

# As Executive Branch Scrutiny of DEI Programs Intensifies, Companies Must Assess All Aspects of Their Policies and Business Practices to Ensure Compliance with Civil Rights Laws

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**H**ealth care and other federal funding recipients face new risks on multiple fronts in their use of diversity, equity and inclusion (“DEI”) programs. The Executive Branch has undertaken a concerted effort to reshape the interpretation and enforcement of federal civil rights laws impacting DEI practices through the issuance of Executive Orders, as discussed in a previous Hall Render Insight<sup>1</sup>, and by directing the Department of Justice (“DOJ”) and the Equal Employment Opportunity Commission (“EEOC”) to implement its policy objectives.<sup>2</sup> Additional agency initiatives are sure to follow.

These coordinated actions have laid the groundwork for a broader shift in federal enforcement priorities, a shift that is now being made explicit in a recent DOJ memorandum<sup>3</sup> (the “DOJ Memo”) that directs DOJ Trial Attorneys and Assistant United States Attorneys across the country to leverage the might of the False Claims Act (“FCA”) to investigate DEI programs that have “racist preferences, mandates, [or] policies.”

The combination of the DOJ Memo and the recent Executive Orders changes the risk calculation for DEI-related activities—especially in health care, higher education, research and any sector touching federal funds. Organizations must assess their exposure and compliance posture now, before enforcement actions begin.

## THE DOJ MEMO

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On May 19, 2025, Deputy Attorney General Todd Blanche released the DOJ Memo announcing the creation of a Civil Rights Fraud Initiative. DOJ intends to “utilize the FCA to investigate, and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws,” as those laws are currently being interpreted and applied by the Executive Branch. While the DOJ Memo alludes to an initial focus on colleges and universities, the expansiveness of the FCA combined with the DOJ Memo’s specific reference to engaging the Department of Health and Human Services (“HHS”) highlights the risk for all health care entities, many (if not all) of which receive federal funds. Moreover, the DOJ Memo “strongly encourages” private parties (i.e., whistleblowers, also known as relators) to help DOJ identify instances of civil rights fraud.

While DOJ guidance documents, such as the DOJ Memo, cannot form the basis for DOJ enforcement action, the increased scrutiny and targeting of DEI initiatives implicates a number of federal and state laws, as the interpretation and application of longstanding rules are changed.

This shift elevates risk in two major ways:

- **Expansion of Covered Entities at Risk of Liability:** Entities receiving any federal funding—directly or indirectly—are now more likely to face DOJ scrutiny under civil rights laws. Examples of such funding include government payment for health care services (e.g., Medicare, Medicaid, TriCare, etc.), research grants through the National Institutes of Health, disaster-related grants from the Federal Emergency Management Agency and funding for residency and fellowship programs.
- **Potential Evolving Enforcement Tools:** A shifting federal enforcement landscape under the current administration significantly increases FCA and civil rights liability risks for DEI initiatives in health care and other federally funded sectors.

## IS YOUR ENTITY AT RISK?

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Entities receiving any federal funding—directly or indirectly—are now more likely to face DOJ scrutiny under civil rights laws. Even organizations that do not receive primary Medicare reimbursement may still be liable through secondary funding streams, subcontracts or affiliated arrangements with federal contractors. These funding streams include federal research grants, graduate medical education funding and COVID-19 and public health emergency relief funds. If any part of your operation touches federal dollars, even through downstream contractors, you may fall within DOJ’s enforcement scope. It is critical to map all potential federal funding links and evaluate compliance exposure.

## POTENTIAL ENFORCEMENT RISKS IN THE HEALTH CARE CONTEXT

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The current administration’s focus on DEI programs is not limited to Executive Orders or the DOJ Memo. Other agencies have expressed similar comments,<sup>4</sup> and it should be presumed that every federal agency is exploring how it can promote the anti-discrimination efforts described in recent Executive Orders. In light of this escalating emphasis, here is a non-exhaustive list of ways the government can investigate and prosecute potential violations of civil rights laws.

- **DOJ Investigations – FCA.** To bring a viable FCA claim related to DEI programs, the DOJ must argue that by having a DEI program, a medical provider was violating a federal law, falsely attested to compliance with that law, and such falsity was material to the government’s decision to pay. While this appears to be a novel theory for application of the FCA, the current administration’s Executive Orders, memos, press releases and proposed changes to federal contracts are laying the groundwork to bolster such claims going forward.<sup>5</sup> Indeed, DOJ’s encouragement of FCA liability in the civil rights space expands the possibility

for savvy whistleblowers to find pathways to FCA claims that did not previously exist. Hall Render will continue to monitor this new FCA landscape as it develops.

■ **DOJ Investigations – Civil Rights Division.**

Irrespective of the FCA, DOJ's Civil Rights Division could lean on the recent Executive Orders to investigate institutions for DEI-conscious policies perceived as unlawful under new guidance.

■ **EEOC Investigations and Commissioner Charges.**

Similarly, as has already been seen in EEOC guidance released under the current administration, the EEOC is likely to increase scrutiny of employer DEI programs, particularly if such programs involve racial/ethnic preferences, quotas or resource offerings perceived to exclude certain categories of individuals. This could include reverse discrimination claims with respect to race-conscious hiring. Further, there remains the opportunity for private actors to complain directly via commissioner complaint, should they believe a DEI program violates recent interpretations of long-standing rules and laws.

■ **HHS Office for Civil Rights Investigations.**

Historically focused on enforcing civil rights laws in health and human services settings to support DEI-related initiatives under Title VI (race), Title IX (sex) and Section 1557 of the Affordable Care Act, the change in enforcement expectations could result in a major shift for health care entities, where DEI initiatives that aligned with previous administrations' interpretations of civil rights laws may now be interpreted as discriminatory under new guidance.

■ **HHS Office of the Inspector General ("OIG").** Traditionally focused on auditing, investigating and enforcing compliance to prevent fraud, waste and abuse in HHS programs, OIG, under the new guidance, will be more likely to scrutinize DEI programs that may contravene

federal civil rights laws, particularly those involved in education, trainings and equity-based resource allocation. The Civil Monetary Penalties Law (42 § U.S.C. 1320a-7a) has fraud provisions similar to the FCA, and OIG could seek to impose penalties for false attestations of compliance with civil rights laws.

■ **Health Resources and Services Administration ("HRSA").**

The future of HRSA, as a key grantmaking agency within HHS, is increasingly uncertain. Health care providers receiving HRSA grants should reassess their DEI initiatives, as policies HRSA once encouraged may now pose compliance risks under shifting enforcement priorities.

■ **Private Causes of Action.** Private parties, too, may take the opportunity to leverage long-existing civil rights laws to function contrarily to previous interpretations. Again, while the laws themselves have not changed, the interpretation is changing the calculation for private defendants.

■ **Titles VI and VII and Section 1981.**

Private discrimination plaintiffs may utilize the new guidance to bolster employment discrimination claims that previously may have been less compelling.

■ **Emergency Medical Treatment and Labor Act ("EMTALA").**

While EMTALA continues to mandate that Medicare-participating hospitals provide emergency care, hospitals prioritizing race or gender-based care as part of equity initiatives could face increased scrutiny.

■ **Standard of Care.** DEI-related changes in clinical protocols could be framed as violating medical standards or could open the door to malpractice claims.

■ **State Civil Rights Laws.** Depending on location, state liability may mirror scenarios playing out in the federal landscape.

■ **State Attorneys General Actions.** With the authority to sue under state civil

rights or anti-discrimination laws—or as part of multi-state coalitions—state Attorneys General may initiate actions against DEI similar to those playing out at the federal level.

- **State Medicaid Agencies.** Given federal funding and federal parameters for Medicaid funding, state Medicaid agencies may investigate providers with DEI programs.

### **PRACTICAL TAKEAWAYS**

- Understand your organization's various federal funding streams in order to adequately prepare for potential government inquiry under the Civil Rights Fraud Initiative.
- Consider conducting an internal audit on your current DEI practices to ensure that practices are defensible under federal civil rights laws.
- Consider updating the terminology used to describe programs designed to ensure inclusivity in order to avoid implications of impermissible discrimination.
- Consider revising any public-facing company statements regarding DEI to ensure that such statements reflect lawful non-discrimination practices.
- Educate and remind managers, supervisors and employees that those who express concerns about potential civil rights violations under DEI policies are protected from retaliation in the same manner as any employee expressing

concerns about potentially anti-discriminatory practices.

- Assess exposure and compliance posture now, before enforcement actions begin, and evaluate whether your counsel is sufficient to handle both DEI and FCA issues in this era of uncertainty.
- Continue to check Hall Render's website for updates to litigation and agency action related to DEI.

### **Endnotes**

1. Hall Render, "Executive Order Creates Potential False Claims Act Liability for Employment Discrimination" (Jan. 31, 2025), available at <https://hallrender.com/2025/01/31/executive-order-creates-potential-false-claims-act-liability-for-employment-discrimination/>.
2. See Hall Render, "Federal Courts Consider President Trump's Anti-DEI Executive Orders" (Apr. 29, 2025), available at <https://hallrender.com/2025/04/29/federal-courts-consider-president-trumps-anti-dei-executive-orders/>.
3. U.S. Department of Justice, "Justice Department Establishes Civil Rights Fraud" (May 19, 2025), available at <https://www.justice.gov/opa/pr/justice-department-establishes-civil-rights-fraud-initiative>.
4. The EEOC (see, e.g., "DEI Under Scrutiny: What Employers Must Know About New EEOC and DOJ Guidance and What You Should Know About DEI-Related Discrimination at Work"); the Department of Health and Human Services (see, e.g., HHS-OCR's May 6, 2025 "Dear Colleague" Letter Clarifying Race-Based Prohibitions for Medical Schools); and the Department of Justice (see "Ending Illegal DEI and DEIA Discrimination and Preferences") have already issued memoranda and guidance in alignment with these administration-wide changes.
5. See, e.g., Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

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