

Experts Weigh In On DOJ Use Of FCA To Enforce 'Illegal DEI Practices'

Experts on False Claims Act (FCA) litigation, comprising a law professor, a whistleblower attorney and a former deputy assistant attorney general, who answered FCA-related questions on May 22, weighed in and spoke with **Mealey Publications** on efforts by the U.S. Department of Justice (DOJ) to use the FCA against entities the DOJ accuses of violating the FCA by failing to comply with antidiscrimination requirements in federal contracts or what the DOJ terms are "illegal DEI practices."

While the attorneys addressed the viability of these types of suits under the FCA, 31 U.S.C. § 3729 *et seq.*, particularly in the context of insurance fraud, they also commented on a recent settlement in which International Business Machines Corp. (IBM) agreed to pay the government more than \$17 million related to allegations of FCA violations.

IBM Settlement

On April 10, the DOJ announced in a press release that it had reached a settlement with International Business Machines Corp. (IBM), which agreed to pay the government \$17,077,043 to resolve allegations that it failed to comply with antidiscrimination requirements in its federal contracts.

The DOJ asserted "that IBM took race, color, national origin, or sex into account when making employment decisions, including by using a diversity modifier that tied bonus compensation to achieving demographic targets. The government further alleged that IBM altered interview criteria based on race or sex through the use of 'diverse interview slates' and other related employment practices in connection with identifying 'diverse' candidates for hiring, transfer, or promotion."

March 26 EO

Before the settlement, which was initiated independent of litigation filed in court, President Donald J. Trump on March 26 issued Executive Order (EO) 14398, Addressing DEI Discrimination by Federal Contractors, 91 Fed. Reg. 16147 (March 26, 2026).

This EO establishes that executive departments and agencies shall ensure that federal contractors "will not engage in any racially discriminatory [diversity, equity and inclusion] DEI activities" (the clause). These activities are defined as those that provide "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." Under the EO, contractors will provide reports to ensure compliance with the EO, will report any subcontractor's conduct that may violate the clause and will inform a contracting department if a subcontractor sues the contractor and the suit puts at issue the validity of the clause.

The EO also provides that within 30 days, executive departments and agencies shall ensure that contracts include clauses stating that a contractor "will not engage in any racially discriminatory DEI activities."

Additionally, under the EO, contractors recognize that complying with the provisions requiring them not to engage in the "discriminatory DEI activities" is material to payment under the FCA.

The EO also provides that violating the EO will result in cancellation of contracts and that the Federal Acquisition Regulatory Council shall amend the Federal Acquisition Regulation to remove any provisions inconsistent with the EO.

Elberg Comments

Jacob T. Elberg, faculty director of the Center for Health & Pharmaceutical Law at Seton Hall Law School and a former assistant U.S. attorney who oversaw suits brought pursuant to the FCA, answered questions regarding the DOJ's current enforcement efforts alleging DEI violations under the FCA, the likelihood of establishing liability and whether any of these current enforcement efforts involve insurance-based health care fraud.

Elberg asserted that he had not heard of any insurance-related FCA litigation alleging purported discriminatory DEI practices. He said, "The thing about DOJ claims in this area, and part of why they are not legally sound, is that their theory here is completely divorced from whatever service or product is actually being delivered. In the IBM case, for example, DOJ had no theory that there was any connection between DEI policies and the products or services" related to payment by the government, "and no suggestion that there was any impact on what the government got for its money."

When asked his thoughts on whether health care providers with active DEI policies would potentially consider scaling those policies back when submitting claims for payment to government insurers for fear of being accused of FCA violations, Elberg said, "It's important to note that the law hasn't changed. Nothing about this initiative has changed what policies an entity might have that are illegal or not illegal, and so obviously, as was true before this initiative, entities should make sure that they're following the law. That's the right thing to do, and that hasn't changed."

Guttman Comments

Reuben A. Guttman, founding member of Guttman Buschner LLP, who has represented whistleblowers in FCA litigation and is an adjunct professor at American University, also provided his thoughts on the DOJ's DEI-based FCA enforcement efforts.

When asked about whether companies are likely to change any of their anti-discrimination policies and practices the government labels DEI policies to avoid DOJ enforcement efforts under the FCA, Guttman said, "I think that one approach is that companies understand that this may not be the law" and that because of their "diversified" consumer base, companies "are going to think hard about whether they're going to betray the needs of their consumer base, which has probably driven a lot of their DEI objectives."

Commenting on the IBM settlement, Guttman noted the absence of a federal prosecutor assigned to the case and a lack of "clarity as to what IBM did" in a case that "was completed in less than a year."

"In a case of that magnitude, to be investigated and completed in less than a year, it just doesn't happen. There is no precedent for it."

Guttman explained further that when the DOJ pursues allegations of FCA violations, it is typically seeking to recover money for an agency, but what's "remarkable," especially related to FCA violations alleged against IBM, "is the DOJ seems to be making policy that should be left to the agencies."

Granston Comments

Michael Granston, chair of Covington & Burling LLP's False Claims Act investigations and litigation practice and former DOJ deputy assistant attorney general, addressed the issue of materiality needed to establish liability under the FCA, stating that "[t]he government may face a significantly greater challenge establishing materiality in False Claims Act cases predicated on DEI-related representations or certifications following the Supreme Court's decision last year in *Koussisis v. United States*, 605 U.S. 114 (2025)," in which Justice Clarence Thomas in his concurrence "agreed that [*Escobar Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016)] imposes an 'essence of the bargain' standard for materiality."

"Under such a standard, defendants will have a compelling argument in most cases that any DEI-related violations are too attenuated from any contract, grant or other government program to qualify as material, regardless of how the government has attempted to characterize such violations in any representation or certification," Granston said.

Granston also commented on whether the DOJ theory of liability under the FCA for entities maintaining DEI policies might be more likely to gain traction in the insurance and health care space, particularly in the areas of Medicare Advantage, Medicaid managed care and under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

He said, "From a legal standpoint, none of these programs would appear to render a participant more susceptible to False Claims Act liability premised on DEI-related violations. As a practical matter, however, some of the participants in these and other programs may be less willing or able to incur the potential consequences of litigating alleged violations of this sort."

When questioned about whether relators and whistleblower firms are likely to pursue the DEI-related FCA cases aggressively, Granston said he had "heard that many relators and their attorneys are disinclined to risk their time, resources, and reputation to bring cases premised on alleged DEI-related violations due to the significant uncertainty of establishing either liability or damages."

Working Group

While the IBM settlement is labeled by the DOJ as its "first False Claims Act resolution secured under the Civil Rights Fraud Initiative," efforts to combat health care fraud by linking FCA compliance with DEI policies go back to almost a year ago.

In a press release issued July 2, 2025, the DOJ announced a partnership with the U.S. Department of Health and Human Services (HHS) to form an FCA Working Group "to combat" health care fraud. The DOJ noted that membership in the working group "will include leadership from the HHS Office of General Counsel, the Centers for Medicare & Medicaid Services Center for Program Integrity, the Office of Counsel to the HHS Office of Inspector General (HHS-OIG), and DOJ's Civil Division, with designees representing U.S. Attorneys' Offices."

Additionally, the DOJ explained that through the coordination of the working group, HHS will make referrals to the DOJ for possible violations of the FCA, for priority enforcement areas including Medicare Advantage, kickbacks related to drugs or products paid for by federal health care programs and manipulation of electronic health records.

Cited in the press release is a June 11, 2025, memo written by Assistant Attorney General Brett A. Shumate outlining the DOJ Civil Division enforcement priorities.

Civil Division Enforcement Priorities

This memo references Trump's Jan. 21, 2025, Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025), that ordered "all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector [diversity, equity and inclusion] DEI preferences, mandates, policies, programs, and activities."

Additionally, the memo points to a directive by then-U.S. Attorney General Pam Bondi (Attorney General Memorandum, Eliminating Internal Discriminatory Practices, Feb. 5, 2025), requiring the DOJ to "align its 'litigating positions with [the] requirement of equal dignity and respect.'"

"Consistent with these directives, the Civil Division will use all available resources to pursue affirmative litigation combatting unlawful discriminatory practices in the private sector," Shumate says.

Shumate explained that "the Civil Division is authorized to bring suit under the False Claims Act for treble damages and penalties against any person who knowingly submits or causes the submission of false claims to the government," including "entities that receive federal funds but knowingly violate civil rights laws."

According to Shumate, the Civil Division "will aggressively investigate and, as appropriate, pursue False Claims Act violations against recipients of federal funds that knowingly violate civil rights laws" and "will work with the Civil Rights Division, relators, other whistleblowers, and federal agencies to advance these efforts."

Civil Rights Fraud Initiative

The "Civil Rights Fraud Initiative" referenced in the IBM settlement was initially announced in a May 19, 2025, memo issued by then-Deputy Attorney General Todd Blanche stating that this initiative will use the FCA "to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws."

To further the objective, Blanche stated that the Civil Fraud Section and the Civil Rights Division will work with the Criminal Division and "other federal agencies that enforce civil rights requirements for federal funding recipients" and "establish partnerships with state attorneys general and local law enforcement to share information and coordinate enforcement actions."

Further, the memo encourages "anyone with knowledge of discrimination by federal-funding recipients to report that information to the appropriate federal authorities so that the Department may consider the information and take any appropriate action."

(Documents available: **IBM settlement**. Document #73-260427-126X. **March 26, 2026, EO**. Document #73-260427-128X. **DOJ enforcement priorities memo**. Document #20-250711-063X.)