

DEI Restrictions for Federal Contractors and Grantees

A Rapidly Evolving Landscape

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Agenda

- Introductions
- Summary of Developments on Diversity, Equity, and Inclusion (DEI) in 2025 and 2026
 - Executive Orders
 - DOJ Memoranda and Administrative Guidance
 - Investigative Priorities and Settlements
 - Court Cases
- Regulatory Changes to Obligations for Federally Funded Work
 - Proposed SAM Assurances for Grantees
 - FAR Clause Deviation (FAR 52.222-90)
 - Disadvantaged Business Enterprise (DBE) Requirements for DOT Infrastructure
- Key Federal Antidiscrimination Laws and Employment Discrimination
- Potential Enforcement Risks
- Key Compliance Concepts and Considerations
- DEI Policies and Practices Today: What's In and What's Out?

Introductions



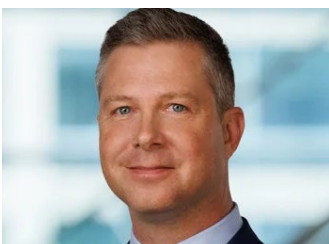
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Paul Debolt counsels government contractors in navigating the requirements for conducting business with the federal government. Whether consulting on day-to-day issues or bet-the-company litigation, Paul brings deep understanding and meaningful experience. He tackles competitive source-selection problems; defends and prosecutes bid protests; advises on regulatory issues, technical data rights, and Foreign Ownership Control and Influence (FOCI); and addresses performance and termination-related claims. Paul advises on internal investigations, conducts due diligence in connection with the merger and acquisition of government contractors, and manages novations and post-transactional matters.



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With a strategic approach shaped by years of private and federal practice, including service as an attorney within the U.S. Navy and Military Sealift Command, Scott Sheffler brings deep insight to clients facing high-stakes regulatory and funding issues. Scott has more than 15 years of experience advising on federal grant compliance, government procurement law, and internal investigations. He counsels nonprofits, commercial entities, and state and local governments navigating complex federal funding requirements.

Introductions, Cont.



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Jennifer Prozinski counsels employers in a broad range of labor and employment matters and advises clients on compliance with a variety of federal and state laws. Jennifer assists with the development and implementation of employment policies; strategizing for lay-offs; determining disability accommodations; and drafting and negotiating executive employment, restrictive covenants, service, severance, and settlement agreements. Jennifer has significant experience in conducting internal investigations and performing company-wide audits of employee classifications to ensure compliance with federal and state wage-and-hour laws.



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Chris Griesedieck's practice encompasses government contract and grant-related matters, including claims, requests for equitable adjustment, and bid protests. Chris supports large and small companies doing business with defense and civilian agencies. He advises and represents clients on cost and pricing issues, including the Federal Acquisition Regulation Cost Principles and Procedures and the Cost Accounting Standards. Chris helps clients comply with the Service Contract Labor Standards (formerly the Service Contract Act of 1965) and the U.S. General Services Administration's Multiple Award Schedule. He also addresses organizational conflicts of interest, post-employment restrictions on former federal officials, and the ratification of unauthorized commitments.

Developments in DEI in 2025 and 2026

Executive Orders (EOs)

- [EO 14151](#), Ending Radical and Wasteful Government DEI Programs and Preferencing (1/20/25)
 - Terminate all “equity-related’ grants or contracts” and “DEI or DEIA performance requirements for employees, contractors, or grantees”
- [EO 14170](#), Reforming the Federal Hiring Process and Restoring Merit to Government Service (1/20/25)
 - No “hiring of individuals based on their race, sex, or religion” for federal positions
- [EO 14173](#), Ending Illegal Discrimination and Restoring Merit-Based Opportunity (1/21/25)
 - Revoked EO 11246 (which had required contractor Affirmative Action Plans)
 - Every contract/grant must include clause (1) requiring certification of compliance with federal antidiscrimination law and (2) acknowledging compliance is material to government’s decision to pay (*i.e.*, potential False Claims Act liability for violations)
 - DOJ must issue guidance to federal fund recipients on compliance with [SFFA v. Harvard](#)
- [EO 14281](#), Restoring Equality of Opportunity and Meritocracy (4/23/25)
 - Eliminate “disparate-impact liability in all contexts to the maximum degree possible,” including by “deprioritize[ing] enforcement of all statutes and regulations to the extent they include disparate-impact liability”

Developments in DEI in 2025 and 2026, Cont.

Executive Orders (EOs), Cont.

- [EO 14398](#), Addressing DEI Discrimination by Federal Contractors (3/26/2026)
 - Every federal contract/subcontract must include clause:
 - Prohibiting “racially discriminatory DEI activities” in performance
 - This means “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”
 - Giving government access to records to ensure compliance
 - Providing for termination or suspension of contract if contractor or subcontractor violates
 - Requiring prime to report potential violations or litigation of clause by subcontractor
 - Stating prime’s acknowledgment that compliance is material to payment (*i.e.*, FCA)
 - Suspension/debarment for violations is possible, too

Developments in DEI in 2025 and 2026, Cont.

DOJ Memoranda and Administration Guidance

- [DOJ Memo](#), Ending Illegal DEI And DEIA Discrimination and Preferences (2/5/2025)
 - DOJ “will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds”
- [EEOC & DOJ Technical Assistance](#) on “Unlawful DEI-Related Discrimination” (3/19/25)
 - Noted that “[t]he prohibition against disparate treatment” does “include[e] DEI-related disparate treatment”
 - Discussed application of statutes to types of DEI (*e.g.*, organizing trainings or employee resource groups based on race can constitute segregation)
- [DOJ Memo](#), Implementation of Executive Orders 14151 And 14173: Eliminating Unlawful DEI Programs In Federal Operations (3/21/2025)
 - Directed at agency operations but outlined legal interpretations that apply more broadly
 - Directed agencies to eliminate numerical goals/targets, ensure hiring/promotion criteria are not based on race or sex, and “[r]emove any contracting or funding requirement or guidance that induces, requires, or encourages private parties to adopt discriminatory practices”

Developments in DEI in 2025 and 2026, Cont.

DOJ Memoranda and Administration Guidance, Cont.

- OFCCP Director [Letter to Contractors](#) (6/27/25)
 - Office of Federal Contract Compliance Programs no longer enforcing portions of EO 11246
 - Regulations “expressly prohibited unlawful discrimination” and said the required “placement goals should not operate as quotas,” but “many federal contractors improperly engaged in such conduct in reaction”
 - Sought “information about [contractor] efforts to wind down compliance with” EO 11246
- [DOJ Memo](#), Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination (7/29/25)
 - Styled as “Best Practices” and “non-binding suggestions”
 - Included specific “Examples of Unlawful Practices” (*e.g.*, “Race-Based ‘Diverse Slate’ Policies in Hiring”), but seemed to indicate that some versions of such practices could be lawful (*e.g.*, by “satisfying the appropriate level of judicial scrutiny”)
- SBA, [8\(a\) Program Guidance](#) (1/22/26)
 - “Social disadvantage” determined by “such factors as whether” applicant “has been the victim of illegal or radical DEI policies or illegal affirmative action policies or has otherwise been the victim of discriminatory practices such as race-based quotas, set asides, or hiring targets”

Developments in DEI in 2025 and 2026, Cont.

DOJ Memoranda and Administration Guidance, Cont.

- EEOC, [Reminder Letter to Fortune 500](#) (2/26/26)
 - “[T]he widespread adoption of DEI in the Fortune 500 and elsewhere in our country does not change longstanding legal prohibitions against the use of race, sex, and other protected characteristics in employment”

Developments in DEI in 2025 and 2026, Cont.

Investigative Priorities and Settlements

- DOJ, [Civil Rights Enforcement Initiative](#) (5/19/25)
 - Promised “vigorous enforcement of the False Claims Act ... against those who defraud the United States by taking its money while knowingly violating civil rights laws”
 - FCA is “implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through [DEI] programs that assign benefits or burdens on race, ethnicity, or national origin”
- [DOJ Memo](#), Civil Division Enforcement Priorities (6/11/25)
 - Promises to “use all available resources to pursue affirmative litigation combating unlawful discriminatory practices in the private sector,” including working with Civil Rights Division, FCA qui tam relators, and other whistleblowers

Developments in DEI in 2025 and 2026, Cont.

Investigative Priorities and Settlements, Cont.

- [DOJ Press Release](#), State of Minnesota Lawsuit (1/14/26)
 - Impact litigation seeking to [close](#) the “*Weber-Johnson*” exception, which has permitted employers (in very narrow circumstances) to consider race or sex in affirmative action plans
 - Effectively expands DOJ’s definition of “illegal DEI” to include conduct currently lawful under existing precedent
- DOJ, [Reported Comments](#) at Federal Bar Association 2026 Qui Tam Conference (2/19/26)
 - “At the top of the list for me and what’s coming into focus as the heart of many of our investigations are companies that implemented programs and practices that pressured supervisors and management to make hiring and promotion decisions based on race or sex”
 - “These programs and practices include creating and tracking demographic goals that have no connection to remedying underutilization within the Office of Federal Contract Compliance Programs framework, tying employee compensation to the achievement of corporate demographic goals, and requiring employees to develop their own DEI goals that affect their compensation and promotion”
 - “A couple other programs we’ve been taking a look at are executive training and mentoring programs, where participation is restricted on the basis of race or sex and diverse slate policies”

Developments in DEI in 2025 and 2026, Cont.

Investigative Priorities and Settlements, Cont.

- [EEOC Press Release](#), Nike Subpoena (2/4/26)
 - Filed court action to compel compliance with subpoena investigating DEI matters, such as alleged “tracking and use of worker race and ethnicity data, including as a factor in setting executive compensation” and “race-restricted mentoring, leadership, or career development opportunities”
- [EEOC Press Release](#), Coca-Cola Lawsuit (2/18/26)
 - Alleged a “two-day employer-sponsored trip and networking event” which “privately invited female employees,” but “did not invite any male employees,” violated Title VII
- [EEOC Press Release](#), Planned Parenthood \$500,000 Settlement (3/19/26)
 - Alleged “mandatory ‘affinity caucuses’ that were segregated by race”; “DEI-related training sessions which involved repeated harassing and derogatory statements targeting white employees, including that they ‘are White and do not feel racism the same way non-White patients feel’”; and time off “granted only to black employees”
- [EEOC Press Release](#), HCL America \$495,000 Settlement (4/3/26)
 - Allegedly rejected candidate as “too old” and instead sought to “explore diverse candidates” who were “non-Indian, female, or both”

Developments in DEI in 2025 and 2026, Cont.

Investigative Priorities and Settlements, Cont.

- [DOJ Press Release](#), IBM \$17,077,043 Settlement (4/10/26)
 - “[F]irst False Claims Act resolution secured under the Civil Rights Fraud Initiative”
 - Resolved allegations IBM failed to comply with contract clauses certifying compliance with antidiscrimination law. Examples:
 - “[A] diversity modifier that tied bonus compensation to achieving demographic targets,”
 - “[T]he use of ‘diverse interview slates,’”
 - Acting on “race and sex demographic goals for business units,”
 - Limiting “training, partnerships, mentoring, leadership development programs and educational opportunities” by race/sex
 - FCA hook was indirectly billing federal contracts for such activities
- [EEOC Press Release](#), New York Times Lawsuit (5/5/26)
 - Allegedly “chose not to promote a well-qualified white male employee because of his race and/or sex” based on company’s “goals and action plans to increase non-white and female representation in its leadership positions”

Developments in DEI in 2025 and 2026, Cont.

FAR Clause Deviation (52.222-90)

- [FAR Council Memo](#), Agency Implementation of Executive Order 14398, Addressing DEI Discrimination by Federal Contractors (4/17/26)
 - Directed use in new solicitations starting 4/24/26 and in existing contracts by 7/24/26.
 - Agencies “must make every effort to bilaterally modify” such contracts under RFO 1.107(d) (former FAR 1.108(d)), but “[i]f 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”
 - Violation of new clause is grounds for suspension/debarment
 - Prohibits “[r]acially discriminatory DEI activities” in connection with performance, including any “disparate treatment” in “allocation or deployment of an entity’s resources,” without any requirement that such activities violate existing statute
 - Requires contractor to give access to records so government can ensure compliance
 - Requires flow-down to subcontractors and reporting on their noncompliance with and lawsuits challenging the clause
 - Permits contract termination for violation of clause by contractor or its subcontractor
 - Contractor acknowledges compliance is material to payment (FCA hook)

Developments in DEI in 2025 and 2026, Cont.

Proposed SAM Assurances for Grantees

- SAM [already requires](#) grantees to certify compliance with “all applicable requirements of all other federal laws, executive orders, regulations, and public policies,” including Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.
- GSA [proposed](#) to update certifications “to align with” DOJ’s July 2025 memo (draft text is [here](#)):
 - Adds Title VII of the Civil Rights Act, although it may not apply to all recipients
 - Clarifies that “Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as” DEI
 - Provides a list of “practices that may violate” such laws, including “cultural competence requirements, ‘overcoming obstacles’ narratives, or ‘diversity statements’”; “race-based training sessions” and “implicit segregation through program eligibility”; and “race-based ‘diverse-slate policies in hiring” and “race-based selection for contracts”
 - Includes new certifications on certain “knowing” interactions with “an illegal alien” and funding, subsidizing, or facilitating “violence, terrorism, or other illegal activities that threaten public safety or national security”
 - GSA received thousands of comments and may require time to implement

Developments in DEI in 2025 and 2026, Cont.

Court Cases

- Some courts have enjoined DEI-related certifications/terms, but relief has generally been limited to the parties in the case, was temporary in nature, and/or is the subject of an appeal. Examples:
- *Chi. Women in Trades v. Trump*, 778 F. Supp. 3d 959 (N.D. Ill. 2025)
 - Preliminary injunction on DOL requiring any grantee to execute EO 14173 certifications
- *Freedom Network v. Trump*, No. 25-cv-12419, 2026 WL 800392 (N.D. Ill. Mar. 23, 2026)
 - Preliminary injunction on DOJ requiring any grantee to execute EO 14173 certifications
- *City of Chicago v. U.S. Dep't of Just.*, No. 25-cv-13863, ECF 31, 43 (N.D. Ill. 2025)
 - Preliminary injunctions for plaintiff cities and subrecipients against DOJ
- *City of Seattle v. Trump*, 808 F. Supp. 3d 1204 (W.D. Wash. 2025)
 - Preliminary injunction granted to plaintiff city against multiple defendant agencies
- *Rhode Island Coalition Against Domestic Violence v. Kennedy*, No. 25-2229, 2026 WL 926474 (D.R.I. Jan. 5, 2026)
 - Preliminary injunction on conditions by HHS and for plaintiffs' specific grants
- *King Cnty. v. Turner*, 785 F. Supp. 3d 863 (W.D. Wash. 2025), appeal filed (9th Cir. 2025)
 - Preliminary injunction on HUD as to plaintiffs and their members

Developments in DEI in 2025 and 2026, Cont.

Court Cases, Cont.

- Not all challenges have succeeded. Examples:
- *Nat'l Urb. League v. Trump*, 783 F. Supp. 3d 61 (D.D.C. 2025)
 - No injunction because “[t]he government need not subsidize the exercise of constitutional rights to avoid infringing them, and the Constitution does not provide a right to violate federal antidiscrimination law”
- *San Francisco A.I.D.S. Found. v. Trump*, 786 F. Supp. 3d 1184 (N.D. Cal. 2025)
 - No injunction on certification because it only prohibited already illegal conduct, and plaintiff could challenge any enforcement action related to legal DEI later
- *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 167 F.4th 86 (4th Cir. 2026)
 - Vacating injunction because “what they’re really challenging is how the Administration and its agency actors interpret antidiscrimination law in relation to plaintiffs’ DEI programming” and “[i]f the President, his subordinates, or another grantor misinterprets federal antidiscrimination law, plaintiffs ‘can challenge that interpretation in a specific enforcement action””

Developments in DEI in 2025 and 2026, Cont.

Court Cases, Cont.

- *Nat'l Assoc. of Diversity Officers in Higher Education v. Trump*, No. 8:26-cv-01532 (D. Md. Apr 20, 2026)
 - A group has challenged the latest contractor DEI executive order (EO 14398)
 - The case remains pending before the same judge who enjoined portions of the prior contractor DEI executive order (EO 14173) and was reversed by the Fourth Circuit
- *City of Seattle v. Trump*, No. 2:25-cv-01435 (W.D. Wash. Jul 31, 2025)
 - Additional plaintiffs have moved to extend the existing injunction to themselves, citing in part EO 14398
- *Nat'l Assoc. of Diversity Officers in Higher Education v. Trump*, No. 1:25-cv-00333 (D. Md. Feb 03, 2025)
 - This action challenges, among other things, implementation of EO 14173
 - Plaintiffs recently moved to stay proceedings indefinitely pending GSA's anticipated issuance of the new DEI-related SAM assurances for federal funding recipients

Regulatory Changes to Obligations for Federally Funded Work

- Financial Assistance (Assurances in SAM.gov)
- Procurement Contracts (FAR Clause 52.222-90)
- DBE Requirements in Infrastructure Projects (*see* DOT Regulatory Changes)

Financial Assistance General Reps and Certs – Pending Updates

91 Fed. Reg. 3726 (Jan 28, 2026):

<https://www.govinfo.gov/content/pkg/FR-2026-01-28/pdf/2026-01676.pdf>

- Update proposed for SAM.gov Financial Assistance General Reps and Certs:

“The proposed amendment would update the Financial Assistance General Representations and Certifications to align with updated executive branch guidance including Department of Justice “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination” (July 29, 2025) (<https://www.justice.gov/ag/media/1409486/dl>) and Executive Order (E.O.) 14173 of January 21, 2025, Ending Illegal Discrimination and Restoring Merit-Based Opportunity (<https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity>) applicable to all entities receiving grants, cooperative agreements, and financial assistance such as loans, insurance, and direct appropriations”
- Comments were due March 30, 2026

Financial Assistance General Reps and Certs

Text of Proposed Reps and Certs available here: <https://www.regulations.gov/document/GSA-GSA-2026-0001-0007>:

(6) Will comply with the U.S. Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs (See Titles VI and VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and 2 C.F.R. § 200.303 Internal controls). Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) programs. Entities that receive 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 or color. Examples of practices that may violate applicable Federal anti-discrimination laws include:

(i) Granting preferential treatment based on race or color, such as race-based scholarships or programs, preferential hiring or promotion practices, or access to facilities or resources based on race or ethnicity, including through the use of “cultural competence” requirements, “overcoming obstacles” narratives, or “diversity statements;”

(ii) Segregation based on race or color, such as race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility;

Financial Assistance General Reps and Certs, Cont.

Text of Proposed Reps and Certs available here: <https://www.regulations.gov/document/GSA-GSA-2026-0001-0007>:

(iii) Other unlawful use of race or color as criteria, such as race-based “diverse slate” policies in hiring, race-based selection for contracts, or race-based program participation or resource allocation;

(iv) Training programs that stereotype, exclude, or single out individuals based on protected characteristics or create a hostile environment; or

(v) Retaliation by taking 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. Protected activities include raising concerns or filing complaints about, or objecting to or refusing to participate in, discriminatory programs, trainings, or policies;

Financial Assistance General Reps and Certs, Cont.

Text of Proposed Reps and Certs available here: <https://www.regulations.gov/document/GSA-GSA-2026-0001-0007>:

(7) Will not knowingly bring or attempt to bring to the United States, transport, conceal, harbor, shield, hire, or recruit for a fee an illegal alien; and will not induce an alien to enter or reside in the United States with reckless disregard of the fact that the alien is illegal (See 8 U.S.C. § 1324 and 2 C.F.R. § 200.303 Internal controls);

(8) Will not fund, subsidize, or facilitate violence, terrorism, or other illegal activities that threaten public safety or national security (See 2 CFR 200.303 Internal controls);

Financial Assistance General Reps and Certs, Cont.

Text of Proposed Reps and Certs available here: <https://www.regulations.gov/document/GSA-GSA-2026-0001-0007>:

To the extent that any the certifications or representations on this page are the subject of an active court order or injunction that is legally binding on the recipient and the relevant awarding agency, and prohibits enforcement of such requirements, the affected certifications or representations will be deemed inapplicable to that recipient. All other certifications and representations not directly affected by such order shall remain in full force and effect.

FAR Clause 52.222-90

FAR Council Memorandum of April 17, 2026:

- Directed changes to certain FAR sections by deviation no later than April 27, 2026, and
- Prescribes FAR 52.222-90 for all new contracts and even for existing contracts:

For existing contracts

Insert the clause at FAR 52.222-90 in all existing contracts (i.e., definitive contracts and indefinite-delivery contracts) valued over the micro-purchase threshold, including those for commercial products and commercial services, and for which the place of delivery or performance is in the United States. In accordance with FAR 1.107(d) (May 2, 2025 deviation), contracting officers must make every effort to 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.

Modification of contracts with a final expiration no later than December 31, 2026, is at contracting officer discretion.

FAR Clause 52.222-90, Cont.

Clause Text:

(a) Definitions. As used in this clause—

Program participation means membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor

Racially discriminatory diversity, equity, and inclusion (DEI) activities mean 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

(b) 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**
- (2) The Contractor **will furnish all information** and reports, including providing access to books, records, and accounts, **as required by the Contracting Officer**, for purposes of ascertaining compliance with this clause

FAR Clause 52.222-90, Cont.

Clause Text, Cont.:

(3) In the event of the Contractor's or a subcontractor's noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the Contractor or subcontractor may be declared ineligible for further Government contracts

(4) The Contractor will report any subcontractor's known or reasonably knowable conduct that may violate this clause to the Contracting Officer and take any appropriate remedial actions directed by the Contracting Officer

(5) The Contractor will inform the Contracting Officer if a subcontractor sues the Contractor and the suit puts at issue, in any way, the validity of this clause

(6) The Contractor recognizes that compliance with the requirements of this clause is material to the Government's payment decisions for purposes of 31 U.S.C. 3729(b)(4)

(c) The Contractor must include the substance of this clause, including this paragraph (c), in subcontracts at any tier, including those for commercial products and commercial services, for which the place of delivery or performance is in the United States

Department of Transportation DBE Regs Updated

90 Fed. Reg. 47969 (Oct 3, 2025): <https://www.federalregister.gov/documents/2025/10/03/2025-19460/disadvantaged-business-enterprise-program-and-disadvantaged-business-enterprise-in-airport>

- For certain DOT-funded programs, there is a statutory requirement that Disadvantaged Business Enterprises (DBEs) be provided certain support and advantages
- The statute mandates that certain racial groups and women are presumed to be socially disadvantaged for purposes of DBE eligibility
- After *SFFA*, lower courts have held such preferences to be violations of equal protection requirements under the Constitution
- DOT has amended its regulations to remove these presumptions
- Further, each Unified Certification Program (UCP) that certifies DBEs must reevaluate all previously certified DBEs under the new standards. Entity statements describing social disadvantage are not to rely “in whole or in part on race or sex.” 49 C.F.R. § § 26.5 and 26.67
- DOT guidance, including FAQs, available here: <https://www.transportation.gov/mission/civil-rights/disadvantaged-business-enterprise/october-2025-interim-final-rule>

Key Federal Anti-Discrimination Laws

List Is Non-Exhaustive

Statute	Scope	Implementing Regs (or example thereof)
Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d <i>et seq.</i> (Triggered by receipt of federal funds)	Prohibits, generally organization-wide, discrimination in program access on the basis of race, color, or national origin.	45 C.F.R. Part 80 (HHS implementing regulations)
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e (Regulatory, no federal funds needed to trigger)	Prohibits, organization-wide, discrimination in employment practices on the basis of race, color, religion, sex, or national origin.	Generally enforced by EEOC
Education Amendments Act of 1972, Title IX, 20 U.S.C. § 1681 <i>et seq.</i> (Triggered by receipt of federal funds)	Prohibits, generally organization-wide, discrimination in program access on the basis of “sex” in education programs.	34 C.F.R. Part 106 45 C.F.R. Part 86 (HHS implementing regulations)
Patient Protection and Affordable Care Act (ACA) Sec. 1557 anti-discrimination provision, 42 U.S.C. § 18116 (Triggered by receipt of federal funds)	Prohibits, generally organization-wide, discrimination on the basis of race, color, national origin, sex, age, or disability in health programs and activities.	45 C.F.R. Part 92

Key Federal Anti-Discrimination Laws, Cont.

List Is Non-Exhaustive

Statute	Scope	Implementing Regs (or example thereof)
Civil Rights Act of 1866, 42 U.S.C. § 1981 (Section 1981) (No federal funds needed to trigger)	Contains contract clause providing that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens.” Prohibits intentional race discrimination in making and enforcement of public and private contracts.	None; has been interpreted to permit a private cause of action for remedies such as equitable and legal relief, including compensatory and, under certain circumstances, punitive damages

Employment Discrimination

Types of discrimination

- Harassment
- Disparate treatment
- Disparate impact

Employment Discrimination, Cont.

Disparate Impact

- Employers' historical approach
- Pursuant to EO 1428, disparate impact is considered a “pernicious movement” that promotes “racial balancing” and, accordingly, “disparate-impact liability” must be eliminated
- U.S. EEOC no longer investigates charges of discrimination where only claim is disparate impact and instead provides a notice of right to sue to the charging party
 - Similar action by DOJ in Title VI context
- U.S. EEOC has proposed to rescind requirement of EEO-1 reporting (May 14, 2026)
- State law employment discrimination laws and state agencies

Employment Discrimination, Cont.

- Review for compliance:
 - Administration and content of trainings
 - Leadership and mentorship programs, affinity groups and ERGs
 - Employee handbook and policies
 - Internal policies and procedures, including hiring practices and performance reviews
 - DEI officers and departments
- Examine bases for implementation of neutral criteria in recruitment and hiring

Potential Enforcement Risks

False Statement Statute (18 U.S.C. § 1001)

- “[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, *knowingly and willfully--(1) falsifies*, conceals, or covers up by any trick, scheme, or device *a material fact*; (2) *makes any materially false, fictitious, or fraudulent statement or representation*; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; *shall be fined* under this title, *imprisoned* not more than 5 years or, if the offense involves international or domestic terrorism ... imprisoned not more than 8 years, or both.”
- Notes
 - A covered statement is criminal if false, even if not made under oath
 - Agency has jurisdiction when it has power to exercise authority in a particular situation
 - Knowing/willing does not require showing of intent to defraud federal entity
 - Material = natural tendency to influence or be capable of influencing the decision-maker
 - No safe harbor for recantation or correction of a prior false statement
 - Ensure certifications to Government are true, and no documents submitted to Government include false statements

Potential Enforcement Risks, Cont.

Increased Audit Risk and Remedies for Noncompliance

- For Grantees:
 - Uniform Guidance audit requirements (2 C.F.R. §§ 200.500-200.521) do not preclude other agencies (*e.g.*, OIG, GAO) from auditing under separate statutes and regulations
 - DOJ July 30, 2025, [Press Release](#): “This Department of Justice will not stand by while recipients of federal funds engage in illegal discrimination”
 - Government Remedies for Noncompliance (2 C.F.R. §§ 200.339-200.343)
 - Temporarily withhold payments until the recipient or subrecipient takes corrective action
 - Disallow costs for all or part of the activity associated with the noncompliance
 - Suspend or terminate the federal award in part or in its entirety
 - Initiate suspension or debarment proceedings
 - Withhold federal funds (new awards or continuation funding) for the project or program
 - Pursue other legally available remedies
 - Nonprocurement Suspension and Debarment (2 C.F.R. Part 180)

Potential Enforcement Risks, Cont.

Increased Audit Risk and Remedies for Noncompliance, Cont.

- For Contractors:
 - Multiple potential audit clauses (FAR 52.215-2, FAR 52.222-26(c)(9), FAR 52.212-5(d))
 - New audit rights in FAR 52.222-90
 - Government Contract-Based Remedies
 - Decline to Award New Contract (*e.g.*, Find Contractor Non-Responsible)
 - Partial or Total Termination of Contract for Default
 - May entitle government to excess reprocurement and administrative costs
 - Decline to Exercise Option Period(s)
 - Assign Poor Ratings in Contractor Performance Assessment Reports
 - Suspension and Debarment (FAR Subpart 9.4)

Potential Enforcement Risks, Cont.

False Claims Acts

- Criminal False Claims Act (18 U.S.C. § 287)
 - “Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, *knowing such claim to be false*, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title”
 - Notes
 - Generally requires actual knowledge of falsity

Potential Enforcement Risks, Cont.

False Claims Acts, Cont.

- Civil False Claims Act (31 U.S.C. §§ 3729-3733)
 - Liability for “any person who,” among other things:
 - “**knowingly** presents, or causes to be presented, a false or fraudulent claim for payment or approval,”
 - “**knowingly** makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim,” or
 - “**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”
 - Notes:
 - Used to enforce accurate and truthful representations/certifications
 - Reps and certs can be express or implied
 - Enforcement can begin with qui tam relator (Government can then intervene)
 - Potentially Severe Consequences: treble damages, statutory penalties, payment of government/relator litigation costs

Potential Enforcement Risks, Cont.

False Claims Acts, Cont.

- Civil False Claims Act (31 U.S.C. § 3729-3733- knowingly in general
- The term “knowingly” means that “a person, with respect to information ... 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[.]” 31 U.S.C. § 3729(b)(1). “In short, either actual knowledge, deliberate ignorance, or recklessness will suffice.” *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391, 1399–1400 (2023). **This is a subjective test.** “The FCA’s [knowledge requirement] refers to [defendants’] knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed.” *SuperValu Inc.*, 143 S. Ct. at 1399. What matters is “what the defendant knew when presenting the claim.” *Id.* at 1401.
- “[A]ctual knowledge’ refers to whether a person is ‘aware of’ information.” *Id.* at 1400 (citing *Intel Corp. Investment Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020); *Escobar*, 579 U.S. at 191; Black’s Law Dictionary 784 (5th ed. 1979); Restatement (Second) of Torts § 526, and Comment. The FCA’s actual knowledge standard inquires whether a person subjectively believed his or her claim for payment to the government was false or fraudulent. *See SuperValu*, 143 S. Ct. at 1401.

Potential Enforcement Risks, Cont.

False Claims Acts, Cont.

- Civil False Claims Act (31 U.S.C. § 3729-3733) - Falsity
- “A claim may be false under the FCA if it is either factually or legally false.” *United States v. Honeywell Int’l, Inc.*, 798 F. Supp. 2d 12, 19 (D.D.C. 2011) (citing *United States v. Sci Applications Int’l Corp.*, 555 F. Supp. 2d 40, 49 (D.D.C. 2008))
- “A claim can be ‘factually false if it invoices for services that were not rendered’ or incorrectly describes goods or services provided.” *Id.* (quoting *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.* 498 F. Supp. 2d 25, 64 (D.D.C. 2007)). “Alternatively, a claim is legally false if it contains an express false certification—that is, ‘a claim that falsely certifies compliance with a particular statute, regulation or contractual terms, where compliance is a prerequisite for payment.’” *Id.* (quoting *Hockett*, 498 F. Supp. 2d at 64)
- “A claim also may be legally false under an implied certification theory.” *Id.* This includes a “claim for payment that makes specific representations . . . but knowingly fails to disclose the defendant’s noncompliance with a statutory, regulatory, or contractual requirement.” *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176, 181 (2016) (“*Escobar*”). “Because common-law fraud has long encompassed certain misrepresentations by omission, ‘false or fraudulent claims’ include more than just claims containing express falsehoods.” *Id.* at 187

Potential Enforcement Risks, Cont.

False Claims Acts, Cont.

- Civil False Claims Act (31 U.S.C. § 3729-3733)- False Certifications
- False certifications “involve claims of fraud where the contract required compliance with certain conditions ‘as a prerequisite to a government benefit, payment, or program; the defendant failed to comply with those conditions; and the defendant falsely certified that it had complied with the conditions in order to induce the government benefit,’” and can be express or implied. *AI Procurement, LLC v. Thermcor, Inc.*, No. 2:15-cv-00015, 2017 U.S. Dist. LEXIS 105343 *29 (E.D. Va. Apr. 4, 2017) (citing *Harrison*, 176 F.3d at 786–87)
- A certification is express where a contractor affirmatively certifies it complied with a contractual or regulatory requirement as a prerequisite to payment. *Id.* (citing *Harrison*, 176 F.3d at 786–87). A certification is implied where a contractor “submits a claim but fails to disclose violations of statutory, regulatory, or contractual requirements, compliance with which is implicit in making the claim.” *Id.* at 30 (citing *Escobar*, 579 U.S. at 180–81)
- Example of False Certification: *United States ex rel. Simpson v. Bayer Corp.*, 376 F. Supp. 3d 392 (D.N.J. 2019) – Defendants falsely certified compliance with anti-kickback laws when seeking reimbursement from Medicaid
- Example of No False Certification: *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996) – Defendants not liable under False Claims Act because regulatory compliance was not requirement for receipt of state funding

Potential Enforcement Risks, Cont.

False Claims Acts, Cont.

- Civil False Claims Act (31 U.S.C. §§ 3729-3733), Cont.
 - Additional Notes:
 - Under “implied” theory, **material** noncompliance can be a violation of the statute
 - Qui Tam: creates a private right of action (*i.e.*, a whistleblower)
 - Direct Consequences:
 - Civil penalty between \$14,308 and \$28,619 per false claim
 - Three times the damages sustained by the government
 - Cost of any civil action brought
 - Collateral Consequences:
 - Bad past performance and non-responsibility findings precluding future awards
 - Termination of existing contracts
 - Suspension and/or debarment from federal contracting

Potential Enforcement Risks, Cont.

False Claims Acts, Cont.

Civil False Claims Act (31 U.S.C. § 3729-3733) - Materiality

- Simply labeling a condition material is relevant evidence of materiality, but not dispositive
- The court will weigh this factor against all others and may still find that a condition labeled “material” is not, at least as it relates to payment

<i>Hawaii ex rel. Torricer v. Liberty Dialysis-Hawaii, LLC, 512 F. Supp. 3d 1096 (D. Haw. 2021)</i>	<i>United States v. LabQ Clinical Diagnostics, LLC, No. 22-cv-10313, 2026 WL 787460 (S.D.N.Y. Mar. 20, 2026).</i>
<ul style="list-style-type: none">- Relator alleged forging and backdating documents to demonstrate compliance with CMS guidelines for ESRD facilities- The court ruled that violating “qualifications for payment” didn’t mean that the violations were material- Since government action was optional, materiality did not automatically follow	<ul style="list-style-type: none">- An entity was reimbursed for testing uninsured people but hadn’t confirmed the people were uninsured- Compliance with terms requiring checking insurance status was deemed “material” by the contract to the decision to disburse funds- The court agreed this designation was relevant, but still analyzed other evidence available before confirming statements were material

Potential Enforcement Risks, Cont.

False Claims Acts, Cont.

- Administrative False Claims Act (31 U.S.C. § 3801)
 - Previously known as the Program Fraud Civil Remedies Act of 1986
 - FY25 NDAA amended to revitalize because of perception it was underutilized
 - Streamlined administrative remedy for agencies to address false claims and statements that DOJ opts not to prosecute (usually due to the relatively small dollar value)
 - Similar to civil FCA, but:
 - No qui tam mechanism,
 - Covers written statements even in the absence of a claim, and
 - Provides for administrative rather than judicial resolution

Key Compliance Concepts and Considerations

Potential Conflicts with State and Local Requirements

- Four Potential Approaches, None Perfect:
 - Forgo Federal or State/Local Funding When Requirements Conflict
 - Risks net loss of funds; will not alleviate federal enforcement risk for requirements that are not tied to funding; may not preserve mission orientation
 - Accept High State/Local Risk
 - The “federal contractor defense” and related doctrines (*Yearsley, Boyle*) are not easily invoked; case law suggests they may not apply to grantees
 - Accept High Federal Risk
 - Risks of noncompliance with federal certifications are substantial (see prior slides); courts may agree with government’s application of *SFFA* logic to other statutes and that new DEI-related clauses are lawful
 - Litigation
 - Success is uncertain given divergent rulings to date

Key Compliance Concepts and Considerations, Cont.

Framework for Addressing Risks

- Ask the Right Questions:
 - How important is X, Y, or Z funding source to my organization?
 - What internal policies or practices present enforcement risk?
 - Which presents the most enforcement risk?
 - How important are they to my organization's mission?
 - Are there alternative policies and practices that are consistent with our mission, but that present less enforcement risk?
 - Is my organization subject to state or local laws that may conflict with the new federal requirements (*e.g.*, FAR 52.222-90 or proposed SAM assurances)?
- Develop an Approach Based on the Answers to Those Questions
- Consult with Legal Counsel If Necessary
- Continue to Monitor Developments

DEI Policies and Practices Today

What's In and What's Out?

- Consistent with the Supreme Court's reasoning in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (*SFFA*), the federal government is now treating any classification based on race as presumptively violative of all federal antidiscrimination laws...
 - ...not just the U.S. Constitution's Equal Protection Clause and Title VI of the Civil Rights Act (which were at issue in *SFFA*)
 - ...and regardless of whether the intent is to avoid subordination of marginalized groups*
- Grant recipients should assume that the “examples” in the July 2025 DOJ Memo and the proposed SAM Assurances will be viewed as presumptively unlawful
 - Given the IBM settlement and other administrative guidance, contractors should make the same assumption
- Contractors should assume that any disparate treatment based on race or ethnicity in connection with contract performance—even if it does not violate federal antidiscrimination law—will be viewed as violating FAR 52.222-90

* See K. Yoshino & D. Glasgow, *The Irresistible Force and the Immovable Object: Students for Fair Admissions and Workplace DEI*, Amer. J. of Law & Equality (2024).

DEI Policies and Practices Today, Cont.

What's In and What's Out? (Cont.)

- Specific Examples:
 - Diverse Slate Hiring Policies
 - Such policies are the focus of heightened enforcement priority, and it is not clear that courts will find such policies lawful post-*SFFA*
 - Although a federal court [suggested](#) that the “Mansfield Rule” was lawful, the NFL recently appears to have [changed](#) parts of its “Rooney Rule” in response to anti-DEI enforcement
 - Race- or Sex-Based Attendance for Trainings, Networking, and/or Affinity Groups
 - Federal authorities have been treating such practices as “segregation”
 - Supplier Diversity Programs
 - While Title VII governs employment discrimination, the Civil Rights Act of 1866 (42 U.S.C. § 1981) covers discrimination in private contracts
 - *Fearless Fund*: 11th Circuit found that a private entrepreneurship funding competition open only to businesses owned by black women likely violated Section 1981
 - Changes in SBA’s 8(a) guidance suggest added scrutiny of these programs
 - May create conflicts with state and local contractual/legal requirements

DEI Policies and Practices Today, Cont.

What's In and What's Out? (Cont.)

- Specific Examples (Cont.):
 - Collection of Demographic Data
 - DOJ has [confirmed](#) that grantees “should have available for [DOJ] racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs,” but only “to help establish, as an evidentiary matter, liability for *intentional* discrimination,” not “to impose liability for an unintentional disparate impact”
 - Collection in conjunction with DEI policies raises enforcement risk
 - Setting Placement or Hiring Targets/Goals
 - DOJ/EEOC/OFCCP have cited such targets and goals as evidence of intent to discriminate against non-minority job candidates and employees

Questions?

Don't be shy!



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