

**Blueprints for Evolving Compliance: Navigating DEI, FCA, OFCCP & Immigration Under the New Trump Administration**, for presentation at the 2025 Construction Super Conference held at The Hyatt Regency Coconut Point in Bonita Springs, FL, December 9-11, 2025.

This session has been scheduled for **Wednesday, 12/10/2025, from 9:45 AM to 11:00 AM.**

With the Trump administration's latest Executive Orders reshaping regulatory compliance priorities and landscape, the construction industry faces changing federal obligations and standards of review — particularly in the areas of Diversity, Equity & Inclusion (DEI), the False Claims Act (FCA), Office of Federal Contract Compliance ("OFCCP") regulations and Immigration. Stay ahead of these changing and, indeed, evolving standards in order to best maintain internal policy decisions and compliance foundation in an environment of changed regulatory focus.

This essential seminar is designed specifically for construction industry professionals who work on federal and federally assisted projects. You'll gain expert insights into the regulatory priorities as embodied in the various Executive Orders and Enforcement Memoranda issued by the new Administration, the new compliance landscape that is emerging from these official policy statements, and how the evolving federal compliance regimen may impact hiring practices, reporting, and certifications. Moreover, insights will be provided as to the extent to which changes in the federal compliance paradigm may (or may not) result in alter state and local regulatory approaches – and how to help industry members navigate differences in compliance expectations and duties on the federal, state, and local levels.

**What You'll Learn:**

- The latest federal compliance changes impacting construction contractors with a particular focus on invigorated focus on immigration law compliance.
- How to assess, align, and maintain your DEI internal DEI policy determinations and processes with evolving federal expectations and especially as how those may differ from/conflict with existing state and local expectations.
- Strategies to minimize FCA-related risks in bids, certifications, and billing.
- What to expect in OFCCP audits and how to stay audit-ready; and,
- Best practices for subcontractor compliance and workforce documentation.

# **Blueprints for Evolving Compliance: Navigating Diversity Policies and Programs (including internal DEI measures and external MWDBE programs), FCA, OFCCP & Immigration Under the New Trump Administration**

**Thomas J. Curran, Esq., , Duane Morris LLP**  
**Lorraine D'Angelo, Esq., LDA Compliance Consulting, Inc.**

## **I. Introduction**

Starting in the 20<sup>th</sup> Century, the regulation of businesses and industries by government exploded on the federal, state, and even local levels. The construction industry was among the most impacted by this development. This trend encompassed every aspect of everyday business – from how construction firms sought work, with whom they partnered to perform work, how they paid its employees, how they protected their employees, how it performed its work, to how they ultimately received payment for their work. The regulation manifested in interactions with myriad civil and/or (including contemporaneous) civil and criminal government legal authorities. Moreover, and adding to the challenge of proactively complying with a multi-leveled regulatory framework and to address risk presented by actual regulatory inquiries and investigations, the concept of what constituted the law enforcement community itself expanded as offices and officials not traditionally identified as being part of “law enforcement” increasingly initiated and inquiries and investigations including criminal matters.

The construction industry adapted to the evolving regulatory landscape as the business reality and risk that was. Compliance departments with professionals adopting and enforcing policies and procedures designed to promote best practices were either created or greatly expanded in size and scope of operation. Indeed, an entire industry arose around assisting the construction industry internally and externally to manage the growing regulatory risk and the need for proactive compliance. The process was a challenge for the industry, but over the course of years the industry had set itself upon vastly improved footing as regards its regulatory risk.

The advent of the Trump Administration and its seeming refocus of regulatory priorities has created uncertainty as to many of the actions and processes undertaken by industry members in the face of a generation of law and regulation. Questions exist not only to whether actions taken to prevent exposure to established regulatory risk remain necessary but also whether those actions – intended to prophylactically protect the business from regulatory action – may themselves violate changed views and priorities promulgated under the Trump Administration,

No business favors uncertainty. All the less so when that uncertainty presents potential exposure to sanction arising out of measures themselves enacted to prevent and ameliorate exposure. This presentation focuses upon the changing landscape of regulatory priorities and actions in certain finite, discreet areas: DEI and similar policies and programs (like MWDBE) for which the Administration has expressed federal civil rights concerns, False Claims Act claims and litigation, OFCCP compliance, and fundamental change in enforcement and priorities under the Immigration Laws.

## **II. Regulatory Priorities and Enforcement Under the Trump Administration**

Beginning in January 2025, the federal government issued a series of executive orders and high-level enforcement memoranda that collectively reshape diversity, equity and inclusion programs and policies, affirmative action, immigration litigation, federal funding compliance. These actions demonstrate a coordinated policy shift emphasizing merit-based decision-making, eliminating perceived discriminatory practices, aggressively using fraud tools (including the False Claims Act) to enforce the Administration's priorities, and reorienting DOJ criminal priorities around efficiency and strategic focus. The directives have significant implications for the construction industry, public agencies, and federal funding recipients.

### **A. Summary of Recent Executive Orders and Enforcement Memoranda**

Two Executive Orders, 14151 and 14173, were issued by President Trump on the first days of his second Presidential Term. These Executive Orders aimed to restore merit-based opportunities by eliminating diversity, equity and inclusion (DEI) initiatives and offices across the federal government and among federal contractors, characterizing them as "illegal" and a form of "preferences" that violate equal protection principles found in our Constitution and destroy merit-based principles. The primary impact of these two Executives Orders is creation of a significant shift away from race-based and gender-based affirmative action efforts towards an enforcement approach based upon a narrow interpretation of civil rights laws.

#### **1. Executive Order 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Jan. 21, 2025)**

Executive Order 14173 directs federal agencies to eliminate policies perceived as violating principles of equal treatment and merit-based opportunity. Key provisions include:

- Ending discriminatory or outcome-based employment, contracting, and programmatic practices within federal agencies and among federal contractors, including the requirement to have affirmative action programs.
- Reevaluation of DEI, MWBE/DBE, and similar equity-based programs, with the presumption that such policies may conflict with federal nondiscrimination principles.
- Increased compliance obligations on federal fund recipients, including contractors and grantees.
- Implementation of a requirement for contractors to certify that their DEI programs do not violate federal anti-discrimination laws.
- Shift toward "neutral," merit-driven standards in hiring, promotions, contracting decisions, and program administration.
- Directs the Attorney General to develop a plan to deter "illegal" DEI in the private sector

One of the most impactful actions of E) 14173 was the revocation of Executive Order 11246 which required federal contractors and subcontractors to implement affirmative action programs. E.O. 14173 ordered that the Office of Federal Contract Compliance Programs (OFCCP) immediately cease holding federal contractors responsible for taking affirmative action or allowing workforce balancing on certain biases. Federal contractors were in turn told to wind down compliance with E.O. 11246's regulatory scheme by April 21, 2025.

This Executive Order became the foundation for subsequent DOJ and Civil Division enforcement directives on what the Administration considered unlawful discrimination at work: (a) EEOC and Justice Department Warn Against Unlawful DEI-Related Discrimination, <https://www.eeoc.gov/newsroom/eeoc-and-justice-department-warn-against-unlawful-dei-related-discrimination> . (b) What You Should Know About DEI-Related Discrimination at Work, <https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work>. (c) What To Do If You Experience Discrimination Related to DEI at Work, <https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work> and (d) issued EEOC guidance, <https://www.eeoc.gov/eeoc-guidance> .

## **2. Executive Order 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing (January 20, 2025)**

Executive Order 14151 seeks to end “diversity, equity, inclusion and accessibility programs” throughout the federal government. It mandates the termination of DEI and DEIA initiatives within federal agencies, the end of DEI-related performance requirements, and a review of “equity related” grants and contracts.

## **3. Memorandum from Attorney General, Eliminating Internal Discriminatory Practices, at 2 (Feb. 5, 2025)**

This memorandum directs DOJ to (a) review internal policies to ensure they do not create unlawful disparate treatment or disparate impact; (b) reassess diversity or preference-based programs to ensure compliance with Executive Order 14173 and (c) standardize DOJ's internal nondiscrimination procedures, positioning DOJ as a model for federal compliance.

## **4. July 29, 2025, Attorney General Pam Bondi, Guidance For Recipients of Federal Funding Regarding Unlawful Discrimination.**

On July 29, 2025, Attorney General Pam Bondi, issued Guidance For Recipients of Federal Funding Regarding Unlawful Discrimination. The Guidance sets forth the bedrock principle that all Americans must be treated equally. It clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity and Inclusion.” “Entities receiving 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, color, national origin, sex, religion, or other protected characteristics-no matter the program's labels, objectives, or intentions.” The Guidance offers non-binding suggestions for compliance with antidiscrimination laws.

The Guidance defines “unlawful proxy discrimination” as the practice of using facially neutral criteria (e.g. “cultural competence,” “lived experience” or geographic targeting) as proxies for protected characteristics. If these neutral criteria have the intention of advantaging, or disadvantaging, an individual based on protected characteristics, the DOJ will consider the practice unlawful discrimination. The Guidance goes on the opine that a federally funded program which requires applicants to describe “obstacles they have overcome” or submit a “diversity statement” in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics, it will be considered using the narrative as proxy for advantaging that protected characteristic in providing benefits. Recipients of federal funds should ensure funds are not used to support programs that discriminate unless such practices meet the very narrow exceptions.

The Guidance makes several on-binding Best Practice recommendations, including: (1) Review All Programs, Policies and partnerships to comply with federal law; (2) Ensure Inclusive Access (3) Focus On Skills And Qualifications; (4) Prohibit Demographic-Driven Criteria; (5) Document Legitimate Rationales; (6) Scrutinize Neutral Criteria For Proxy Effects; (7) Eliminate Diversity Quotas; (8) Avoid Exclusionary Training Programs; (9) Include Nondiscrimination Clauses in Contracts to Third Parties and Monitor Compliance and (10) Establish Clear Anti-Retaliation Procedures and Create Safe Reporting Mechanisms

Bondi advises that recipients of federal funds should ensure funds are not used to support programs that discriminate unless such practices meet the very narrow exceptions.

**5. May 19, 2025, USDOJ, Deputy Attorney General Todd Blanche Memorandum announcing a new Civil Rights Fraud Initiative and Announcement of the Civil Rights Fraud Initiative (Feb. 5, 2025)**

The Civil Rights Fraud Initiative expands DOJ’s enforcement toolkit by integrating fraud and civil rights enforcement. Key aspects include use of the False Claims Act (FCA) to investigate entities that misrepresent compliance with civil rights obligations; Application of criminal fraud statutes to civil rights violations tied to federal funding; Focus on contracting, procurement, hiring, and program certifications, where demographic or compliance reporting may be inaccurate; and, Coordination between the Civil Division Fraud Unit and the Civil Rights Division, modeling an integrated enforcement approach.

This initiative signals heightened risk for recipients of federal funds whose policies may be deemed discriminatory or whose compliance certifications could be challenged as false.

The Blanche memorandum publicly reinforces and expands DOJ's Civil Rights Fraud Initiative. Key provisions include: (1) Reaffirmation of DOJ's commitment to federal civil rights enforcement and the principle of equal protection. (2) Explicit authorization to use the False Claims Act to pursue any federal-fund recipient that knowingly violates civil rights laws. (3) Classification of any "program" or "policy" that violates federal civil rights—such as DEI programs or public DBE preferences—as presumptively unlawful. (4) Designation of the Civil Division Fraud Unit and the Civil Rights Division as co-leaders of the Initiative, with an Assistant U.S. Attorney in each district coordinating local enforcement.

This memorandum further solidifies the connection between civil rights compliance and fraud enforcement and places DEI/DBE-type programs squarely within DOJ's enforcement crosshairs.

#### **6. June 11, 2025 US DOJ, Civil Division, issues a Memorandum (Brett Shumate, Assistant Attorney General)**

The Shumate Memorandum sets forth the DOJ Civil Division's enforcement priorities and directing the prioritization and enforcement of the Trump Administration's policy objectives. Citing to Executive Order 14173, the memorandum emphasizes:

- The federal government's policy to "promote individual initiative, excellence, and hard work."
- A directive for "all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."
- Attorney General Bondi's order to align all DOJ litigation positions with principles of equal dignity and respect.

The Shumate Memorandum directed: (a) affirmative litigation to pursue "unlawful discriminatory practices in the private sector.; (b) Authorized the Civil Division to bring suit under the False Claims Act against "entities that receive federal funds but who knowingly violate civil rights laws;" (c) Using the recently formed Civil Rights Fraud Initiative to advance this Initiative and aggressively investigate and pursue FCA violations against recipients of federal funds that knowingly violate civil rights laws; (d) Collaboration between DOJ, Civil Division, Civil Rights Division, relators, other whistleblowers and federal agencies. In light of these priorities, it would seem to include the DBE program.

#### **7. May 12, 2025, US DOJ Memorandum, Matthew R. Galeotti, Focus, Fairness and Efficiency in the Fight Against White Collar Crime, Outlines**

**Criminal Division Enforcement Priorities guided by three core tenets: (1) focus, (2) fairness and (3) efficiency.**

This Memorandum prioritizes White Collar Crime and “dishonest actors exploit[ing] government programs, funded by American taxpayers, to enrich themselves through fraud, waste and abuse.” One area noted is “[w]aste, fraud, and abuse, including ... federal program and procurement fraud that harm the public fisc.” This would include the DBE Program as well as all federal government procurement. The Memorandum also amended the Division’s pilot program related whistleblowers to include violations by corporations of federal immigration law and corporate procurement fraud. Finally, it narrowly tailors the use of integrity monitors.

**8. Sanctuary City Directive, Attorney General Pam Bondi, (February 5, 2025)**

This Memorandum implicates immigration policy. It (a) revives federal pressure on “sanctuary jurisdictions” that limit cooperation with federal immigration enforcement. (b) links federal funding to state and local compliance with immigration information-sharing requirements and (c) represents a renewed federal role in immigration enforcement, with implications for states, municipalities, and industries relying on large labor forces.

**B. Use of the False Claims Act as a Means of Enforcement**

The False Claims Act, 31 U.S.C. § 3729, is the primary tool used to combat fraud in federally funded programs and contracts and recover taxpayer money lost due to fraud. Indeed, most states – and even certain municipalities – possess their own version (substantially modeled upon and similar to the federal Act) of the False Claims Act (“FCA”). The FCA is a powerful tool by which the government (and private actors in the name of the government – so-called “Relators” in Qui Tam litigation) can address fraudulent practices at the expense of the government and public monies. The FCA imposes liability (upon anyone who knowingly submits or makes materially false claims to the government for approval or payment. These matters can be criminal in the form of indictments under the federal Mail and Wire Fraud statutes (or Schemes to Defraud statutes that exist on the state level). Government contractors that enter contracts to provide goods and services to the government are often the subject of false claims act cases.

The Program Fraud Civil Remedies Act of 1986 is now called the Administrative False Claims Act (AFCA), 31 USC 3801 through 3812 (2025). Recently revised, the AFCA grants federal agencies enhanced power to investigate and resolve false claims cases made by government contractors and other entities dealing with federal programs.

The AFCA allows for administrative resolution of certain false claims up to \$1 million dollars. The Program Fraud Civil Remedies Act only allowed claims up to \$150,000. It permits the agency to impose civil penalties, damages and assessments without court intervention. The AFCA does not include a whistleblower provision. The ability of agencies to investigate and resolve cases without resort to litigation could lead to increased enforcement activity.

The revisions indicate a desire on the part of the Trump Administration to use false claims as a tool to find waste, fraud and abuse in government contracting. For contractors it is a heightened compliance risk that can be mitigated through an effective, compliance program which calls for regular audits and employee training. Of course, with the threat of increased enforcement activity contractors should be prepared by implementing policies and procedures that ensure accurate reporting and require documentation.

Businesses which enter contracts to provide goods and services to the government in return for payment of public funds can be subjected to investigation (which are very expensive to defend and are harmful to the business' brand and reputation) The False Claims Act is a rare example of a civil exposure that can be worse than any potential criminal liability in that it has a longer statute of limitations and provides for treble damages (indeed, treble the damages of the contract value itself, potentially).

The FCA encourages so-called "whistleblowers" to come forward and to bring recovery actions on behalf of governmental entities. Indeed, this encouragement is compelling – whistleblowers are provided with large financial rewards through a percentage of recovery obtained for any fraud alleged. An entire industry – investigations firms and lawyers dedicated to bringing cases alleging fraud against the government – has grown up around the bringing of FCA cases through whistleblowers and private litigations in the name of government by individuals.

Prosecution of construction industry members for FCA violations has been common. This expansion of FCA claims is at least in part a function of the numerous certifications and affirmations that a contractor must make to the governmental entity as part of the requisition for payment process. These affirmative representations often require the contractor to swear that its entire submission is true and accurate in all respects. It is common for the governmental entities to require these certifications in the bid phase as well as during the construction phase. Typically, a contractor will be required to represent in connection with each payment application that all of its work, for which payment is requested, has been performed in strict accordance with the contract plans and specifications. Certifications should never be viewed as a mere formality or paper requirement.

FCA and AFCA liability will likely be implicated in the diversity space where entities are required to certify to compliance with anti-discrimination laws (EO 14173) or with the goals of a DBE program (federal work) or MWBE (State work) attached to the project by contract (either under an express certification or implied certification theory).

### III. Diversity Policies and Programs

Companies made a lot of decisions in the post-George Floyd world as regards their internal policies and procedures in the area collectively referred to as “DEI.” Now, the US has a President, DOJ (civil and criminal) and others in the Trump Administration seemingly looking to reverse government programs that have existed for decades to promote diversity (and specifically in the construction industry) as well as attack private efforts to enhance diversity in business models and operations. In this, the Administration is changing decades-long government policies as well as specific regulatory paradigms that the industry reasonably considered settled and upon which it could rely.

DEI programs and initiatives are facing court challenges following the Supreme Court’s ruling in Students for Fair Admissions, Inc. v. Harvard College, 143 S. Ct. 2141(2023).

The Deputy Attorney General of the United States has issued two Memoranda specifically stating that public and private policies and programs that are premised upon “invidious characteristics” – as necessarily characterize public programs like MWDBE and private DEI programs alike – violate the federal Civil Rights laws. The Deputy AG has made it clear that the DOJ fully reserves all avenues of redress at DOJ’s disposal (which includes civil as well as criminal remedial actions) for what it believes to be violative conduct.

Recently, a federal judge in the Western District of Kentucky issued an injunction against the awarding of work to a company qualifying under a “DBE” program in favor of a company denied that work on account of being owned by a white person. Mid-America Milling Company, LLC, et. al. v. U.S. Department of Transportation, et. al., Case No. 3:23-cv72, Federal District Court, Eastern District of Kentucky (“MAMCO”). Recently, the DOJ supported this view in the case by offering to enter into a settlement with the plaintiff in which the DBE programs that have existed at the Department of Transportation through Act of Congress in 1983 are conceded to be discriminatory in violation of the federal Civil Rights laws and the United States Constitution. While this settlement has not been approved by the Court as yet, much less subjected to the vigorous appeals that are expected (numerous civil rights groups opposing the injunction and the DOJ’s proposed settlement have been granted amicus status in the litigation by the court), it promises to be interesting to watch this unfold.

While the MAMCO case was still pending, the USDOT issued an Interim Final Rule which eliminated the race-based and sex-based presumptions of disadvantage. This finding essentially suspended the requirements of the DBE Program goal setting and attainment counting. The DBE IFR was effective immediately. Goals on USDOT funded projects moving forward are set to zero pending the re-certification of 41,000 DBEs and the submission by the agencies of new DBE Programs consistent with the DBE IFR and new goals based on the new pool of DBE firms. DBEs are to submit personal narratives outlining individualized social and economic disadvantage and personal net worth statements. UCPs are required to complete the re-certification process as soon as practicable.

What is a responsible member of the construction industry to do in the face of such pronounced, unambiguous intention by the primary regulator in the country? Of course, federal policies and

action is not the end of what the industry must consider when considering what to do to navigate the current Administration's positions. As certain "blue" states have made clear, just because the Trump Administration is changing federal regulatory paradigms does not mean that the state and local authorities are going to do so. States like New York, Massachusetts, Connecticut, California, Illinois, Oregon, Washington, and others have well-developed policies and programs to advance diversity – MWBE programs that exist under state and local laws and regulation, for example – as well as views of private DEI programs as permitted under their respective Constitutions. They also have comprehensive regulatory enforcement frameworks – Inspectors General, Attorneys General, and District Attorneys – ready, willing and able to vindicate their public interests through civil and criminal regulation. As a practical matter, regulatory enforcement yields money in the form of fines and penalties – and the states may be reluctant to forgo these benefits by acceding to a reduction in regulation on the federal level.

All of this change creates an environment of uncertainty for the construction industry as it tries to comply with a pendulum swing on regulation at the federal level, the interest states have in asserting contrary views, and the construction industry members' interests in vindicating the values they may have asserted privately in the area of diversity.

#### **A. What is Considered "Illegal DEI"?**

Underlying employment policies in the Trump Administration is the principle that race or sex should not impact one's ability to be hired, promoted, or paid a fair wage. The Administration's focus is on eliminating reliance upon "unlawful, unfair, and unsafe discriminatory practices, including those labeled as DEI, and revokes executive orders that implemented or encouraged the adoption of such unlawful practices. It seeks to eliminate DEI "unlawful discrimination."

In support of its position, the Trump Administration cites to the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution and the *Civil Rights Act of 1964*. *Title VI of the Civil Rights Act of 1964* prohibits discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance. This includes most educational institutions, healthcare providers, and state and local governmental agencies. *Title VII of the Civil Rights Act of 1964* prohibits employment discrimination based on, or motivated by, race, color, religion, sex, or national origin, in any terms, conditions, or privileges of employment, including hiring, promotion, demotion, termination, compensation, job transfers, training, or access to employment privileges and benefits. Under Title VI or Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic.

On March 19, 2025 the Equal Employment Opportunity Commission issued two technical assistance documents related to the Presidential January 2025 Executive Orders on DEI. The guidance contains a reminder on the scope of the Title VII protections which prohibit employment discrimination based on protected characteristics and reiterates that the protections should apply equally to all—including individuals who are a part of a

“minority group” and “majority group” – eliminating “reverse discrimination” and higher evidentiary burdens. “Far too many employers defend certain types of race or sex preferences as good, provided they are motivated by business interests in ‘diversity, equity, or inclusion.’ But no matter an employer’s motive, there is no ‘good,’ or even acceptable, race or sex discrimination,” said EEOC Acting Chair Andrea Lucas. DEI programs may be considered unlawful if they lead to employment actions based on an employee’s protected characteristic.

The July 29, 2025 Bondi Guidance offers examples of “unlawful practices,” including, for example: (a) preferential hiring or promotion practices that prioritizes candidates from “underrepresented groups” based on a protected characteristic to the disadvantage of a qualified candidate that does not belong to the group. (b) Hosting race-based DEI training which separates groups based on protected characteristics while excluding individuals who do not share the characteristic from participating. (c) Unlawful use of protected characteristics occurs when a federally funded entity or program considers race, sex, or any other protected trait as a basis for selecting candidates for employment (e.g., hiring, promotions), contracts (e.g., vendor agreements), or program participation (e.g., internships, admissions, scholarships, training). “Sex-Based Selection for Contracts” is also described as illegal DEI. Bondi specifically provided an example: “A federally funded state agency implements a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses without preferred group status. This includes any contract selection process that uses sex or race as a tiebreaker or primary criterion, such as policies favoring “minority- or women-owned” businesses without satisfying the appropriate level of judicial scrutiny.”

DEI Training programs are unlawful if they “stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment.” Such an “objectively hostile environment,” may be created “through severe or pervasive use of presentations, videos, or other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.”

Examples include:

Stereotyping or Assigning Collective Guilt: Training that presents members of a particular race or sex as inherently privileged, oppressive, or biased. This can be seen as creating a hostile work environment for those groups by assigning collective guilt or negative attributes based on their protected characteristics.

Segregated Training: Limiting access to specific training or workshops based on an employee’s race, sex, or other protected characteristic. While some programs, like Employee Resource Groups (ERGs), are allowed, excluding employees from general professional development opportunities based on their identity can be discriminatory.

Coerced Adoption of Ideology: Requiring employees to adopt or affirm specific ideological viewpoints about race or gender as a condition of employment or advancement. This could be seen as a form of harassment or creating a hostile work environment if it targets a specific group of employees.

"Reverse Discrimination": Training that suggests a person's employment opportunities or advancement should be limited because of their race or sex, even if the goal is to address historical underrepresentation. The DOJ and EEOC guidance clarify that "there is no such thing as 'reverse' discrimination; there is only discrimination" under the law.

Unlawful Hiring or Promotion Practices: Training that encourages managers to use race, sex, or other protected characteristics as a "plus factor" in hiring, promotion, or other employment decisions, rather than focusing on merit-based criteria.

The EEOC Guidance states that business interests like diversity or client preference do not justify discriminatory employment actions.

## **B. What Practices Are Still Considered Lawful?**

Based on recent executive orders and guidance from the Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC), federal contractors can continue to engage in DEI initiatives as long as they are race- and sex-neutral and do not involve quotas or preferences based on protected characteristics. The new framework emphasizes that DEI must be legally defensible and merit based.

Initiatives that are still considered permissible and lawful include:

Broad Recruitment and Outreach: Programs aimed at expanding the candidate pool to include individuals from various backgrounds without establishing quotas or preferential treatment.

Neutral Anti-Discrimination Training: Training that is open to all employees and focuses on preventing harassment and discrimination based on any protected characteristic, such as race, sex, or national origin.

Non-Discriminatory Employee Resource Groups (ERGs): Affinity groups that are open to all employees and do not limit membership to individuals of a specific protected class.

Reviewing Policies for Unconscious Bias: Auditing hiring, promotion, and compensation practices to identify and remove unintended bias, rather than using race- or sex-based preferences.

Affirmative Action for Protected Groups: Contractors must continue to comply with affirmative action requirements for veterans and individuals with disabilities as these protections are required by federal statute and were not eliminated by the executive orders.

### **C. Elimination of OFCCP**

The FY 2026 Budget proposes to eliminate OFCCP. The federal government's rationale is that Executive Order (EO) 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, rescinded EO 11246, permanently removing the primary basis for OFCCP's enforcement authority and program work. The Budget transfers enforcement of the Vietnam Era Veterans' Readjustment Assistance Act to VETS, and enforcement of Section 503 of the Rehabilitation Act of 1973 to EEOC.

### **D. U.S. Department of Transportation Disadvantaged Business Enterprise Program**

The USDOT DBE program's stated objectives had been to remedy ongoing discrimination and the continuing effects of past discrimination in federally assisted programs in highway, aviation and transit contracts. The DBE program required state and local transportation agencies that receive financial assistance to establish goals for the participation of DBEs in their program. The latest re-authorization of the DBE Program was in the Infrastructure Investment and Jobs Act (IIJA). The USDOT establishes a nationwide goal of 10% of transportation funding for "small business concerns" owned and controlled by "socially and economically disadvantaged individuals." The implementing regulation can be found at 49 CFR Parts 26 and 23.

Courts have found government programs that rely on race-based or gender-based classifications must be narrowly tailored and subject to strict scrutiny. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *City of Richmond v. J.A. Croson Company* was a landmark Supreme Court case that invalidated a set-aside program in Richmond, Virginia, which required prime contractors on city projects to subcontract at least 30% of their work to minority-owned businesses (MBEs). The program was challenged by a white-owned contracting firm, J.A. Croson Company, whose low bid was rejected because it could not meet the 30% MBE requirement. The company argued that the program was unconstitutional and violated the Equal Protection Clause of the Fourteenth Amendment. The Court ruled in a 6-3 decision that "generalized assertions" of past societal discrimination were not a sufficient basis to justify a rigid racial quota. The Court, in an opinion written by Justice Sandra Day O'Connor, held that all racial classifications by state and local governments must be reviewed under a "strict scrutiny" standard. To pass this test, the government must demonstrate that the program serves a "compelling governmental interest" and is "narrowly tailored" to achieve that interest. The Court found that Richmond's plan failed both prongs of the strict scrutiny test: (1) Compelling Interest: The city's evidence of past discrimination was based on broad statistical disparities and national findings, not specific, identified discrimination within the Richmond construction industry. The Court

held that this was not a compelling interest. (2) Narrowly Tailored: The 30% quota was deemed arbitrary and not narrowly tailored to remedy any specific discrimination. It also included a wide range of minority groups (such as Asians and Eskimos), for whom there was no evidence of past discrimination in the city's construction industry. The decision established that states and localities have a limited power to implement race-based affirmative action policies and must provide specific, local evidence of past discrimination to justify such measures. *Adarand Constructors, Inc. v. Peña*, was also a landmark Supreme Court case that held that for a government program to survive strict scrutiny, it must serve a "compelling governmental interest" and be "narrowly tailored" to achieve that interest. The decision established that the same high standard of review for race-based programs applies to all levels of government—federal, state, and local. While it did not ban affirmative action, it made it more difficult for federal programs with racial preferences to be upheld.

The following legal cases all bear upon the continued viability of the DBE Program: *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (“SFFA”); *Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.*, U.S. District Court for the Eastern District of Tennessee, 2:20-cv00041-DCLC-CRW; *Mid-America Milling Company, LLC, et. al. v. U.S. Department of Transportation, et. al.*, Case No. 3:23-cv72, Federal District Court, Eastern District of Kentucky; Consent Order; *Bruckner et. al. v. Biden et. al.*, Case No. 8:22-cv-1582, Federal District Court, Middle District Of Florida, Tampa Division; *Jeffery Nuziard, et. al. v. Minority Business Development Agency, et. al.*, Case 4:23-cv-00278-P

The USDOT has published an Interim Final Rule (IFR), *Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications* (October 3, 2025). The IFR modifies the DBE Program to remove race- and sex-based presumptions of social and economic disadvantage on the basis that the presumptions violate the U.S. Constitution. These changes will impact approximately 41,000 businesses. It was effective immediately and in effect suspends the DBE Program goal setting and counting.

In order to participate in the DBE Program firms will have to re-certify and provide a personal narrative citing to specific instances of economic hardship, systemic barriers and denied opportunities which impeded personal success in education, employment or business. Recently, the General Counsel of the Department of Transportation issued Official Frequently Asked Questions to provide clarity to the public regarding the DBE IFR.

The IFR requires each certifying agency (UCP) to reevaluate any currently certified DBE or ACDBE and re-certify the firms based upon new certification standards” as quickly as practicable.” Firms that do not meet the new standards are required to be decertified. The new standards require an individualized showing of disadvantage, regardless of race or sex by the submission of a Personal Narrative (PN). The PN is to be based on their own experiences in American society without reliance in whole or in part on race or sex. Until the UCP completes the re-evaluation process and re-submits its DBE Program to

USDOT, no goals may be established “to ensure that existing DBEs do not continue to receive any benefits as a result of their certification under the old standards,” and no participation may be counted toward any DBE goals already in effect.

49 CFR 26.67 defines social and economic disadvantage as:

- (a) Non-presumptive Disadvantage. All applicants must demonstrate social and economic disadvantage (SED) affirmatively based on their own experiences and circumstances within American society, and without regard to race or sex.
  - (1) To satisfy the SED requirement and ensure all determinations of disadvantage are not based in whole or in part on race or sex, an owner must provide the certifier a Personal Narrative (PN) that establishes the *existence of disadvantage by a preponderance of the evidence based on individualized proof regarding specific instances of economic hardship, systemic barriers, and denied opportunities that impeded the owner's progress or success in education, employment, or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.*
  - (2) The PN must state how and to what extent the impediments caused the owner economic harm, including a full description of type and magnitude, and must establish the owner is economically disadvantaged in fact relative to similarly situated non-disadvantaged individuals.
  - (3) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.

#### IV. Immigration Law

The Immigration and Reform Control Act of 1986 (8 U.S. Code §§ 1150-24) (“IRCA”) was structured from the start to present compliance challenges for the business community. The first section requires employers to only employ persons with the legal authority under the immigration laws to work in the United States. The second section, contrarily, proscribes employers from discriminating against any person on account of their immigration status. IRCA requires US employers to use the Form I-9 to verify a new hire’s identity and their eligibility to work in the US. The Department of Homeland Security (“DHS”), enforcing the immigration laws through its offices of Homeland Security Investigations (“HIS”) and Immigration and Customs Enforcement (“ICE”) is on record announcing that it will impose higher fines on non-compliant employers and HIS and ICE are focusing on worksite enforcement, including visits wherein this agents have served employers with “Requests for Inspection” and ICE has conducted actual “raids” to investigate I-9 compliance. Conversations had in meetings with DHS and HIS leadership have confirmed the intention of the current Administration to target the construction industry.

Notices of Inspection require the contractor to produce their I-9 Forms within 3 days, 72 hours of the government’s request for the original forms. The Notice of Inspection will likely include a request for a list of employees’ names, most recent payroll and names of contractors and staffing companies used. The current I-9 Form has an issue date of 1/20/25 and expires 5/31/2027. The Form I-9 and instructions on how to complete the form can be found here, <https://www.uscis.gov/i-9>. Employees must complete Section 1 on their first day of work by

producing documentation verifying their identity. The form provides a list of acceptable documentation and employers are required to examine the documentation to determine if it appears genuine and relates to the particular employee. Employers are required to complete Section 2 of the Form within 3 business days of an employee's start date. The employee must present acceptable, unexpired, original documents (of their choosing and noted on the Lists) establishing the employee's identity and employment authorization. Rehire may require reverification of an employee's status. Failure to comply can result in civil fines, criminal penalties and debarment from government contracting.

In addition to Form I-9, companies may use (and on federal jobs, be required contractually to use) the government's E-Verify system. In one recent raid by ICE, however, when the employer noted that they were in full E-Verify compliance, the government personnel indicated that the E-Verify system it maintains is "unreliable" and cannot be pointed to as an indicator of that employer's compliance with immigration law responsibilities. Obviously, this extraordinary statement adds to the compliance challenges faced by employers, and especially in the current and aggressive enforcement climate. Self-auditing practices should be discussed.

Although the process appears relatively straightforward, it is complex. The audit will look for both technical paperwork violations and more substantive violations like document fraud or known hiring of unauthorized workers. Often the forms are completed incorrectly, filling in the information in the wrong boxes or not following the instructions. Other failures related to the failure to obtain acceptable documentation or to examine it for its reasonable genuineness. Employers must not discriminate against the new hire and must be careful when rejecting documentation and cannot request the potential employee produce a particular form of documentation. An employer may not correct errors or omissions in Section 1. If an employer discovers an error or omission in Section 1 the employee should be asked to correct the error by (1) drawing a line through the incorrect information; (2) entering the correct or omitted information; and (3) initialing and dating the correction or omitted information. If the employee is no longer working for the employer, the employer should attach a signed and dated statement identifying the error or omission and explaining why the correction could not be made. Errors in Section 2 should be completed in the same manner. No erasures or white out should be used and the form should never be back dated. The completion of the Form I-9 should not be treated as a clerical or administrative process. It is a substantive process which requires knowledge and care to properly complete the forms based on appropriate documentation.

Compliance is made more difficult and challenging in the current environment in light of the fundamental change in focus the current Administration has placed upon IRCA. The first section of IRCA places a burden on the employer not to employ persons who lack proper status to work in the US under the immigration laws and rules. The second section, however, prohibits employers from discriminating against prospective employees on account of their immigration status. Compliance with these competing provisions was made easier over the preceding 40 years as the courts, NLRB opinions, and the position of organized labor all placed the primary enforcement emphasis on the priority of avoidance of discrimination under section two. Thus, an entire generation of Human Resource personnel (relied upon by companies to implement IRCA compliance) reasonably defaulted to avoidance of discrimination with the result of some allowable laxity in immigration status confirmation required under the first section of IRCA.

The current Administration has expressly stated that it is changing the prioritization of compliance under IRCA to a focus upon the first section's prohibition of employment of persons without proper immigration status. Concerns about discrimination that may result out of strict enforcement of the prohibition are expressly of a lesser priority under the current Administration's policy.

Some examples of typical failures include:

- Using the wrong Form I-9
- Missing or incomplete forms
- Accepting expired documentation
- Accepting documents that are not genuine
- Failing to sign the form
- Failure of the employee to attest to his citizenship or immigration status
- Filling in the form wrong
- Not timely completed the process (The more late completions, the higher the fines)
- Relying on I-9 software (It is NOT a safe harbor)
- Failure to retain the forms for all employees, including terminated employees
- Failing to document errors or omissions correctly (Do NOT use white-out or erase information)
- Failure to retain supporting documentation
- Failure to re-verify employees after work authorization expires

An employer may choose to conduct its own internal audit or contact an outside third party to assist. Regular self-audits can help identify errors and make corrections in advance. Training of staff regarding the I-9 compliance can be performed. Care should be taken to make sure the audit is not discriminatory or retaliatory. Employees should be informed of the scope and purpose of the audit.

Despite the current Administration's change in IRCA compliance paradigms, employers must still adopt approaches that avoid discriminatory practices. A balance between I-9 Compliance and discrimination on account of Immigration Status must be carefully struck – in full awareness of the concern about discrimination on the basis of immigration status.

## **V. Key Takeaways and Recommended Strategies to Minimize Risks**

- Equal Employment and antidiscrimination laws set forth in the US Constitution and Civil Rights Laws cannot be changed by Executive Orders. Review all internal employment and contractual policies and requirements to examine whether any policies, procedures or criteria, including criteria which is neutral on its face, would constitute “unlawful discrimination” or “proxy discrimination.”
- Carefully review any certification of compliance required by Executive Order 14173 with anti-discrimination laws to avoid false certifications and potential FCA liability.
- Be hyper-aware of these federal policies and initiatives when working in state or local jurisdictions which still maintain DEI programs, procedures or policies.
- DEI training programs that “stereotype, exclude, or disadvantage individuals based on

protected characteristics or create a hostile environment” are illegal.

- Prioritizing awards of federally funded contracts to women-owned or minority businesses or uses a contract selection process that uses race or sex as a tiebreaker or primary criterion is considered unlawful discrimination.
- Employment Law
  - Federal funding recipients should open trainings to all qualified participants, avoid segregating participants into groups based on protected characteristics and do not require participants to affirm specific ideological positions or confess to personal biases or privileges based on protected characteristics.
  - Avoid efforts that focus on diversity in recruiting and hiring and on metrics. Instead focusing on efforts toward inclusion for all and creating a culture that supports opportunities for all.
  - Contractors are no longer required to comply with affirmative action requirements based upon race, ethnicity and gender. They must continue to comply with Section 503 and VEVRAA, which will be enforced by the EEOC.
- Contracting
  - Avoid any DEI policy that prioritizes the award of contract to a minority or woman-owned business, automatically advancing female vendors or minority-owned businesses over other businesses based on protected characteristics.
  - Carefully review any requirements that implicate subcontracting plans or diversity utilization plans as “sex-based selection for contracts” has been specifically named as an example of an “unlawful DEI practice.”
  - Take care to continue to follow DBE Program requirements related to prompt payment and termination of DBE firms listed on active contracts awarded prior to October 3, 2025.
- Conduct an internal assessment of your I-9 compliance and be prepared to respond within the 72-hour timeframe.
- Reach out to third parties to perform risk assessments and offer independent review of internal policies or procedures or external contracting requirements.

## **VI. Conclusion**

Taken together, the 2025 Trump Administration actions represent a sweeping shift in federal enforcement philosophy. The government is increasingly:

- Linking civil rights compliance with fraud liability, particularly through the False Claims Act.
- Targeting DEI, DBE, and similar programs as potentially unlawful discriminatory practices.
- Reviving immigration enforcement priorities, including litigation against non-cooperative jurisdictions

Key characteristics of the Administration’s enforcement regime include:

- Strict adherence to race-neutral, merit-based legal standards.
- Use of the False Claims Act as a central enforcement tool against civil-rights violations by federal fund recipients.
- Heightened scrutiny—and likely litigation exposure—for DEI initiatives, DBE programs, and identity-based contracting preferences.
- Renewed focus on sanctuary jurisdiction litigation and aggressive enforcement of federal immigration law.

Industries dependent on federal funding—such as construction, transportation, infrastructure development, higher education, and healthcare—face new and significant compliance risks. Organizations should review internal policies, civil rights certifications, hiring and contracting practices, and federal funding assurances to avoid exposure under these enhanced enforcement regimes.