency.

1. New Matters refers to newly received referrals, investigations, and qui tam actions.
2. Settlements and judgments include common law recoveries arising out of our False Claims Act investigations.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relators claims, which may be less than the total settlement or judgment, and are paid based on the amount collected on the settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. 3730(h).
4. Historically, non qui tam settlements and judgments did not include matters separately handled by the United States Attorneys' Offices, as the Civil Division did not maintain that data. However, beginning October 1, 2019, non qui tam settlements and judgments include settlements and judgments occurring on or after October 1, 2019 in matters separately handled by the United States Attorneys' Offices when those settlements and judgments have been reported to the Civil Division.

FRAUD STATISTICS - OTHER (NON-HHS and NON-DOD)**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	92	7	47,220,995	0	0	0	47,220,995	0	0	0
1988	77	13	21,968,775	1,954,354	0	1,954,354	23,923,129	0	0	0
1989	81	42	42,263,423	10,000	1,681	11,681	42,275,104	2,000	200	2,200
1990	136	26	62,120,889	17,949,496	6,000	17,955,496	80,076,385	2,694,612	1,800	2,696,412
1991	135	30	33,961,487	7,764,431	27,500	7,791,931	41,753,418	1,180,336	8,250	1,188,586
1992	183	40	65,532,871	4,056,969	0	4,056,969	69,589,840	135,000	0	135,000
1993	189	47	85,679,571	7,883,383	895,359	8,778,742	94,458,313	1,349,709	95,404	1,445,113
1994	175	61	101,753,461	3,601,184	1,052,323	4,653,507	106,406,968	627,074	315,696	942,770
1995	152	94	63,239,477	14,414,266	0	14,414,266	77,653,743	2,475,603	0	2,475,603
1996	121	88	106,212,299	19,215,578	5,257,707	24,473,285	130,685,584	2,586,902	1,367,655	3,954,557
1997	89	200	83,393,761	7,841,980	4,415,000	12,256,980	95,650,741	986,005	1,258,800	2,244,805
1998	55	131	40,264,735	64,547,494	5,000	64,552,494	104,817,229	11,187,844	1,000	11,188,844
1999	80	112	126,866,982	71,048,596	2,955,667	74,004,263	200,871,245	15,159,323	876,908	16,036,231
2000	50	111	105,980,489	389,610,617	850,000	390,460,617	496,441,106	52,613,715	165,000	52,778,715
2001	41	92	41,175,045	254,232,298	25,512,500	279,744,798	320,919,843	37,730,204	7,514,514	45,244,718
2002	23	84	30,126,500	122,275,178	1,028,569	123,303,748	153,430,248	8,520,908	192,633	8,713,542
2003	56	83	61,831,489	25,057,571	2,305,126	27,362,697	89,194,186	4,640,694	660,508	5,301,202
2004	68	110	70,741,084	69,801,056	3,486,818	73,287,873	144,028,957	11,272,462	750,999	12,023,461
2005	56	88	53,043,500	141,265,488	810,000	142,075,488	195,118,988	26,163,159	131,600	26,294,759

FRAUD STATISTICS - OTHER (NON-HHS and NON-DOD)**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2006	43	101	75,388,158	211,511,060	4,961,620	216,472,680	291,860,838	45,679,413	1,425,854	47,105,266
2007	90	116	83,373,851	285,880,313	7,293,344	293,173,657	376,547,508	31,618,872	1,993,303	33,612,175
2008	74	105	78,464,624	37,653,025	125,000	37,778,025	116,242,649	4,107,880	36,000	4,143,880
2009	81	103	208,884,996	178,740,859	3,353,028	182,093,887	390,978,883	29,656,732	987,725	30,644,457
2010	77	135	70,621,154	91,895,466	83,938,681	175,834,147	246,455,301	15,801,739	23,442,348	39,244,087
2011	75	172	33,594,105	360,529,170	85,597,310	446,126,480	479,720,585	54,715,891	24,986,043	79,701,934
2012	108	179	1,048,838,895	627,352,531	52,102,675	679,455,206	1,728,294,101	122,026,208	14,192,949	136,219,158
2013	71	175	122,153,274	195,831,949	80,983,687	276,815,636	398,968,910	30,746,225	21,585,906	52,332,131
2014	72	201	1,574,451,486	2,056,146,352	6,800,375	2,062,946,727	3,637,398,213	308,630,594	1,524,789	310,155,383
2015	94	177	467,691,913	259,949,218	13,180,432	273,129,650	740,821,563	46,776,169	3,174,818	49,950,986
2016	81	174	1,771,523,175	328,268,159	19,437,381	347,705,540	2,119,228,715	51,066,300	5,248,753	56,315,052
2017	84	158	237,469,951	670,120,409	153,296,969	823,417,378	1,060,887,329	66,212,335	10,921,813	77,134,148
2018	57	167	189,762,000	85,810,994	21,137,431	106,948,425	296,710,425	15,546,171	5,821,211	21,367,382
2019	78	148	86,091,121	98,688,636	20,838,022	119,526,658	205,617,779	16,804,256	6,004,552	22,808,808
2020	108	183	113,943,787	176,185,744	8,094,628	184,280,372	298,224,159	35,028,727	2,244,624	37,273,351
2021	84	182	380,433,763	65,156,279	26,574,764	91,731,043	472,164,805	12,783,493	7,540,921	20,324,414
2022	178	248	91,512,440	109,468,031	147,313,320	256,781,351	348,293,791	19,879,607	43,104,437	62,984,044
2023	382	324	65,635,083	200,497,974	104,061,211	304,559,185	370,194,268	35,659,037	20,687,821	56,346,858
2024	312	575	270,376,589	866,742,483	14,382,897	881,125,379	1,151,501,969	120,323,410	4,026,544	124,349,954

FRAUD STATISTICS - OTHER (NON-HHS and NON-DOD)**

October 1, 1986 - September 30, 2024

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS[1]					RELATOR SHARE AWARDS[2]		
	NON QUI TAM	QUI TAM	NON[3] QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	4,008	5,082	8,213,587,196	8,128,958,589	902,082,025	9,031,040,614	17,244,627,810	1,242,388,609	212,291,378	1,454,679,988

NOTES:

** The information reported in this table covers matters in which the primary client agency is neither the Department of Health and Human Services nor the Department of Defense.

1. New Matters refers to newly received referrals, investigations, and qui tam actions.
2. Settlements and judgments include common law recoveries arising out of our False Claims Act investigations.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relators claims, which may be less than the total settlement or judgment, and are paid based on the amount collected on the settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. 3730(h).
4. Historically, non qui tam settlements and judgments did not include matters separately handled by the United States Attorneys' Offices, as the Civil Division did not maintain that data. However, beginning October 1, 2019, non qui tam settlements and judgments include settlements and judgments occurring on or after October 1, 2019 in matters separately handled by the United States Attorneys' Offices when those settlements and judgments have been reported to the Civil Division.

ABA opposes any DEI probes into bar associations

By **Karen Sloan**

February 4, 2025 4:25 PM EST · Updated a day ago

Signage is seen outside of the American Bar Association (ABA) in Washington, D.C., U.S., May 10, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights

Feb 4 (Reuters) - The American Bar Association urged the Trump administration to roll back its executive order calling for federal investigations into diversity and inclusion efforts by bar associations, citing the groups' 1st Amendment rights.

The resolution adopted by the group on Monday marks its first public stance against the Jan. 21 executive order that cited bar associations along with medical associations, publicly traded companies and other private-sector entities as potential targets for federal civil investigations into diversity, equity and inclusion programs that may "constitute illegal discrimination or preferences."

The city of Baltimore and three other groups sued Trump on Monday to stop it and another executive order focused on ending diversity and inclusion programs. That suit alleges the executive orders exceeded the president's authority under the U.S. Constitution.

"The First Amendment prohibits the federal government from interfering with the expressive rights of bar associations and others by threatening them with investigation and prosecution for adopting or promoting [diversity and inclusion]," reads a report supporting the ABA resolution. No one spoke against the resolution at the House of Delegates meeting in Phoenix.

The White House did not immediately respond to a request for comment Tuesday.

The ABA's resolution urges the Trump administration to modify the executive order to clarify that it won't be enforced in a manner that infringes on bar associations' 1st Amendment rights.

The ABA, which has about 150,000 paying members and is the federally recognized accreditor of U.S. law schools, has made diversity and inclusion one of its four core goals.

In 2024 the ABA revised the criteria for its longstanding program aimed at boosting the number of racially diverse judicial clerks to eliminate references to minority students and "communities of color" after a conservative legal group accused it of using illegal racial quotas.

A coalition of attorneys general from 21 Republican-controlled U.S. states has twice warned the ABA that its law school accreditation rules, which require schools to show commitment to diversity through recruitment, admissions and programming, are unlawful.

The ABA did not initially comment on the anti-DEI executive order targeting bar associations, though ABA President Bill Bay said the organization "remains committed to inclusivity and fairness" in a Jan. 28 email to members. The ABA is "closely monitoring" all diversity-related developments, he wrote.

The ABA's House of Delegates adopted a separate resolution on Monday calling for the reinstatement of dozens of entry-level lawyer jobs at the U.S. Department of Justice and other federal agencies that were canceled as part of Trump's federal hiring freeze.

The resolution also requests federal agencies reinstate summer internship offers that had been extended to law students prior to Trump's inauguration that were later rescinded.

Read more:

Trump diversity order sparks pushback from attorney groups

Trump's hiring freeze leaves thousands of law students out in the cold

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Reporting by Karen Sloan

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Karen Sloan
Thomson Reuters

Karen Sloan reports on law firms, law schools, and the business of law. Reach her at karen.sloan@thomsonreuters.com

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ADOPTED AS REVISED

AMERICAN BAR ASSOCIATION

VIRGIN ISLANDS BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association opposes the investigation or prosecution of bar associations by the federal government for activities protected by the First Amendment, including but not limited to advocacy for or implementation of diversity, equity, and inclusion (DEI) or diversity, equity, inclusion, and accessibility (DEIA) policies; and

FURTHER RESOLVED, That the American Bar Association urges modification of the Executive Order issued on January 21, 2025, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," to clarify that it shall not be enforced against bar associations or others in a manner that infringes on rights guaranteed by the First Amendment to the United States Constitution.

Deletions struck through; Additions underlined

402

REPORT

On January 21, 2025, the President of the United States signed an Executive Order, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."[1] Section 1, titled "Purpose," states that "critical and influential institutions of American society . . . have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil-rights laws of this Nation." Among its many provisions, section 4 of the Executive Order, titled "Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences," orders the heads of all Executive Branch agencies to—among other things—collaborate with the Attorney General to submit a plan which

> identif[ies] up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars.[2]

The Executive Order acknowledges that the First Amendment may limit the ability of the federal government to enforce civil rights laws in this manner. Section 7, titled "Scope," provides that

> This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech.[3]

and that

> This order does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.[4]

The Executive Order does not, however, expressly acknowledge that other groups—such

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[1] The text of the Executive Order is available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/
[2] *Id.* at § 4(b)(iii) (emphasis added).
[3] *Id.* at § 7(b).
[4] *Id.* at § 7(c).

as state and local bar associations—also may possess First Amendment rights to endorse, promote, advocate for, or implement DEI or DEIA policies.

The First Amendment to the United States Constitution prohibits the government from abridging freedom of speech and association.[5] This prohibition applies not just to direct restrictions on these rights, but also to indirect ones as well. As the Supreme Court of the United States has explained,

> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.[6]

Thus, the First Amendment bars the government from requiring applicants for a professional license to list all organizations to which they have ever belonged to as a student, since while disclosing this information does not directly prohibit an applicant from joining a particular organization, the indirect effect is to encourage applicants "to protect their future by shunning unpopular or controversial organizations."[7]

Consistent with these longstanding precedents, the Supreme Court has recognized that the government cannot enforce public accommodation or antidiscrimination laws—which are generally valid and unquestionably serve a legitimate purpose—in a manner contrary to the First Amendment. For instance, the government cannot invoke public accommodations laws to force the private organizer of a parade to alter the expressive content of the parade by mandating that it includes an affinity group wishing to display a banner propounding a point of view contrary to its beliefs.[8] Similarly, the government cannot invoke its antidiscrimination laws to force a private organization that expressly opposes homosexual conduct to admit an openly-gay man as a member.[9] But on the other hand, the government certainly could enforce its public accommodations laws to force the Rotary Club to admit women as members, when "the evidence fail[ed] to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes," which involved humanitarian service, good will, peace, and other activities wholly unrelated to gender.[10]

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[5] U.S. CONST. amend. I.
[6] *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 289 U.S. 217 (1967).
[7] *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971).
[8] *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995).
[9] *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).
[10] *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

The adoption of DEI or DEIA policies by bar associations has certainly not been without controversy. Those policies, however, originated to remedy the abhorrent, shameful, and wholly unjustified discrimination perpetuated by bar associations for more than a century against ethnic and religious minorities, women, immigrants, and other groups. The American Bar Association was founded in 1878 as an association of "Anglo-Saxon lawyers"[11] and formally excluded African Americans from membership at its founding all the way through 1943.[12] The ABA openly used its accreditation powers to erect barriers designed to reduce the number of minorities in the legal profession,[13] established a college education as a prerequisite to bar admission "so that the immigrants could 'absorb American ideals,'"[14] and proactively sought to deny accreditation to law schools that primarily served African Americans.[15] The ABA likewise prohibited women from membership through 1918, and even after admitting women as members expressly excluded women's bar associations from its House of Delegates through World War II.[16] Many state and local bar associations likewise participated in such systematic discrimination, such as by interpreting moral character and fitness requirements in ways that seemingly were only satisfied by wealthy, American-born white men as a means of excluding minorities, women, immigrants, and members of disfavored political parties from the legal profession.[17]

To try to remedy this long history of discrimination and outright exclusions, some bar associations incorporate DEI or DEIA policies into their constitutions or by-laws, such as by reserving a certain number of seats on their governing boards for members of the groups that were historically discriminated against. People may certainly disagree as to whether this represents the best way to make up for historic past discrimination. Nevertheless, while opinions may differ on the merits of this and other DEI/DEIA policies, courts have held that these activities are squarely protected by the First Amendment.

Most recently, the Appellate Division of the Superior Court of New Jersey rejected a challenge, under New Jersey's antidiscrimination laws, to the New Jersey State Bar Association "setting aside at-large seats on its Board, Nominating Committee, and the

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[11] Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. CIV. RTS. L.J. 51, 66 (2007).
[12] *See* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 109 (2003).
[13] *Id.* at 110-11.
[14] *Id.* at 111.
[15] *Id.* at 113.
[16] *See* Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L.J. 580, 637-38 (2009).
[17] *See* Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1192, 1204-06 (2008).

Judicial and Prosecutorial Appointments Committee . . . to be filled by individuals from demographic groups traditionally underrepresented in leadership positions in the Association."[18] Applying existing U.S. Supreme Court precedent, the court concluded that the New Jersey State Bar Association is an expressive association that enjoys the protections of the First Amendment, and that "compelling it to end its practice of ensuring the presence of designated underrepresented groups in its leadership would unconstitutionally infringe its ability to advocate the value of diversity and inclusivity in the Association and more broadly in the legal profession."[19]

*****

It is the mission of the American Bar Association to increase public understanding and respect for the rule of law and the legal process, to hold governments accountable under the law, to promote the highest quality legal education, promote full and equal participation in the profession by all persons, to eliminate bias in the legal profession, and to work for just laws, including human rights.[20] As the voice of the legal profession in the United States and in furtherance of its mission, the ABA is particularly well-suited to advocate not just on behalf of its own members, but also the hundreds of bar associations that operate throughout our nation. While minds may differ as to the best way for bar associations, the legal profession, and our nation as a whole to address its shameful history of discrimination, the First Amendment prohibits the federal government from interfering with the expressive rights of bar associations and others by threatening them with investigation and prosecution for adopting or promoting DEI or DEIA initiatives.

Respectfully submitted,

J. Russell B. Pate, Esq.
President, Virgin Islands Bar Association

February 2025

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[18] *Saadeh v. New Jersey State Bar Ass'n*, 2024 WL 5182533, at *1 (N.J. Super. Ct. App. Div. Dec. 20, 2024) (unpublished).
[19] *Id.* at *9.
[20] *See* 2008A121.

402

GENERAL INFORMATION FORM

Submitting Entity: Virgin Islands Bar Association

Submitted By: J. Russell B. Pate

1. Summary of the Resolution(s).

This Resolution opposes the investigation or prosecution of bar associations by the federal government for activities protected by the First Amendment, including but not limited to advocacy for or implementation of diversity, equity, and inclusion (DEI) or diversity, equity, inclusion, and accessibility (DEIA) policies. It further urges the President of the United States to modify the Executive Order issued on January 21, 2025, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," to clarify that it shall not be enforced against bar associations or others in a manner that infringes on rights guaranteed by the First Amendment to the United States Constitution.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The Resolution advances Goals III by safeguarding the right of bar associations and others to advocate for or implement actions relate to diversity, equity, and inclusion in the legal profession.

3. Approval by Submitting Entity.

Approved by the Virgin Islands Bar Association on January 27, 2025.

4. Has this or a similar resolution been submitted to the House or Board previously?

No

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

If the American Bar Association does not act, the entirety of Goal III may be at risk, since activities the ABA has undertaken to promote diversity, equity, inclusion, and accessibility in the legal profession may fall within the purview of the Executive Order.

6. If this is a late report, what urgency exists which requires action at this meeting of

the House?

N/A

7. Status of Legislation. (If applicable)

None.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The ABA would engage in appropriate advocacy to implement the policy called for in the resolution.

9. Cost to the Association. (Both direct and indirect costs)

None

10. Disclosure of Interest. (If applicable)

None.

11. Referrals.
(List ABA entities and use proper names. For a list of all entities click here.)

Center for Diversity and Inclusion
Commission on Hispanic Legal Rights and Responsibilities
Commission on Women in the Profession
Government and Public Sector Lawyers Division
Law Student Division
Racial and Ethnic Diversity in the Education Pipeline Council
Section of Criminal Justice
Section of Litigation
Tort Trial and Insurance Practice Section
Young Lawyers Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

Anthony Ciolli
917-362-1355
aciolli@gmail.com

402

13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.

    Anthony Ciolli
    917-362-1355
    aciolli@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution opposes the investigation and prosecution of bar associations by the federal government for activities protected by the First Amendment, including but not limited to advocacy for or implementation of diversity, equity, and inclusion (DEI) or diversity, equity, inclusion, and accessibility (DEIA) policies. It further urges the President of the United States to modify the Executive Order issued on January 21, 2025, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," to clarify that it shall not be enforced against bar associations or others in a manner that infringes on rights guaranteed by the First Amendment to the United States Constitution.

2. Summary of the issue that the resolution addresses.

On January 21, 2025, the President of the United States signed an Executive Order, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." Section 4 of the Executive Order calls for the investigation and potential prosecution of state and local bar associations and other entities that advocate for or implement diversity, equity, and inclusion (DEI) or diversity, equity, inclusion, and accessibility (DEIA) policies.

3. Please explain how the proposed policy position will address the issue.

The proposed policy opposes the investigation and prosecution of bar associations by the federal government for activities protected by the First Amendment, including but not limited to advocacy for or implementation of diversity, equity, and inclusion (DEI) or diversity, equity, inclusion, and accessibility (DEIA) policies. It further urges the President of the United States to modify the Executive Order issued on January 21, 2025, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," to clarify that it shall not be enforced against bar associations or others in a manner that infringes on rights guaranteed by the First Amendment to the United States Constitution.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None

BAR ASSOCIATIONS

Bar associations could be targeted, Trump DEI order says, spurring response from 2 of them

BY DEBRA CASSENS WEISS (HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/4/)

JANUARY 23, 2025, 10:55 AM CST

Bar associations could be targeted for investigation under President Donald Trump's executive order seeking to end "illegal preferences and discrimination" in government and the private sector. (Image from Shutterstock)

Bar associations could be targeted for investigation under President Donald Trump's executive order seeking to end "illegal preferences and discrimination" in government and the private sector.

The order (https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity) issued Tuesday called for federal agencies to identify up to nine entities for possible civil compliance investigations, including large nonprofits and state and local bar associations.

The order declared that "influential institutions of American society" are using "dangerous, demeaning and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity and inclusion' (DEI) or 'diversity, equity, inclusion and accessibility' (DEIA) that can violate the civil rights laws of this nation."

Reuters has the story (https://www.reuters.com/world/us/attorney-groups-push-back-against-trump-dei-order-2025-01-23) on the response from two state bar associations.

The State Bar of California said its programs won't be affected because "none of our work in this space involves illegal discrimination or preferences."

Victoria Santoro, president of the Massachusetts Bar Association, also said the state bar is not breaking the law.

"I think there are better ways our federal government could use its time than looking at bar associations," Santoro added.

The American Bar Association is not commenting at this time, a spokesperson told the ABA Journal.

The ABA's Goal III (https://www.americanbar.org/about_the_aba/aba-mission-goals) calls for eliminating bias and enhancing diversity by promoting full and equal participation in the association, the legal profession and the justice system. Over the last few years, these ABA diversity programs and policies have come under scrutiny:

• The ABA section that is recognized as the accrediting group for JD programs has been wrangling with changes to its diversity standard for law schools. As currently written, Standard 206 says law schools "shall demonstrate by concrete action" a commitment to having a student body, faculty and staff who are "diverse with respect to gender, race and ethnicity." The section decided to revise the standard following a June 2023 U.S. Supreme Court decision (https://www.abajournal.com/web/article/supreme-court-rules-on-affirmative-action) striking down race-conscious admissions programs at universities.

The latest proposed revision (https://www.abajournal.com/web/article/latest-try-at-rewriting-aba-diversity-standard-for-law-schools-gets-pushback-from-gop-ags) under consideration by the ABA Section of Legal Education and Admissions to the Bar requires a commitment to diversity for all people, including listed members of historically disadvantaged groups.

The wording change didn't satisfy 21 attorneys general in Republican-controlled states, who warned that it "appears to perpetuate unlawful racial discrimination."

• At least nine ABA diversity programs were targeted (https://www.abajournal.com/web/article/complaint-targets-aba-diversity-programs-association-says-claims-legally-and-factually-incorrect) by the conservative Wisconsin Institute for Law & Liberty in a civil rights complaint filed with the U.S. Department of Justice in May 2024. The ABA's general counsel, Annaliese Fleming, said at the time the ABA programs are lawful. and the allegations are "factually and legally incorrect."

In October 2024, the ABA updated its description (https://www.abajournal.com/news/article/aba-changes-description-of-judicial-clerkship-program-after-conservative-group-sees-quotas) of one targeted program—its judicial clerkship program—because some language "did not accurately reflect the operation of the program," Fleming said in a statement explaining the change. The program introduces law students from diverse backgrounds to judges and law clerks.

• The ABA changed its diversity policy (https://www.abajournal.com/web/article/aba-revises-cle-policy-after-florida-bans-course-credit-over-panel-quotas-numeric-mandates-are-gone) for continuing legal education programs that it sponsors after the Florida Supreme Court banned course credit in the state for programs with panel "quotas." The old ABA policy had numerical requirements for diverse panelists; the new policy says CLE organizers "will invite and include" moderators and faculty members to create panels to meet Goal III objectives.

Write a letter to the editor, share a story tip or update, or report an error.

LATEST NEWS

New York State Bar Association Decries President Trump's Executive Order Denying Citizenship to Children Born in the United States

By Susan DeSantis
January 24, 2025

News Center *New York State Bar Association…*

Domenick Napoletano, president of the New York State Bar Association, issued the following statement about President Donald Trump's executive orders on immigration:

"The 14th Amendment of the U.S. Constitution is unequivocal. It grants citizenship to every baby born in the United States with limited exceptions. Ignoring decades of court precedent, President Donald Trump on his first day in office issued an executive order denying citizenship to the 150,000 babies born each year to undocumented immigrants. The U.S. Constitution is a sacred document and the foundation of our system of government; it guarantees due process and establishes the rule of law. We ignore it at our peril."

"The president's executive order further undermines our system of government by reducing the likelihood that immigrants will have a lawyer by their sides when defending themselves against a trained government attorney. The Refugee Admissions Program, which the president also eliminated by executive order, included some access to an attorney. The New York State Bar Association's governing body, the House of Delegates, approved a report from the association's Committee on Immigration Representation demonstrating that immigrants without legal representation are at a severe disadvantage in

any legal proceeding. It is now up to the courts to rise above politics and put a stop to this injustice."

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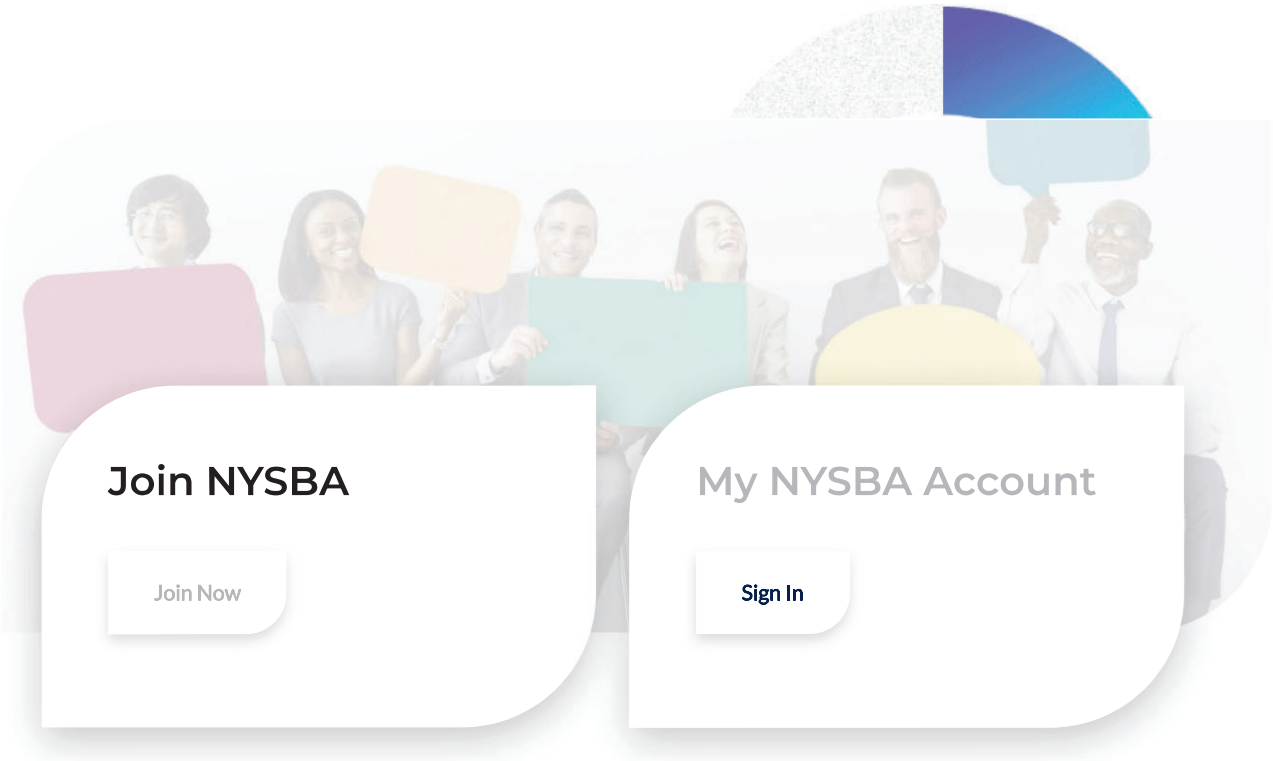

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Trump diversity order sparks pushback from attorney groups

By **Karen Sloan**

January 23, 2025 6:13 AM EST · Updated 13 days ago

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Summary

State bar groups deny discriminating with diversity programs

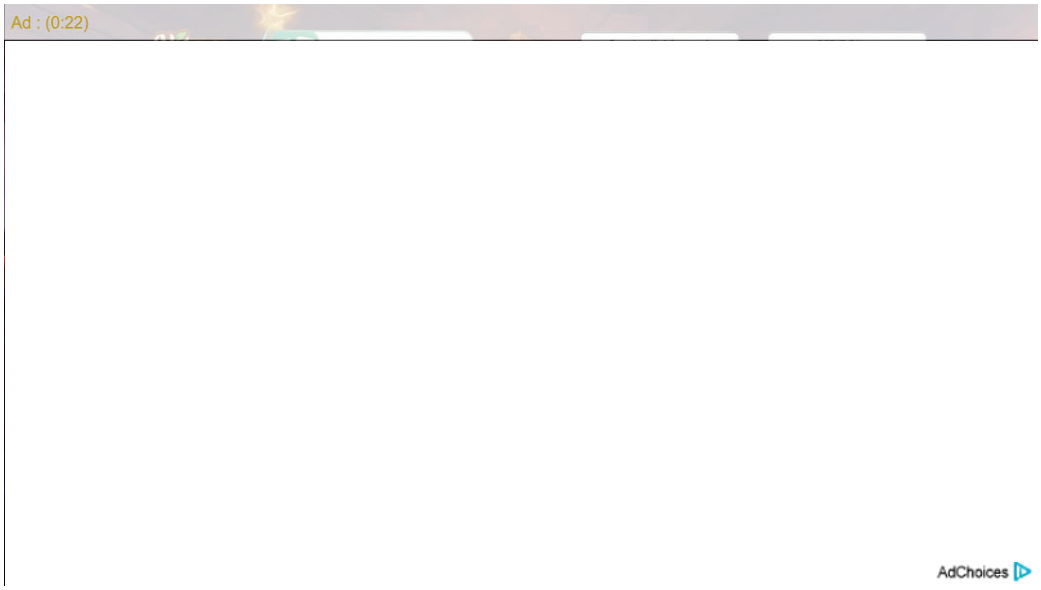
Executive order targets diversity programs in legal profession

Conservative groups challenge bar associations' diversity efforts

Jan 23 (Reuters) - Two major U.S. state bar associations have pushed back after President Donald Trump took aim at efforts to promote more diversity in the legal profession.

Trump in an executive order on Tuesday included state and local bar associations as targets for federal civil probes into private-sector diversity, equity and inclusion programs that may "constitute illegal discrimination or preferences," along with medical associations, publicly traded

companies and major nonprofits and universities.



The State Bar of California, the largest state bar in the country with more than 197,000 active members, said in a statement on Wednesday that the executive order will not affect its programs "as none of our work in this space involves illegal discrimination or preferences."

The Massachusetts Bar Association's president, Victoria Santoro, said the organization's diversity efforts do not violate the law, adding: "I think there are better ways our federal government could use its time than looking at bar associations."

The executive order, part of a wider push by Trump to roll back DEI in the public and private sectors, escalates pressure from conservatives on legal industry diversity programs that gained steam after the U.S. Supreme Court's 2023 decision barring the consideration of race in college admissions.

Edward Blum, a conservative activist and architect of the Supreme Court affirmative action case, has challenged diversity programs in the legal profession. He said on Wednesday the new executive order should force bar associations to end sex and race quotas for board memberships and "may foreclose the need for further state-by-state legal challenges to these unfair and illegal policies."

Bar associations are mandatory or voluntary groups, typically funded through member dues, that advocate for attorneys and sometimes oversee attorney licensing and discipline.

They have emerged in recent decades in many states as vocal proponents of diversity, creating programs to promote ethnic minorities, women, LGBTQ lawyers and other underrepresented groups in leadership posts and throughout the legal profession. While those groups have steadily gained ground, whites make up 77% of American lawyers but only 60% of the U.S. population, according to the American Bar Association.

The American Bar Association and state and city bar groups in New York, Pennsylvania and Texas did not immediately respond to requests for comment or declined to comment.

Many state and local bar associations maintain fellowship or internship programs that place racially diverse law students in legal jobs, hold job fairs geared toward law students of color, or provide scholarships.

After the Supreme Court's 2023 ruling on affirmative action, conservative legal groups sued or filed complaints against several bar associations and law firms over such programs, alleging they are discriminatory.

In 2024 the ABA revised the criteria for its longstanding program aimed at boosting the number of racially diverse judicial clerks to eliminate references to minority students and "communities of color" after a conservative legal group accused it of using illegal racial quotas.

The same year, the State Bar of Wisconsin modified a diversity program for law students after a conservative legal advocacy group sued, alleging racial discrimination.

Some prominent law firms, including Winston & Strawn and Morrison Foerster, altered their application criteria for diversity fellowships in 2023 after being sued by Blum.

The ABA, which has about 150,000 paying members and is the federally recognized accreditor of U.S. law schools, has made diversity and inclusion a core mission, making it a target of the anti-DEI movement.

A coalition of attorneys general from 21 Republican-controlled U.S. states has twice warned the ABA that its law school accreditation rules, which require schools to show commitment to diversity through recruitment, admissions and programming, are unlawful.

Some DEI rollbacks have come about without litigation. The Florida Bar last year ended all its diversity and inclusion initiatives after the state's Republican-controlled Supreme Court ordered it to stop funding such programs, saying the organization must treat all members impartially and without bias.

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Reporting by Karen Sloan in Sacramento, California; Additional reporting by Sara Merken in New York, Mike Scarcella in Washington and David Thomas in Chicago; Editing by David Bario and Matthew Lewis

Suggested Topics:

United States | Donald Trump | Human Rights | Diversity & Inclusion | Social Impact

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US Senate confirms Trump's nominee Pam Bondi as attorney general

United States · February 5, 2025 · 4:57 PM EST · 24 min ago

The Republican-led U.S. Senate confirmed Pam Bondi as the new U.S. attorney general on Tuesday, propelling one of President Donald Trump's staunchest political allies to the top perch of American law enforcement.

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South Carolina Bar

Continuing Legal Education Division

Lessons from Representing High Profile Whistleblowers

Rob Turkewitz

Law Office of Robert M. Turkewitz

Dedication, Diligence, and Experience

Representing Boeing Whistleblowers and Navigating a Media Firestorm

2026 SC Bar Annual Convention

Torts & Negligence Seminar

January 2026

1

Agenda

Whistleblower statutes

Challenges

Boeing and John Barnett

John's death & aftermath

2

ANTI-RETALIATION LAWS

Why do we need whistleblowers?

"Sunlight is the best disinfectant."

U.S. Supreme Court Justice Louis Brandeis

3

FEDERAL ANTI-RETALIATION LAWS

Long list of whistleblower statutes enacted since 1986.

4

ENVIRONMENTAL & SAFETY LAWS

Environmental and Nuclear Safety Laws	Days to File
Section 11(c) of the Occupational Safety & Health Act (OSHA). [29 U.S.C. §660(c)] Section 11(c) provides protection for employees who exercise a variety of rights guaranteed under the Act, such as filing a safety and health complaint with OSHA, participating in an inspection, etc. **29 CFR 1977**	30
Asbestos Hazard Emergency Response Act (AHERA). [15 U.S.C. §2651] Protects employees who report violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems. **29 CFR 1977**	90
Clean Air Act (CAA). [42 U.S.C. §7622] Prohibits retaliation against any employee who reports violations regarding air emissions from area, stationary, and mobile sources. **29 CFR 24**	30
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). [42 U.S.C. §9610] a.k.a. "Superfund," prohibits retaliation against any employee who reports alleged violations relating to cleanup of hazardous waste sites, as well as accidents, spills, and other emergency releases of pollutants and contaminants. **29 CFR 24**	30
Energy Reorganization Act (ERA). [42 U.S.C. §5851] Prohibits retaliation against any employee who reports violations or refuses to engage in violations of the ERA or the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission, and employees of contractors working with the Department of Energy under a contract pursuant to the Atomic Energy Act. **29 CFR 24**	180
Federal Water Pollution Control Act (FWPCA). [33 U.S.C. §1367] a.k.a. "Clean Water Act," prohibits retaliation against any employee who reports alleged violations relating to discharge of pollutants into water. **29 CFR 24**	30
Safe Drinking Water Act (SDWA.) [42 U. S. C. §300j-9(i)] Prohibits retaliation against any employee who reports alleged violations relating to any waters actually or potentially designated for drinking. **29 CFR 24**	30
Solid Waste Disposal Act (SWDA). [42 U.S.C. §6971] Prohibits retaliation against any employee who reports alleged violations relating to the disposal of solid and hazardous waste (including medical waste) at active and future facilities. This statute is also known as the Resource Conservation and Recovery Act. **29 CFR 24**	30
Toxic Substances Control Act (TSCA). [15 U.S.C. §2622] Prohibits retaliation against any employee who reports alleged violations relating to industrial chemicals produced or imported into the United States, and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA). **29 CFR 24**	30

5

CONSUMER & INVESTOR PROTECTION LAWS

Consumer and Investor Protection Laws	Days to File
Affordable Care Act. 29 U.S.C. §218C (ACA) Protects employees who report violations of any provision of title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium.	180
Consumer Financial Protection Act (CFPA). [12 U.S.C. §5567]. Employees are protected for blowing the whistle on reasonably perceived violations of any provision of the Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial, Protection, or any rule, order, standard, or prohibition prescribed by the Bureau.	180
Sarbanes-Oxley Act (SOX). [18 U.S.C. §1514A] Protects employees of certain companies who report alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violation of federal laws related to fraud against shareholders. The Act covers employees of publicly traded companies and their subsidiaries, as well as employees of nationally-recognized statistical rating organizations. **29 CFR 1980**	180
Consumer Product Safety Improvement Act (CPSIA). [15 U.S.C. §2087] Protects employees who report to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Safety Product Safety Commission (CPSC). CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers. **29 CFR 1983**	180
FDA Food Safety Modernization Act (FSMA) [21 U.S.C. 399d]. Protects employees of food manufacturers, distributors, packers, and transporters from reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the Act. Employees are also protected from retaliation for refusing to participate in a practice that violates the Act.	

env_nukehttp://www.whistleblowers.gov/wb_filing_time_limits.html#env_nuke

6

TRANSPORTATION INDUSTRY LAWS

Transportation Industry Laws	Days to File
Federal Railroad Safety Act (FRSA). [49 U.S.C §20109] Protects employees of railroad carriers and their contractors and subcontractors who report a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees who refuse to work when confronted by a hazardous safety or security condition. **29 CFR 1982**	180
International Safe Container Act (ISCA) [46 U.S.C. §80507] Protects employees involved in international shipping who report to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act. **29 CFR 1977**	60
Moving Ahead for Progress in the 21st Century Act (MAP-21). [49 U.S.C. §30171] Prohibits retaliation by motor vehicle manufacturers, part suppliers, and dealerships against employees for providing information to the employer or the U.S. Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration or for engaging in related protected activities as set forth in the provision.	180
National Transit Systems Security Act (NTSSA). [6 U.S.C. §1142] Protects transit employees who report a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees who refuse to work when confronted by a hazardous safety or security condition or refuse to violate a federal law related to public transportation safety. **29 CFR 1982**	180
Pipeline Safety Improvement Act (PSIA). [49 U.S.C. §60129] Protects employees who report violations of federal laws related to pipeline safety and security or who refuse to violate such laws. **29 CFR 1981**	180
Seaman's Protection Act, 46 U.S.C. §2114 (SPA), as amended by §611 of the Coast Guard Authorization Act of 2010, Public Law 111-281. Protects employees who report to the Coast Guard or another federal agency a violation of a maritime safety law or regulation. The Act also protects seamen who refuse to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public.	180
Surface Transportation Assistance Act (STAA). [49 U.S.C §31105] Protects truck drivers and other employees who refuse to violate regulations related to the safety of commercial motor vehicles or who report violations of those regulations. **29 CFR 1978**	180
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). [49 U.S.C. §42121] Protects employees of air carriers and contractors and subcontractors of air carriers who, among other things, report violations of laws related to aviation safety. **29 CFR 1979**	90

7

ANTI-RETALIATION LAW AVIATION INDUSTRY

- **Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). [49 U.S.C. §42121]**
- Protects employees of air carriers and contractors and subcontractors of air carriers who, among other things, report violations of laws related to aviation safety. **29 CFR 1979.**
- **90-day statute of limitations.**

8

RETALIATION CASES: DIFFICULTIES

- Emotionally distressed clients
- Short statutes of limitations
- Often sole remedy
- OSHA
- No subpoena power – investigators & judges
- No jury trial

9

BOEING - BACKGROUND

Went from trusted company to staple of late-night talk show jokes

1997, Boeing acquired McDonnell Douglas

Boeing's focus changed from engineering quality to shareholder value & profits

10

COMMERCIAL AIRCRAFT QUALITY REQUIREMENTS

787 Production Certificate contingent on following a quality management system (QMS)

QMS requires all work and parts on an aircraft to be fully documented in a database that becomes the build record

QMS requires all defects to be identified, investigated by engineering, corrective action taken, all to be recorded in the build record

Complete build record allows airline customers and investigators to know what was done and what part was installed for future maintenance and if there is a problem

Failure to document defects is a civil and criminal violation – civil fine of $500,000 per violation

11

11

18 U.S.C. §38. Fraud involving aircraft or space vehicle parts in interstate or foreign commerce

(a) Offenses.—Whoever, in or affecting interstate or foreign commerce, knowingly and with the intent to defraud—

(1)

(A) falsifies or conceals a material fact concerning any aircraft or space vehicle part;

(B) makes any materially fraudulent representation concerning any aircraft or space vehicle part; or

(C) makes or uses any materially false writing, entry, certification, document, record, data plate, label, or electronic communication concerning any aircraft or space vehicle part;

(2) exports from or imports or introduces into the United States, sells, trades, installs on or in any aircraft or space vehicle any aircraft or space vehicle part using or by means of a fraudulent representation, document, record, certification, depiction, data plate, label, or electronic communication; or

(3) attempts or conspires to commit an offense described in paragraph (1) or (2), shall be punished as provided in subsection (b).

(b) Penalties.—The punishment for an offense under subsection (a) is as follows:

(1) Aviation quality.—If the offense relates to the aviation quality of a part and the part is installed in an aircraft or space vehicle, **a fine of not more than $500,000, imprisonment for not more than 15 years, or both.**

12

John's Allegations:

- Boeing senior management pressuring workers to cut corners & ignore defects.
- Senior management told John to not put defects in writing, and work in "grey zone." John refused.
  - Denigrated and embarrassed in front of his workers
  - Given low performance ratings
  - Blocked from transfers and promotions
- John complained about serious problems not being adequately addressed, including the following:
  - Defective parts installed on airplanes
  - Emergency oxygen tanks not working properly
  - Metal titanium slivers falling on top of flight control wires

JOHN BARNETT

COURAGEOUS BOEING WHISTLEBLOWER

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13

13

AIR-21 Litigation

BARNETT v. BOEING

- AIR-21 Complaint filed January 2017 immediately within the statute of limitations
- OSHA investigation lasted 4 years
- Denied claim on grounds of insufficient evidence and statute of limitations
- Appealed OSHA decision
- Boeing moved to dismiss – ALJ held hostile work environment adequately alleged and statute of limitation continuing
- Boeing withheld evidence and delayed case
- Barnett's 3 motions to compel granted; Motion for Sanctions pending

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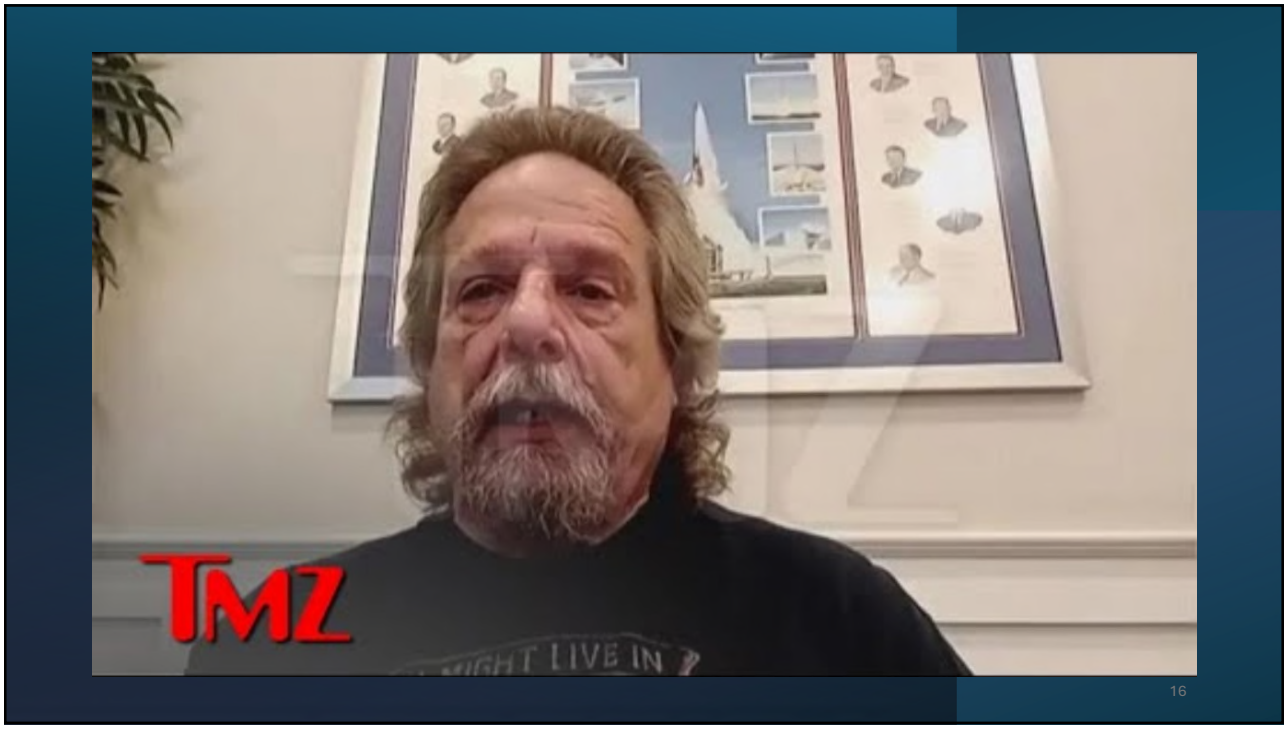
14

14

ALASKA AIR DOOR PLUG BLOWOUT

- Early January 2024, Alaska Air door plug blowout
- FAA found Boeing was not following processes and procedures
- Reaffirmed John's complaints
- TMZ interview

15



16

JOHN'S TRAGIC DEATH

- Trial scheduled for late June 2024
- Depositions scheduled throughout March 2024
- In deposition, John testified about hostile work environment
- John's testimony devastating to Boeing
- Between the second and third day of deposition, on March 9, John was found dead in his truck

17

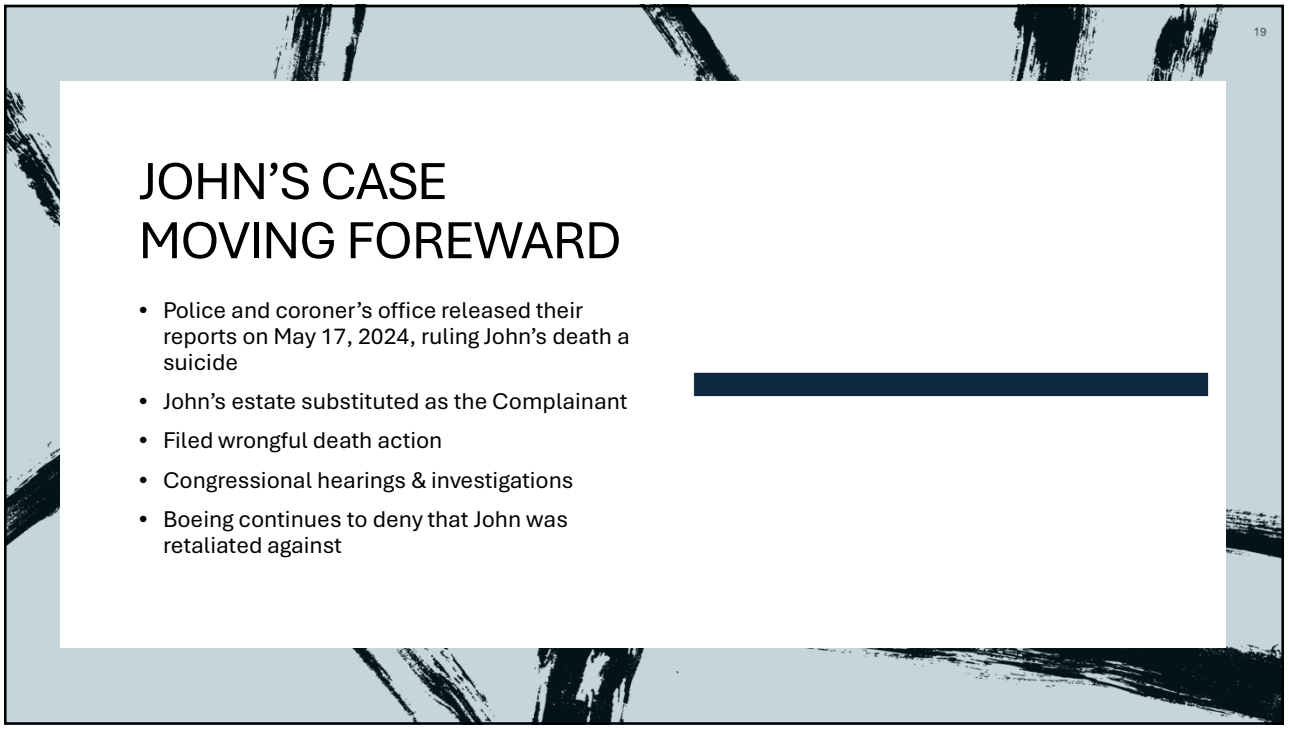
17

PUBLIC & MEDIA REACTION

- His family, friends and lawyers were shocked and devastated. Immediately coordinated with family and made sure that his death was being properly investigated
- Overwhelming media attention, calls, interviews, articles, documentaries
- Most people who contacted us believed John was murdered by Boeing; internet comments
- We (lawyers and staff) were advised to be cautious and exercise situational awareness. Trespassers.
- Death threats: Boeing, Coroner's Office
- Boeing Whistleblower Josh Dean's death; other whistleblowers came forward

18

18

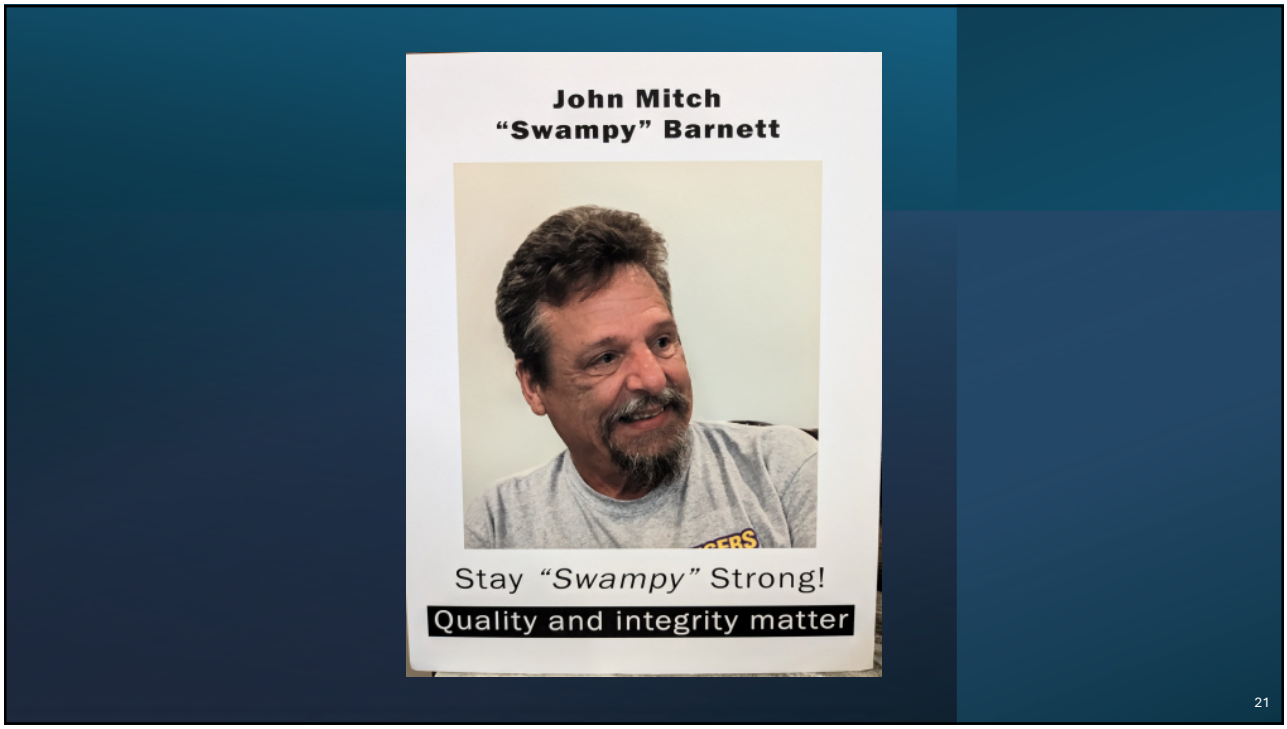


19

LESSONS LEARNED

- Transparent, but ethical considerations of attorney/client privilege, confidentiality
- "Just the facts"
- Control the narrative, get your side out.
- Consult media expert, if necessary, press releases
- Evaluate and be choosy who you allow interviews. Overwhelming volume of contacts
- Clients' needs, get expert/physical/mental/emotional help as needed. Lengthy cases
- Personal rewards of representation, make a difference

20



21

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22

South Carolina Bar
Continuing Legal Education Division

"I Tell You, Jerry at That Moment, I Was a Marine Biologist" George Costanza, The AD, and Mental Health

Stephanie Sandifer
Brian Quisenberry

"I Tell You, Jerry, at That Moment, I Was a Marine Biologist" – A Study of Mental Health and Disability Issues Through the Lens of the TV Camera… Study of Seinfeld character George Castanza and his all over the place behavior – he is no different than many of those in our own workplaces, as well as our client's workplaces.

By: Stephanie Sandifer, Esq. and Brian Quisenberry, Esq. – Clement Rivers, LLP

Overview

This presentation will explore ideas for handling mental health and disability issues that have become prevalent in today's workforce. Specifically, we will look at EEOC Charge and ADA Accommodations trends, mental health, remote work, service animals and related topics. Below are some recent stats and case law authority to use as a resource when evaluating mental health disabilities and reasonable accommodations in the workplace, and issues related to same.

Recent Trends and 2024 Stats

- The EEOC received 88,531 new charges of discrimination in FY 2024, reflecting an increase of more than 9% over FY 2023.
- 38.0% of all EEOC discrimination charges filed in FY 2024 alleged disability discrimination—33,668 charges (an increase from 29,160 [36%]).
- SHRM's 2024 mental health and workplace wellness research found:
    - 44% of employees feel burned out
    - 30% feel stressed
    - 22% feel anxious
- According to USAFacts (Nonpartisan Government Data), citing Substance Abuse and Mental Health Services Administration (SAMHSA) data, in 2023, 58.7 million adults in the US – 22.8% of the adult population – have a mental illness. This is about 2 in 9 adults.

While EEOC data does not expressly quantify sub-categories of the different kinds of charges (e.g. mental health-based charges), many analysts estimate that a 10% increase in claims for emotional and mental health accommodations and/or discrimination has occurred. This general understanding that mental health-based charges are on the rise is based on employer reports, litigation patterns, employee surveys, and post-COVID accommodation requests. Similarly, it seems likely that ADA cases will continue to increase. An often-seen scenario is the "well-meaning" but untrained supervisor/manager who cuts off an employee request for accommodation because he/she believes (and says) that if the supervisor/manager did that for the requesting employee, he/she would have to do that for everyone.

In sum, mental health has become a leading driver of both time-off requests and ADA accommodation claims, especially remote-work, modified schedule, and reduced exposure requests.

Hot Topics in Mental Health-Based ADA Claims

Reasonable Accommodations and the Interactive Process Backdrop

The ADA makes it unlawful to "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). The ADA defines such discrimination in the employment context to include "not making reasonable accommodations to the known physical or *mental* limitations of an otherwise

qualified [employee] with a disability," absent undue hardship. *Id.* § 12221(b)(5)(A) (emphasis added); *Tartaro-McGowan v. Inova Home Health, LLC*, 91 F.4th 158, 165 (4th Cir. 2024) ("Discrimination can include failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."). "The ADA's implementing regulations contemplate that an employer will often have to 'initiate an informal, interactive process' with an employee to identify a reasonable accommodation." *Tarquinio v. Johns Hopkins Univ. Applied Physics Lab*, 141 F.4th 568, 573 (4th Cir. 2025), *cert. denied sub nom. Tarquinio v. Johns Hopkins Univ. Applied Physics Lab.*, No. 25-353, 2025 WL 3131850 (U.S. Nov. 10, 2025) (quoting 29 C.F.R. § 1630.2(o)(3)). This process "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3); *see also Tarquinio*, *supra*, *Perdue v. Sanofi-Aventis U.S., LLC* 999 F.3d 954, 962 (4th Cir. 2021), and *Jones, infra* (the interactive process is "not an end in itself", but rather a "means for determining what reasonable accommodations are available to allow the disabled individual to perform essential job functions of the position.").

Importantly, to trigger an employer's obligation to participate in the interactive process, the employee must make an adequate request, thereby putting the employer on notice of the disability and need for accommodation (satisfying the first element of a claim noted below). *Kelly v. Town of Abingdon, Va.*, 90 F.4th 158, 166 (4th Cir. 2024) (citing several cases including *Lashley v. Spartanburg Methodist Coll.*, 66 F.4th 168, 179 (4th Cir. 2023) and *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 581 (4th Cir. 2015)). This requires the employee to communicate his/her disability *and* a desire for accommodation; the employee does not need specify the precise limitations resulting from the disability or identify a specific, reasonable accommodation. *Id.* at 166-167 (quotations omitted) (further noting that while no magic words of "reasonable accommodation" are required, the request must nonetheless make clear the employee wants assistance for his/her disability). "Rather, when a valid request leaves the precise nature of the disability or desired accommodation ambiguous, the employer should seek clarification" and do so through the informal, interactive process. *Kelly,* 90 F.4th at 166 (citations omitted).

When it comes to disability discrimination cases, often times the issue involves a "failure to accommodate" disability as a form of the alleged discrimination. *Cf. Perdue v. Sanofi-Aventis U.S., LLC,* 999 F.3d at 962 ("One form of discrimination is failing to make reasonable accommodations for a disabled employee's known physical or mental limitations." (internal quotation marks and citation omitted)). In other words, the claim is that the employer discriminated against the employee by failing to provide him/her a reasonable accommodation. To make out a failure-to-accommodate claim, a plaintiff must show that "(i) [he/she] is disabled, (ii) the employer had notice of [his/her] disability, (iii) [he/she] could perform the essential functions of [his/her] position with a reasonable accommodation, and (iv) the employer refused to make such accommodation." *Tarquinio*, 141 F.4th at 573 (quoting *Cowgill v. First Data Techs., Inc.*, 41 F.4th 370, 378 (4th Cir. 2022)). The Fourth Circuit has "read the fourth element to require the employer's good-faith participation in § 1630.2(o)(3)'s interactive process." *Id.* (citation omitted). The plaintiff carries the burden of proof on each element. *Hannah v. United Parcel Serv., Inc.*, 72 F.4th 630, 635 (4th Cir. 2023).

In *Tarquino*, *supra*, the Fourth Circuit explained that § 12112(b)(5)(A) of the "ADA imposes failure-to-accommodate liability only on employers who don't make reasonable accommodations to the

known physical or mental limitations of an otherwise qualified individual with a disability," and that said subparagraph imposes "an affirmative, ADA-created duty to accommodate so that disabled persons can obtain the same workplace opportunities that those without disabilities automatically enjoy." *Id.* at 574 (citations omitted).[1] This interactive process "helps employers to discharge their duty to accommodate," which means that it gives "employers and employees a chance to work together to figure out what accommodation, if any, would be reasonable and not unduly burdensome." *Id.* Because an employer's obligation to engage in the interactive process is closely tied to its duty to accommodate, the Fourth Circuit has held that where an employer does not engage in good faith with the interactive process, said employer violates the ADA so long as a reasonable accommodation was possible. *Id.*

Nevertheless, the interactive process is a two-way street, with both parties sharing responsibility. It gives the employer the opportunity to confirm that it has a duty to accommodate to begin with (*i.e.* that the need for an accommodation exists) and an employee must engage in the interactive process. *Tarquinio*, 141 F.4th at 574. Acquiring the knowledge that an employee's disability limits [him/her] in a way that needs accommodating "is a central purpose of the interactive process." *Id.* at 575. An employee meets his/her obligation by providing sufficient information that the employer requires in order to verify the existence of the employee's disability and determine the scope of any disability-related limitation(s) where same are not obvious. *Id.* at 575 ("If an employee has a disability which causes limitations that interfere with work, and the employer knows it, then the employer must try to accommodate. But if any link in that logical chain is missing, no duty arises, and there's no liability."); *Williamson v. Bon Secours Richmond Health Sys., Inc.*, 34 F. Supp. 3d 607, 613 (E.D. Va. 2014) (employer did not breach its obligation under the ADA to engage in interactive process to determine reasonable accommodation by requesting that employee, a veteran who suffered from post-traumatic stress disorder (PTSD) and traumatic brain injury, provide doctor's note outlining exactly how his schedule should change, so as to not aggravate his PTSD). However, an employee fails to meet this obligation where he/she refuses to engage in that process and/or otherwise refuses to provide adequate medical documentation to support the employee's accommodation request(s). *Id.* at 575–76. In short, "if the employee prevents the employer from understanding [his/her] disability, then the employer's duty never arises, and the employee's claim fails." *Id.* at 575.

In sum, "the plaintiff bears the burden of identifying an accommodation that would allow a qualified individual to perform the job, as well as the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." *Shin v. Univ. of Md. Med. Sys. Corp.*, 369 Fed. App'x 472, 482 (4th Cir. 2010) (unpublished) (citation omitted).

Practical Implications

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[1] *Clark v. Sch. Dist. Five of Lexington & Richland Cntys*, 247 F.Supp.3d 734, 744, 746 (D.S.C. 2017) (explaining the ADA standards related to reasonable accommodation, interactive process, and alternative reasonable accommodations: "A plaintiff may also be entitled to a reasonable accommodation if it enables him or her to enjoy 'equal benefits and privileges' of employment." § 1630.2(o)(iii). . . . "a reasonable accommodation should provide a meaningful employment opportunity [and m]eaningful employment opportunity means an opportunity to attain the same level of performance as is available to nondisabled employees having similar skills and abilities.").

- Employers should develop an ADA accommodations request protocol and train managers on it.
- Individuals making the request should do so in a clear manner and link the disability and its limitations/interference with work sufficient enough for the employer to be able to determine the scope of any disability-related limitations where same is not obvious such as mental health conditions. Employees need to understand that the employer is entitled to ask for information, including from the employee's medical providers in order to understand his/her disability and scope of any limitation(s).

Mental Health Accommodations – Generally

Courts in the Fourth Circuit make it clear that where the employee's proposed accommodation would not have allowed him/her to perform all the essential functions of their job, same is unreasonable. *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 581 (4th Cir. 2015) ("An employer is not required to grant even a reasonable accommodation unless it would enable the employee to perform *all* [not simply most] of the essential functions of her position."); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) (the ADA's operative "provisions contain no reference to an individual's *future* ability to perform the essential functions of [their] position. . . . [Instead, the ADA is] "formulated entirely in the present tense, framing the precise issue as whether an individual 'can' (not 'will be able to') perform the job with reasonable accommodation." (emphasis in original)); *Jones v. Fairfax Cnty. Sch. Bd.*, No. 24-1444, 2025 WL 2813607, at *4 (4th Cir. Oct. 3, 2025). Thus, whether the plaintiff can perform the essential functions of the position with a reasonable accommodation is two-fold—first, essential functions must be identified, and then one looks to performance and whether the accommodation is reasonable (*i.e.* whether the accommodation allows the employee to perform all essential functions of the job).

What constitutes an essential function of a job generally depends on whether the reason the position exists is to perform that function, whether there aren't enough employees available to perform the function, or whether the function is so specialized that someone is hired specifically because of his or her expertise in performing that function. 29 C.F.R. § 1630.2(n)(2); *Jacobs*, 780 F.3d at 579.

In *Jacobs*, the plaintiff was a courthouse deputy clerk who was diagnosed with social anxiety disorder—persistent fear of social or performance situations in which a person is exposed to unfamiliar people or to possible scrutiny by others"—causing her to suffer significant anxiety and/or distress when enduring social or performance situations such as working the front counter at the clerk's office. *Id.* at 565 (further noting an example as "a job promotion to a position requiring public speaking may result in the emergence of social anxiety disorder in someone who previously never needed to speak in public." (citation omitted)). To accommodate her disability, the plaintiff requested to work less days at the front counter or otherwise be moved away from the front counter all together.

The Fourth Circuit reversed summary judgment granted to the employer and held that the plaintiff established a genuine issue of fact whether working the front counter in the clerk's office was an essential function of the deputy clerk position. *Id.* at 580. The Court relied on: (i) the plaintiff's evidence that the job description did not indicate that all deputy clerks were expected to work at the

front counter and most clerks performed other tasks (fewer than 15% of the office's deputy clerks worked behind the front counter); (ii) the fact that 30 deputy clerks were in the office, establishing many employees were available to perform the front desk function; (ii) the employer's failure to establish evidence that mastering the front desk duties was essential to the position or that the office would be negatively impacted if the plaintiff no longer worked behind the front counter. *Id.* Accordingly, what constitutes an essential function can play a pivotal role in the accommodations analysis.

In *Jacobs*, the Fourth Circuit also found a genuine factual dispute concerning the plaintiff's performance and, thereby in turn, whether the accommodation was reasonable. The plaintiff asserted that fewer days working at or moving her away from the front counter would reduce her social anxiety—which was caused by constant face-to-face interactions—and help her meet expectations; whereas the employer contended the plaintiff was a poor performer (albeit after the fact of her termination) and that she could not do the job even with the location move. The Court reasoned, even if the plaintiff worked slowly or asked coworkers for help, which was disputed, a jury could decide those issues were linked to her anxiety and might not happen if the accommodation of removing her from the front desk/constant face-to-face interactions or performance situations with unfamiliar people was given. *Id.* at 581. Thus, an accommodation may be deemed reasonable if it is likely same will allow the employee to perform essential functions of the position. But that does not prohibit an employer from presenting an alternative accommodation that similarly allows performance of essential functions.

Notably, the ADA does not require an employer to provide the "exact accommodation" requested by the employee, but it does have to, in good faith, engage in the interactive and determine whether a reasonable accommodation is feasible. *See e.g. Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407, 415 (4th Cir. 2015) (employer not required to provide the "exact accommodation that the employee request[s]"); *see also Hannah P. v. Coats*, 916 F.3d 327, 337 (4th Cir. 2019) (same); *cf. Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013) (finding an employer may be liable for failure to accommodate if the evidence establishes that "had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions.") (internal citation and quotations omitted). Consequently, it is prudent to not only evaluate the employee's desired accommodation, but any others that the employer deems functional and effective.

Practical Implications

- Growing share of disability claims.[2]

[2] Note, the *Jacobs* case also does a good job addressing an ordinary disability discrimination claim based on an individual's mental health disability, including its evaluation of whether the employee was performing her job at a level that met her employer's legitimate expectations so as to render her a "qualified" individual in satisfaction of the second element. Briefly, "[t]o establish a claim for disability discrimination under the ADA, a plaintiff must prove "(1) that she has a disability, (2) that she is a 'qualified individual' for the employment in question, and (3) that [her employer] discharged her (or took other adverse employment action) because of her disability." *Jacobs*, 780 F.3d at 572. In denying summary judgment as to the disability discrimination claim, the Fourth Circuit relied on inconsistencies of witness testimony and the "total lack of documentary evidence" concerning the plaintiff's alleged poor performance.

- Stigma decline means more employees willing to request support.
- Employers should expect:
    - More accommodations requests, as well as time off requests;
    - More schedule flexibility issues; and
    - More disputes over remote/hybrid work.
- Employers should engage in good-faith interactive discussions when an employee requests accommodation. Employers are only required to provide accommodations that enable the employee to perform all essential job functions. Before denying a request, confirm whether the accommodation would allow the employee to meet job requirements. Performance concerns should be carefully evaluated—poor performance may be linked to the disability and could improve with accommodation. Document the analysis and make sure to engage in the interactive process to avoid liability.

Remote Work

Work from home/telework (aka remote work or telecommuting) has been looked at as a potential reasonable accommodation for over twenty years. *See* EEOC Guidance 2003-1, "Work at Home/Telework as a Reasonable Accommodation", issued Feb. 3, 2003, *available a*t https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation. There is no denying, however, that technological advances have made working from home, in many instances, more feasible. Thereby meaning that employers cannot solely rely on "automatic presumptions" that working from home is unreasonable, that productivity inevitably would be greatly reduced, and that most jobs require in-person teamwork, personal interaction, and supervision. The many lessons learned about working from home effectively during the pandemic have reinforced this point that generalities and automatic presumptions are no longer sufficient. Nevertheless, the fact that many employees were able to work remotely temporarily when forced to do so by a global pandemic and health crisis does not mean that those jobs do *not* have essential functions that require in-person work over the medium to long term. Rather, determining whether a specific job has essential functions that require in-person work has become much more of case-by-case specific inquiry. *Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635, 644 (7th Cir. 2023); *Cf. Jones v. Fairfax Cnty. Sch. Bd.*, No. 24-1444, 2025 WL 2813607 (4th Cir. Oct. 3, 2025) (unpublished).

Albeit in a reasoned but nonprecedential decision, the Fourth Circuit has held that telework, even temporary but total telework, is not a reasonable accommodation when it will not allow the employee to perform all the essential functions of the job. *Jones*, 2025 WL 2813607 at *3 (finding co-teaching lessons and testing elementary students were essential functions and that same could not be performed while teleworking). Moreover, the Fourth Circuit has long held "employers do not need to change a job's essential functions or split them across multiple employees" in order to satisfy ADA obligations. *Id.* (citing *Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004, 1009 (4th Cir. 2020)); *see also* 29 C.F.R. § 1630.2(o); *cf. Shin*, 369 Fed. App'x at 482 (4th Cir. 2010) (unpublished) (holding that an accommodation that would result in other employees having to work harder or longer hours is not required, and upholding the district court's grant of summary judgment on the basis that the plaintiff failed to establish evidence that he could perform the essential functions of his job with or without reasonable accommodation to his alleged disabilities involving attention deficit disorder and cognitive impairments (visual reasoning an memory)).

Practical Implications

- Still a heavily litigated area post-COVID; no significant change in Fourth Circuit precedent post-COVID.
- Courts increasingly require fact-specific analysis, not blanket denials.
- Employers should maintain strong documentation of essential functions and remote-work feasibility.
- If employer has a work from home policy or program, and same requires an employee to work at least one year before he/she is eligible to participate in the telework program, the employer may have to waive it's one-year rule if for an individual who needs to work at home because of a disability and the job can be performed fully from home.
- When requesting an accommodation such as telework, employees should submit documentation that provides an explanation of the impact of his/her condition on the job, an assessment on the employee's ability to perform the essential functions, and an explanation as to how the telework accommodation will assist the employee in performing the essential functions of his/her position./

Service Animals

Very few cases have addressed use of a service or emotional support animal as a reasonable accommodation in the employment context. Specifically, two courts in the Fourth Circuit have addressed the issue. A main issue in cases involving service animals (dogs), which can also be considered an "emotional support" animal,[3] is undue hardship on the employer to allow the animal's presence in the workplace. *See Clark v. Sch. Dist. Five of Lexington & Richland Cntys*, 247 F.Supp.3d 734 (D.S.C. 2017); *see also Maubach v. City of Fairfax*, No. 1:17-cv-921, 2018 WL 2018552, at *6 (E.D. Va. Apr. 30, 2018) (finding undue hardship existed and, therefore, the employer did not have to allow plaintiff to bring an emotional support dog to work as an accommodation). These cases further establish that service animal (or similar) accommodations are highly fact dependent. The District of South Carolina allowed ADA claims to proceed past summary judgment where the service animal materially reduced risk or stabilized symptoms, and no evidence of undue hardship on the employer (or coworkers) existed. *See Clark*, *supra* (denying the employer summary judgment because genuine issues of fact existed, in part, as to whether service dog was the only reasonable accommodation). In other words, the *Clark* court found that the plaintiff demonstrated that there were no reported problems caused by the service/emotional support animal.

[3] Title I of the ADA prohibits discrimination against the disabled in employment. Unlike Title II of the ADA (public accommodation statute), Title I has no specific regulations or guidance related to service animals or emotional support animals, and there is very little case law addressing the question whether an emotional support animal can qualify as a reasonable accommodation for a disabled employee. *Maubach v. City of Fairfax*, No. 1:17-CV-921, 2018 WL 2018552, at *6 n.6 (E.D. Va. Apr. 30, 2018). In *Maubach*, the court assumed without deciding that an emotional support animal qualifies as a reasonable accommodation under Title I of the ADA. *Id.* Thus, the inquiry turns to the reasonableness of the particular accommodation in the particular employment context, which is likely whether the dog's presence in the workplace as an emotional support animal for the plaintiff is a reasonable accommodation for his/her disability or whether the dog's presence imposes an undue hardship on the employer given the context in which the plaintiff works. *Id.*

Considerations include: (i) whether a service dog is the only reasonable accommodation or whether alternatives exist; (ii) workplace environment – whether other employees were allergic to the animal; (iii) whether the dog's presence and care required imposed a hardship on other employees or the employer's operations; and (iv) physical workplace barriers or operational needs

Practical Implications

- Employers should thoroughly evaluate (and document):
    - Specific job environment;
    - Health/safety protocols; and
    - Alternative accommodations that may achieve similar effect without the animal.

Best Practices based on precedent and trends

- Modify job duties to remove non-essential duties
- Equipment and/or tech investment
- Management and supervision
    - Provide training on the interactive process and reasonable accommodations under the ADA. Avoid retaliation claims and become familiar with and train on this issue as well.
    - Clear job descriptions, work conditions, job expectations, and goals that define success.
    - As the workforce generation is growing and getting younger, the way employers have to supervise needs to change. Employees want more feedback and positive reinforcement.

Much of the above may seem obvious, but the reality is that often times we as lawyers see these best practices not being followed and that is, in part, why we are seeing increased filings with the EEOC for mental health-based ADA claims.

South Carolina Bar
Continuing Legal Education Division

The ABCs of TEDA in 2026: A Panel Discussion of SC Teacher Laws

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No Materials Available