CLIENT ALERT

New FAR Rule Puts DEI Programs Under False Claims Act Exposure — And a $17 Million Settlement Shows What's at Stake

A new federal contract clause converts DEI compliance into a False Claims Act question, and DOJ's first enforcement action under it — a nine-figure settlement with a Fortune 500 contractor — shows the government is prepared to use it.

BY EDWARD WILLIAMS, PRINCIPAL · AUGUST 19, 2026

KEY TAKEAWAYS

- A new FAR clause, 52.222-90, now requires federal contractors to certify that they do not engage in "racially discriminatory DEI activities" — and states that compliance is material to the government's payment decisions under the False Claims Act.
- The clause has applied to new contracts since April 24, 2026, and agencies have been directed to add it to existing contracts by bilateral modification by July 24, 2026 — a deadline that has now passed, meaning most affected contractors should assume the clause is either already in their contracts or the subject of an active modification request.
- DOJ's first DEI-related FCA settlement — a settlement of $17,077,043 with a major federal contractor — shows the government using ordinary personnel practices (bonus structures, interview slates, sourcing programs) as the basis for FCA liability, not just formal set-asides or quotas.
- Two lawsuits are challenging the underlying executive order, but neither has produced an injunction. Absent a court order, compliance remains mandatory.
- Organizations that hold federal contracts, or are considering one, should treat a privileged review of their DEI-adjacent programs and practices as immediate priority — not a project for later in the year.

Since March 2026, the federal government has moved decisively to convert DEI compliance from a reputational and Title VII question into a False Claims Act question for any organization holding a federal contract. Executive Order 14398, "Addressing DEI Discrimination by Federal Contractors," directed agencies to stop doing business with contractors that engage in what the order calls "racially discriminatory DEI activities." The FAR Council responded with a new mandatory clause — FAR 52.222-90 — that agencies began inserting into new solicitations on April 24, 2026, with a July 24, 2026 deadline to modify existing contracts.

The clause defines the prohibited conduct broadly: disparate treatment based on race or ethnicity in recruitment, hiring, promotion, contracting, program participation, or the allocation of an organization's resources. It flows down to subcontractors at every tier, and failure to comply is now an express basis for suspension and debarment.

WHY THIS MATTERS NOW

The clause does more than restate existing antidiscrimination law — it makes compliance a condition of payment. FAR 52.222-90 states that a contractor's compliance is material to the government's payment decisions for purposes of 31 U.S.C. § 3729(b)(4), the FCA's materiality provision. That single sentence arguably converts an HR policy dispute into treble-damages exposure, and it opens the door to qui tam suits brought by employees, former employees, or competitors who stand to collect a share of any recovery. The FAR Council's own Paperwork Reduction Act filing projects roughly 6,825 contractor audits per year across the federal government — this is not a remote or theoretical enforcement posture.

On April 10, 2026, DOJ made its intentions concrete. Under its Civil Rights Fraud Initiative, the government resolved its first FCA action under this framework against a major New York–based federal contractor for $17,077,043, more than $8 million of which was structured as restitution. The government's allegations were not about diversity mission statements or formal quotas. They centered on ordinary internal programs: a bonus modifier tied to demographic targets, "diverse interview slates" and "diverse sourcing" practices, business-unit demographic goals factored into hiring and promotion decisions, and training or mentoring programs limited by race, national origin, or sex. The covered conduct dated back to January 2019 — years before the current FAR clause existed. Notably, the settlement was neither an admission of liability by the contractor nor a finding that the government's claims were well-founded, and the contractor received meaningful credit for early voluntary disclosure and remediation — a marker in DOJ's own guidance for how self-reporting and program termination can shape resolution value even where the underlying conduct is not conceded.

WHAT WE'RE WATCHING

Litigation is underway on two fronts, but organizations should not assume either will provide near-term relief. In *National Association of Diversity Officers in Higher Education v. Trump* (D. Md.), a coalition of higher-education and minority-contractor associations is challenging the executive order itself on First Amendment and Procurement Act grounds.

A preliminary injunction motion has been pending since June 2026, and no ruling has issued as of this writing. In *Maryland v. Hegseth* (D. Md.), a coalition of nineteen states and the District of Columbia is challenging the FAR Council's implementation on Administrative Procedure Act grounds, arguing the agencies bypassed required notice-and-comment rulemaking and that the clause's terms are too vague to enforce. Either case could ultimately produce an injunction with governmentwide effect. As of this writing, neither has, and the July 24 modification deadline has already passed.

Organizations should also watch how courts distinguish this framework from the related EO 14173 certification requirement, which the Fourth Circuit allowed to proceed earlier this year on the theory that requiring a certification of compliance with existing antidiscrimination law is different from banning protected activity outright — the plaintiffs here argue FAR 52.222-90 goes further by defining a new, broader category of prohibited conduct untethered from existing law. How that argument fares will shape how aggressively DOJ can rely on the clause in future enforcement.

The organizations best positioned going into the fall aren't the ones waiting to see how the litigation resolves. They're the ones who have already had counsel review their federal contracts, personnel programs, and employment practices — under privilege — to identify what a contracting officer or a qui tam relator might flag, and who have a documented, defensible record of why their programs comply with existing antidiscrimination law before anyone asks.

This is precisely the gap our Program Defensibility Review is built to close. The PDR is a privileged, pre-litigation audit of an organization's race-conscious or demographically-informed programs, policies, and eligibility criteria — reviewing the same categories of practice at issue in the settlement discussed above, before a contracting officer's inquiry, an audit, or a qui tam complaint forces the review to happen under far worse conditions. For federal contractors and subcontractors facing a July 24 modification deadline that has already passed, that kind of review is no longer optional due diligence.
