

New Executive Order on DEI: What Federal Contractors Need to Know

April 2026

Agenda

What we will be discussing today:

- Background and Context
- What the Executive Order (EO) Requires and Timeline for Implementation
- Key Aspects of the DEI Clause
- Permitted v. Prohibited Activities
- Considerations and Obligations as a Prime Contractor
- Enforcement and Penalties
- Action Steps

Presenters and Moderator



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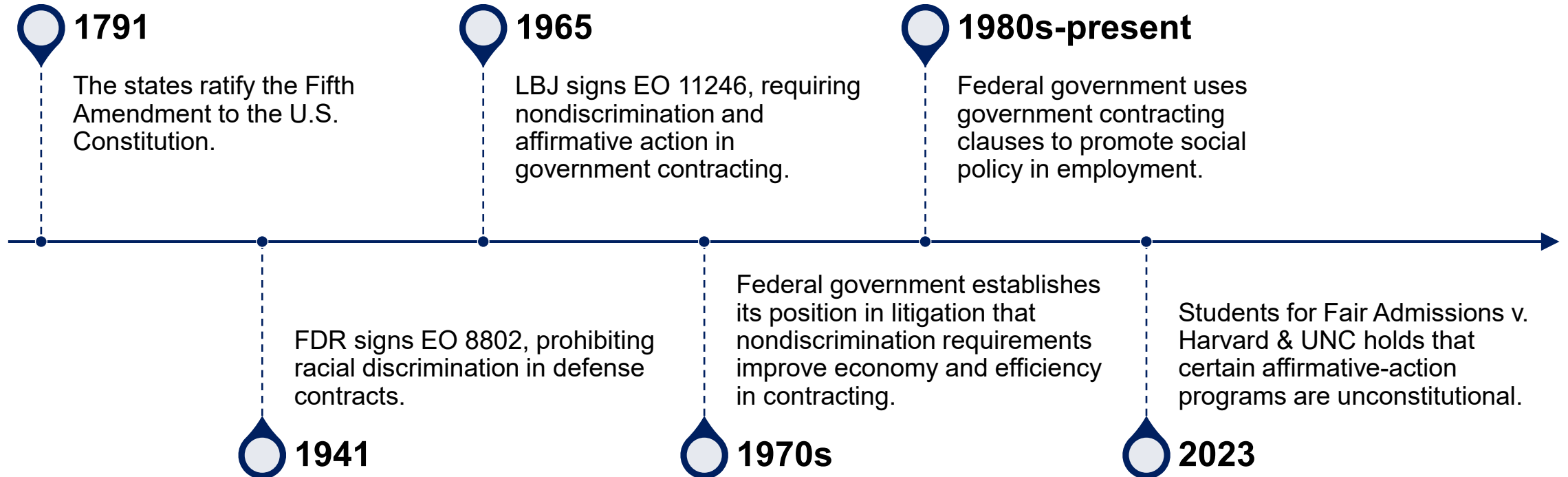


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Historical Context and Practices



Recent Initiatives

- **Jan. 2025**

EO 14173 - Ended affirmative action requirements; required contractor certification against “illegal DEI”

- **Jan. 2025**

Revoked EO 11246 - Rescinded decades of EEO requirements for federal contractors and OFCCP as regulator

- **Apr. 2025**

Disparate-impact EO - Eliminated use of disparate-impact liability in various enforcement contexts

- **May 2025**

DOJ Civil Rights Fraud Initiative - Signaled FCA use against DEI-related contractor conduct

- **Mar. 2026**

EO 14398 - Current order; sharpens focus, adds contract clause, escalates FCA enforcement

- **Apr. 2026**

IBM Settlement Agreement - False claims and statements related to violation of FAR 52.222-26 (Title VII of Civil Rights Act)

Executive Order 14398

What the EO Does:

- Requires all federal agencies to insert a new anti-DEI contract clause into contracts, subcontracts, and lower-tier subcontracts by April 25, 2026
- Includes broad definition of "racially discriminatory DEI activities"
- "Program participation" includes training, mentoring, leadership development programs, educational opportunities, clubs, and associations sponsored by the contractor
- The obligation to insert the clause falls on the contracting agency — but the clause creates direct obligations for contractors and subcontractors at all tiers

Why is EO 14398 Different?

- Provides an explicit textual definition of racially discriminatory DEI activities - unlike prior EOs
- Mandates a specific six-paragraph contract clause with precise language agencies must use
- Expressly states compliance is material to payment - triggering False Claims Act liability
- Requires prime contractors to police and report subcontractor violations at every tier

Compliance Timeline: Key Dates

March 26, 2026

EO Signed

EO 14398 signed; published in Federal Register on March 31, 2026

April 25, 2026

Clause Insertion Deadline (30 days)

Agencies must insert the mandatory compliance clause into all contracts and flow it down to subcontractors at every tier

May 25, 2026

FAR Council Interim Guidance (60 days)

FAR Council must issue deviation and interim guidance to agencies on implementation of the clause

July 24, 2026

Agency Compliance Reports (120 days)

Each agency head must review EO implementation and report to the Assistant to the President for Domestic Policy

TBD -- No Deadline

FAR Final Rulemaking

FAR Council must formally amend the FAR to incorporate the clause permanently and remove any conflicting provisions

ACTION REQUIRED NOW: Agencies must insert the clause into your contracts by **April 25, 2026**. As a prime contractor, you must simultaneously flow the clause down to your subcontractors.

FAR Council Memorandum (Apr. 17, 2026)

To implement the EO, agencies must—

1. Update their Revolutionary Federal Acquisition Regulation Overhaul class deviations for parts 9, 12, 22, and 52 by April 27, 2026;
2. Use the new clause at FAR 52.222-90, Addressing DEI Discrimination by Federal Contractors (APR 2026) (DEVIATION APR 2026) beginning April 24, 2026; and
3. Bilaterally modify existing contracts by July 24, 2026.

If a contractor refuses to agree to a bilateral modification, the contracting officer should consider whether, absent the modification, the contract no longer meets the agency's needs and should therefore be terminated for convenience

The Mandatory Contract Clause: Six Obligations

1 **No Racially Discriminatory DEI**
Contractor agrees not to engage in any racially discriminatory DEI activities as defined by the EO

2 **Records Access & Reporting**
Must furnish all information, reports, books, records, and accounts to the agency upon request for compliance review

3 **Contract Remedies**
Contract may be canceled, terminated, or suspended; contractor may be declared ineligible for future government work

4 **Subcontractor Oversight Duty**
Must report any subcontractor's known or reasonably knowable violations and take directed remedial action

5 **Litigation Notification**
Must notify the contracting agency of any lawsuit challenging the validity of the clause within 10 days of filing

6 **FCA Materiality Statement**
Compliance is expressly material to the Government's payment decisions - directly triggering False Claims Act exposure

What the EO Requires: Key Definitions

The EO's operative term is “Racially Discriminatory DEI Activities”

Disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity's resources.

Employment

Hiring decisions

Promotions & advancement

Pay or benefit allocation

Discipline or termination

Contracting

Vendor selection

Subcontract awards

Supplier diversity mandates using race-based criteria

Resource allocation to contractors

Program Participation

Training & mentoring programs

Leadership development

Educational opportunities

Clubs, associations, access programs

Important Limits

Covers race & ethnicity ONLY

Focused on disparate treatment (not disparate impact)

EO 14173 still separately covers sex-based preferences

What the EO Requires: Key Definitions

In Connection With the Performance of Work

'In connection with the performance of work under this contract, [the contractor] agrees as follows: 1. The contractor will not engage in any racially discriminatory DEI activities . . . !

Textual Limit

The clause does not prohibit all DEI-related activity by the contractor - only activity 'in connection with' contract performance

Activities conducted outside contract performance - community programs, charitable giving - are arguably outside the clause's direct reach

Connected?

Document program governance structures, funding sources, and administration as separate from contract work

Show temporal independence - the program pre-existed the contract or operates on a separate cycle

Demonstrate that contract performance proceeds independently whether the program continues or not

Risks

The term 'in connection with' has no settled definition in this EO context - OMB or DOJ could interpret it expansively

Programs administered by the contracting entity itself are very likely captured

This is a limit-narrowing argument, not a safe harbor

Permitted vs. Prohibited

✓ GENERALLY PERMITTED

Neutral mentorship or training programs open to all employees regardless of race, sex, or other protected characteristics

Tracking EEO workforce data for legal reporting purposes (without creating or acting on demographic-based targets)

Standard nondiscrimination training and similar routine compliance measures to protect against discrimination

Nondiscriminatory hiring and promotion decisions

Subcontracting with firms under applicable FAR and SBA rules without regard to the subcontractor's protected characteristics

Complying with federal government national-security requirements based on citizenship or national origin

✗ LIKELY PROHIBITED

Training or mentoring programs limited to or prioritizing employees based on protected characteristics

Hiring or promotion dashboards, quotas, targets, or scoring systems tied to demographic outcomes, including diverse slates

Vendor / subcontractor / key personnel preferences based on protected characteristics

Allocating resources (budgets, staffing, project assignment) based on protected characteristics, including to accede to customer or contract partner preferences

Requiring or encouraging demographic-based commitments from subcontractors or suppliers

Tracking or publishing race-based workforce goals tied to contract performance milestones

Your Obligations as a Prime Contractor: Subcontractor Oversight

The EO flow-down requirement creates prime contractor liability for subcontractor conduct at every tier

Prime Contractors Must:

Insert the mandatory EO 14398 clause in all subcontracts - every tier, no exceptions

Monitor subcontractor practices for known or reasonably knowable violations

Report discovered subcontractor violations to the contracting agency promptly

Take remedial actions directed by the agency against noncompliant subcontractors

Notify the contracting agency if a subcontractor files suit challenging the clause

Your Obligations as a Prime Contractor: Subcontractor Oversight

The EO flow-down requirement creates prime contractor liability for subcontractor conduct at every tier

Include in New Subcontract Agreements:

Flow-down of the verbatim EO 14398 mandatory compliance clause

Subcontractor representation that it does not engage in racially discriminatory DEI activities

Obligation to notify prime of any known violations within a specified cure period

Prime contractor right to terminate for cause upon confirmed EO noncompliance

Subcontractor cooperation with any agency compliance review or audit

Indemnification provision for losses arising from subcontractor DEI violations

Enforcement Priorities

1

Contract Remedies

- Contract canceled, terminated, or suspended in whole or in part
- Contractor declared ineligible for future government contracts
- Applies to both prime contractors and subcontractors

3

OMB Sector Targeting

- OMB, AG, EEOC to identify high-risk industry sectors
- Sector-specific best practices and heightened scrutiny anticipated
- Contractors in professional services may face review

2

Suspension & Debarment

- Agencies directed to suspend or debar noncompliant contractors
- Typical debarment period: 3 years - effectively ends federal contracting
- Applies to all affiliates and principals of the entity

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False Claims Act Liability

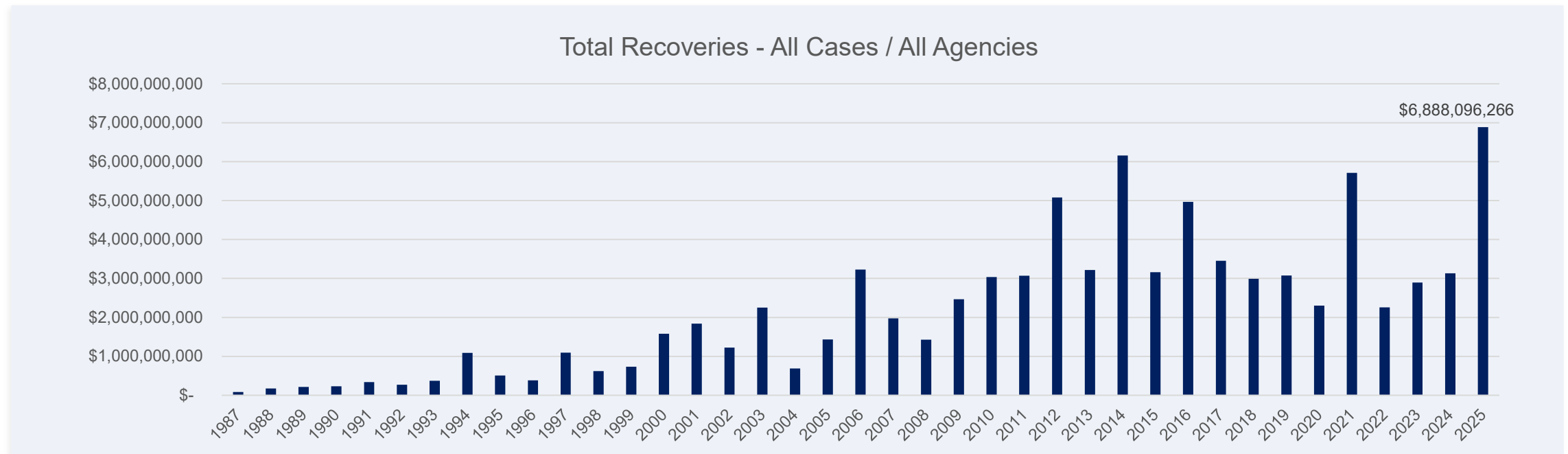
- Materiality purportedly conceded via clause
- AG directed to consider FCA enforcement actions against violators
- DOJ to prioritize review of qui tam (whistleblower) lawsuits

Why the False Claims Act?

Attractiveness of using the False Claims Act

The Act imposes liability of treble damages, statutory per-claim penalties between ~\$14k to \$28k and allows for the award of attorney fees.

The Act enables private citizens (“relators”) to file an action in the name of the government, known as a “qui tam” suit, which is served on DOJ for investigation and private citizens to proceed to litigation even where DOJ declines to intervene in the case.

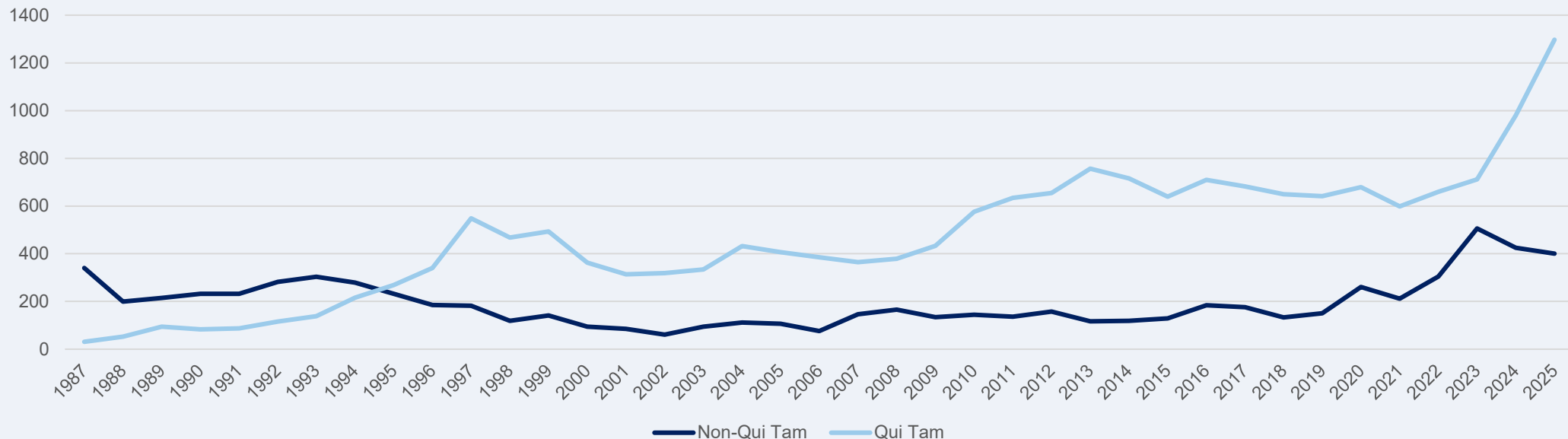


Why the False Claims Act?

Relators are entitled to a share of any judgment received:

At least 15% and not more than 25% of the proceeds of the action or settlement of the claim “if the Government proceeds with the action”; and not less than 25% or more than 30% “of the proceeds of the action or settlement” if the Government does not proceed with the action.

Number of Cases - 1987 Forward



FCA: Key Definitions - Falsity

False Claims and False Statements:

- These terms are NOT defined by the FCA
- Courts recognize two primary categories of falsity: factual falsity and legal falsity

Factual Falsity

A claim is factually false when it misrepresents the goods or services actually provided to the government.

Legal Falsity – Express False Certification

Applies when a defendant falsely certifies compliance with a statute, regulation, or contractual requirement.

Legal Falsity – Implied Certification

Requires two conditions: (1) the claim makes specific representations about the goods or services provided; and (2) the defendant's failure to disclose noncompliance with material requirements renders those representations "misleading half-truths."

FCA: Key Definitions - Scierter

Knowing and knowingly means that a person:

- has actual knowledge of the information;
- acts in deliberate ignorance of the truth or falsity of the information; or
- acts in reckless disregard of the truth or falsity of the information; and
- Requires no proof of specific intent to defraud. 31 U.S.C. § 3729(b)(1)

Unlike criminal statutes, FCA does not require actual knowledge or willful intent; reckless disregard (i.e. gross negligence plus) will suffice.

The Supreme Court has described the scienter requirement as “rigorous.”

Described as using “ostrich-like behavior”, burying head in the sand to avoid learning of relevant facts/law

What matters is what the defendant actually knew or believed when it submitted the claim, not whether some objectively reasonable interpretation of the law could support the claim after the fact.

United States ex rel. Schutte v. SuperValu Inc., 598 U.S. 739 (2023)

FCA: Key Definitions - Materiality

Materiality:

- Material “means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4)
- Materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."

A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government’s payment decision in order to be actionable under the False Claims Act.

Identified as a condition of payment

Refusal to Pay claims that fail to meet the requirement

Continued payment of claims despite knowledge of noncompliance

Minor or insubstantial versus essence of the bargain

The Supreme Court has described the materiality standard as “rigorous” and “demanding.”

Universal Health Services, Inc. v. United States ex rel. Escobar, 579 U.S. 176 (2016)

Defending False Claims Act Actions

Common Challenges Based on FCA Statutory Elements

- **Lack of Scierter / “Knowledge”**
 - Organization’s subjective understanding at the time governs state of mind determination
 - Government knowledge of the issue can negate the scierter
 - Reasonable reliance on legal counsel is a defense to knowing violations
- **Lack of Falsity**
 - Determined as of the point claim or false statement submitted
 - Subregulatory guidance disfavored to prove falsity (though still relevant to scierter)
- **Not Material to Payment/Participation**
 - Government knowledge of the issue can be relevant to materiality
 - For implied certification claims, the invoice or request for payment didn’t make specific representations implying compliance
- **No Claims**
 - Lack of impact on federal funding

United States v. Int'l Business Machines

This was the first FCA resolution secured under DOJ's Civil Rights Fraud Initiative, launched in May 2025.

- DOJ alleged that as a federal contractor, IBM was required to certify compliance with anti-discrimination provisions of Title VII and the Federal Acquisition Regulation (FAR clause 52.222-26).
- DOJ alleged IBM knowingly submitted false claims by certifying compliance while maintaining employment practices that discriminated on the basis of race, color, national origin, or sex.

Diversity modifiers tied to compensation: IBM allegedly tied executive/manager bonus compensation to achieving demographic targets.

Diverse interview slates: IBM allegedly altered interview and hiring criteria based on race or sex through "diverse interview slates" and "diverse sourcing."

Demographic goals: IBM allegedly set race and sex demographic goals for business units and factored those into employment decisions.

Restricted programs: IBM allegedly limited access to training, mentoring, and leadership development programs based on race or sex

Action Steps: What to Do Now

1

Immediate

- Audit all internal workforce and HR policies for race-or sex-based eligibility, quotas, or targets connected to contract performance
- Identify all existing federal contracts and confirm which agency will insert the EO clause by April 25
- Review all active subcontract agreements - identify which lack EO 14398 flow-down language
- Brief your HR, contracts, and leadership teams on what the EO prohibits

3

Near Term

- Prepare template EO 14398 compliance clause language for insertion into new subcontract awards
- Revise teaming agreements and consulting arrangements to include compliance representations
- Document all merit-based criteria used in hiring, promotion, and vendor selection for your records
- Implement a process for subcontractor monitoring and internal reporting of potential violations

2

Ongoing

- Train procurement and HR staff to recognize what EO 14398 prohibits in day-to-day operations
- Monitor OMB and FAR Council guidance as it is issued - sector-specific guidance may affect you directly
- Review any state or local DEI obligations for potential conflict with EO 14398 and seek legal counsel
- Maintain clean documentation demonstrating merit-based decision-making processes

4

Consult Legal Counsel If

- Your company has existing DEI programs, workforce metrics, or training programs tied to contract performance
- You receive a records request or audit inquiry from a contracting agency regarding DEI compliance
- You discover a subcontractor may have violated the EO clause
- A whistleblower, former employee, or competitor raises a concern about your DEI-related practices

Questions?



Speakers and Moderators



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