

PRACTICE AREAS

Unlawful DEI and False Claims Act Defense

Federal contractor employers will be required to certify that they do not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws. They also will be required to agree that their compliance with all applicable Federal anti-discrimination laws is material to the government's payment decisions under the False Claims Act.

Roffman Horvitz conducts privileged audits to ensure that the employer does not maintain any unlawful DEI programs per the requirements of Executive Order 14173. Below are the elements of these audits:

- In-depth review of existing policies and procedures
- Assessment of human resources (HR) practices and documentation
- Evaluation of recruitment and hiring processes, performance review/bonus criteria and advancement processes
- Review of HR reporting and employer internal workplace analytics
- Review of employee resource groups (ERGs)
- Review of contract flow-down language and self-identification forms to ensure compliance with executive orders and current federal regulations
- Statistical analysis to monitor and ensure neutrality of hires, promotions,

terminations decisions

- Review of external website information regarding inclusion and diversity
- Review of intranet and other internal communications regarding inclusion and diversity
- Review of state-required affirmative action plans (which may have requirements that are inconsistent with EO 14173)

Under the False Claims Act (FCA), the burden is on the government or the qui tam relator to prove that the employer had actual knowledge of the false claim, deliberate ignorance of the false claim, or reckless disregard of the truth or falsity of the information. Employers who conduct self-audits of their compliance with federal anti-discrimination laws are less likely to be found to have acted in deliberate ignorance or reckless disregard of federal anti-discrimination laws.

Roffman Horvitz conducts privileged self-audits for FCA compliance and defense. For nearly three decades, the attorneys at Roffman Horvitz have assisted employers in extracting, analyzing, and strategically submitting applicant and employment data for OFCCP compliance audits. That agency focused on using race and sex data to prove a pattern and practice of disparate treatment in hires, promotions, and terminations. We see significant, overlapping similarities in how the Department of Justice or a qui tam relator will try to use similar data in support of an FCA claim.