

DOJ Shifts FCA Focus From Anti-DEI To Antidiscrimination

By **Madeline Lyskawa**

Law360 (February 19, 2026, 9:41 PM EST) -- A U.S. Department of Justice deputy assistant attorney general said on Thursday that the Trump administration is not investigating federal contractors and grant recipients for their diversity, equity and inclusion programs but for potentially engaging in discrimination.

During a panel focused on "illegal DEI" as a trigger to the False Claims Act at the Federal Bar Association's 2026 Qui Tam Conference, Brenna Jenny, deputy assistant attorney general of the DOJ's commercial litigation branch, said companies can engage in discrimination with or without DEI programs. They can also operate a DEI program without it being discriminatory, she said.

Despite the Trump administration's repeated attacks on DEI — which has led many companies to get rid of their programs and attorneys to question what constitutes an "illegal" DEI program — Jenny hardly mentioned the term in laying out the DOJ's FCA enforcement priorities. Instead, she told attendees that the DOJ has been investigating contractors under the FCA for potential violations of federal antidiscrimination laws.

"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," Jenny said.

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, Jenny said.

"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," Jenny said.

While companies may characterize such executive training and mentoring programs as no different from those offered to all employees, Jenny said they're often marketed internally as offering special opportunities to network with company leadership and receive mentorship that will aid with promotions.

"That nexus between participation and promotion, in particular, can raise questions about legality," Jenny said.

The Trump administration's DEI crackdown kicked off in January 2025, when President Donald Trump issued an executive order one day into his second presidency restricting federal agencies, contractors and grant recipients from promoting "illegal" DEI policies deemed to violate antidiscrimination laws. The order also labeled all DEI programs as "dangerous, demeaning, and immoral."

The order further directed federal agency leaders to require grant recipients and contractors to agree that their compliance with all federal antidiscrimination laws is material to the government's payment decisions, and to certify that they do not operate any DEI programs that violate antidiscrimination laws. Trump also directed U.S. Attorney General Pam Bondi to identify the most egregious and

discriminatory DEI practitioners within 120 days.

But the order didn't define DEI programs, and it didn't differentiate "illegal" DEI programs from those that are legal but deemed immoral, Audrey Anderson, counsel at Bass Berry & Sims PLC, said during the panel.

"Without more guidance on what the government thought was legal and illegal, there was lots of overcorrection. People who really wanted to be risk-averse and stay off the bad list tried to make absolutely sure that they excised anything about diversity, equity and inclusion," Anderson said.

Deputy Attorney General Todd Blanche announced in May the creation of the Civil Rights Task Force, which would use the FCA to investigate and pursue claims against recipients of federal funds accused of knowingly violating federal civil rights laws. Bondi in July provided a list of best practices for recipients of federal funding to comply with antidiscrimination law.

"In some ways, these best practices are statements that any civil rights lawyer would agree with. For example, you can't use race in making decisions to hire or fire. But in other ways, the best practices go beyond what a lot of civil rights lawyers would say is the current law," Anderson said, adding that failing to follow Bondi's guidance could make contractors and grant recipients a target for FCA enforcement activities.

Some of the best practices are also antithetical to what the DOJ is saying in other areas, Anderson said, highlighting part of the July guidance that says if a university is going to use a racially neutral factor that may have a disparate impact, the university should make sure that practice won't have such an impact.

While that guidance made more sense in July because universities and other federal funding recipients could still be held liable under Title VI for disparate impact, Anderson said, the DOJ changed the Title VI regulations in December and said that it is no longer going to find liability for disparate impact.

As far as enforcement goes, Darrell Valdez, an attorney at Valdez Legal Insights, said the DOJ may encounter issues with proving that Bondi's guidance is authoritative in light of the U.S. Supreme Court's ruling in [Loper Bright Enterprises v. Raimondo](#) , which whittled down judicial deference to federal agency interpretation. The DOJ will also likely face difficulty in arguing that the alleged discrimination is material to the government's decision to make payment on a claim, Valdez said.

But Jenny disagreed with this suggestion that the DOJ wouldn't be able to prove materiality under the FCA, arguing that the government is merely pursuing violations of federal antidiscrimination law, which "clearly places significant guardrails and protections around efforts to diversify a workforce."

"I think if a jury were to hear some of the stories we're starting to see, they would instinctively understand why this type of discrimination is and was material," Jenny said.

--Editing by Nick Siwek.