BRACEWELL

Using the False Claims Act to Police Federal Contractors' Employment Practices

Update

January 27, 2025 | 3 minute read

Two recent events — one settlement and one executive order — have heightened the risk that the False Claims Act (FCA) will be used as a tool to enforce the employment obligations of companies doing business with the federal government.

First, on January 16, 2025, the Department of Justice (DOJ) announced a settlement with Bollinger Shipyard. DOJ alleged that Bollinger violated the False Claims Act by knowingly billing the US Coast Guard for labor provided by workers who were not verified in the E-Verify system. Under FAR 52.222-54, federal contractors are required to enroll in the E-Verify program and verify the employment eligibility of all new employees as well as verify the eligibility of existing employees before assigning them to a contract. This is the first case we are aware of where DOJ has used the FCA to enforce the requirement to use the E-Verify system.

Second, included among the flurry of "Day-One" executive orders issued on January 21, 2025, the Trump Administration issued an executive order entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." Among other things, this sweeping order addressed the "Federal contracting process" in Section 3(b).

Section 3(b) instructs the Office of Federal Contract Compliance Programs to "immediately cease . . . Holding Federal contractors and subcontractors responsible for taking 'affirmative action' [and] *Allowing* or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin." (emphasis added).[1] That section further purports to prohibit federal contractors from advancing diversity initiatives by directing that "the employment, procurement, and contracting practices of Federal contractors and subcontractors shall not

Related People

Robert
Partner
WASHINGTON, DC
+1.202.828.5872
robert.wagman@bracewell.com

Amber
Managing Partner - San Antonio
SAN ANTONIO
+1.210.299.3569
amber.dodds@bracewell.com

Related Industries

Energy

Related Practices

Government Contracts
Government Enforcement & Investigations
False Claims Act
Labor & Employment

consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws."

To give teeth to this new mandate, the executive order attempts to bring its requirements within the purview of the FCA by providing:

(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.

There is tension between this directive and current law. For example, in *Escobar*, the Supreme Court expressly rejected the notion that the government can establish materiality for FCA purposes through an agreement term. "The materiality standard is demanding. . . A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." *Universal Health Serv. Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194 (2016).

Further, there are few cases where the FCA was used to enforce a contractor's employment practice obligations under current law. In *Hill*, the US Court of Appeals for the Seventh Circuit upheld the dismissal of an FCA case where the whistleblower alleged that the city of Chicago failed to follow its required affirmative action hiring plan. *United States ex rel. Hill v. City of Chicago, Ill.*, 772 F.3d 455 (7th Cir. 2014). The court in that case held that the city's implementation of a program that was different from the plan could not trigger the knowing element required for a false claim. *Id*. at 456.

Notably, the anticipated agreement clause and certification required by the executive order do not prohibit all diversity programs, but only those that "violate any applicable Federal anti-discrimination laws." Accordingly, to be actionable under the FCA a plaintiff would likely need to show that a defendant knew at the time of its certification that it intended to violate applicable law.

---

[1] On Friday, January 24, 2025, Acting Secretary of Labor Vince Micone issued Secretary's Order 03-2025, which directs "all DOL employees" to "immediately cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246." The order clarified that it applied to "all pending cases, conciliation agreements, investigations, complaints, and any other enforcement-related or investigative activity." Notably, it provides that

investigations or reviews under Section 503 and VEVRAA are “held in abeyance pending further guidance.”