

# Insuring Equality: Three Tips for Preserving Coverage for DEI Enforcement Actions

December 17, 2025 Micah Skidmore

PRACTICES Insurance Recovery

At the beginning of this year, the Trump administration issued a series of executive orders rewriting federal policy on employment programs addressing diversity, equity and inclusion (DEI). Executive orders 14151<sup>1</sup> and 14168<sup>2</sup> targeted employment practices within the federal government itself—respectively terminating DEI programs within federal departments, agencies and commissions and directing federal agencies and employees to treat “men and women as biologically distinct sexes.” The third order, EO 14173, focuses on the employment practices of federal contractors and subcontractors.<sup>3</sup> It also instructs federal authorities to encourage the end of DEI programs in the private sector at large.

In the wake of these orders, on Feb. 5, 2025, the Justice Department directed the Civil Rights Division to “investigate, eliminate and penalize illegal DEI and DEIA preferences, mandates, policies, programs and activities in the private sector and in education institutions that receive federal funds.”<sup>4</sup> This directive also solicited proposals for criminal and compliance investigations and potential enforcement litigation in furtherance of the administration’s new policy objectives.

Since then, the Justice Department has issued numerous civil investigative demands (CIDs) over the past year to private employers, including federal contractors and grant recipients, focusing on employers’ DEI programs and practices.<sup>5</sup> The CIDs have been issued pursuant to a Civil Fraud Initiative announced in May.<sup>6</sup> Notably, the Justice Department has framed its DEI investigations under the False Claims Act (FCA). Specifically, pursuant to EO 14173, federal agencies have required recipients of federal funds to certify that they do not “operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws,” and presumably FCA enforcement actions will address the veracity of such certifications for employers, who maintain DEI programs.<sup>7</sup>

The legality of the Trump administration’s executive orders and the Justice Department’s DEI-focused Civil Fraud Initiative are still to be determined.<sup>8</sup> Meanwhile, the Justice Department’s CIDs, the Civil Fraud Initiative, with its focus on the FCA, and the uncertain legal environment have created risk and potential liability for private employers, who are the recipients of federal funds. With this novel risk, such employers must consider how their existing third-party insurance coverage will measure up in protecting against the cost of defending against CIDs and the potential FCA exposure claimed by the Justice Department. In this critical risk management exercise, here are three key considerations for insureds seeking to maximize coverage for this emerging liability threat.

- **Do “Employment Practices Wrongful Acts” Embrace DEI Activity & FCA Claims?** Most corporate policyholders have some form of employment practices liability coverage, either as a standalone policy or combined with the insured’s directors and officers, management liability or similar package liability policy. Generally, employment practices liability coverage provides indemnification for loss on account of a claim first made during the policy period for an

employment practices wrongful act. An employment practices wrongful act will typically include a range of conduct committed against employees or third parties, including, for example, the breach of an employment contract, discrimination, harassment, retaliation, workplace torts, termination, invasion of privacy, wrongful discipline, wrongful deprivation of career opportunity, negligent hiring, retention or supervision, or other wrongful employment decisions. However, does the conduct targeted by the Justice Department's Civil Fraud Initiative fit within the traditional elements of an employment practice's wrongful act? Ostensibly, explicit factual allegations of reverse discrimination would qualify as a wrongful act triggering coverage. To the extent that a CID alleges a false certification under EO 14173, such an assertion would also constitute an employment-related misrepresentation, which is also commonly included—though not always—in the definitions of employment practices wrongful acts. However, allegations that only obliquely reference programs, such as internships, mentoring, hiring and training initiatives, or fellowships, benefiting underrepresented groups, for example, without actually asserting reverse discrimination as a factual matter, create a potential ambiguity when applied to a definition of employment practices wrongful acts that simply references “discrimination.” While such ambiguities must be construed in favor of coverage, corporate policyholders and insurers should consider whether clarifying terms should be added to the definition of employment practices wrongful acts to ensure that the specific risk of DEI investigations and related FCA claims are included in the coverage extended to federally funded insureds. Likewise, at a minimum, risk managers should ensure that the definition of employment practices wrongful acts includes employment related misrepresentations.

- **Does Your D&O Policy Include Coverage for False Claims Act Risk?** Because the exposure created by the administration's executive orders and the Justice Department's Civil Fraud Initiative are couched in terms of violations of the FCA, insureds, who may have otherwise disregarded or downplayed liability coverage for FCA claims, must consider whether directors and officers coverage (D&O) or other liability coverage can protect against this emerging exposure. Specifically, while entity coverage for public companies is typically limited to “securities claims,” private entities may have liability coverage under a D&O policy for a broad range of claims and wrongful acts. Nonetheless, many D&O policies may define “loss” to exclude exemplary or multiplied damages as well as civil fines and penalties imposed by law, with the possible exception of penalties assessed under the Foreign Corrupt Practices Act. Corporate policyholders with potential exposure to DEI-related claims should consider whether changes should be made to the definition of “loss” in potentially applicable D&O or management liability coverage to allow for indemnification of FCA-related liability and damages. Traditional private company D&O policies may also expressly exclude claims alleging violations of the FCA, along with other federal, state and local statutes. These same D&O policies may include exclusions for employment practices and employment-related wrongful acts applicable to Coverage C for entity liability. In the current regulatory environment, risk managers and in-house counsel should review and carefully evaluate whether changes to such default exclusions and other terms are appropriate to address the potential risk associated with DEI-related CIDs and FCA claims made pursuant to the Justice Department's Civil Fraud Initiative. At a minimum, the definition of “employment practices” or “employment wrongful acts” that are excluded under a D&O or management liability policy should not be broader than the definition of covered “employment practices wrongful acts” covered under an Employment Practices Liability Insurance (EPLI) policy, as outlined above, in order to avoid a potentially significant gap in insurance coverage.
- **Does My D&O/EPLI Policy's Fraud/Illegal Profit Exclusion Have Appropriate Final Adjudication Language?** D&O and EPLI policies commonly include exclusions for (1) claims

arising out of any deliberately fraudulent or deliberately criminal act or omission committed by the insured and (2) claims arising out of an insured gaining any profit, remuneration or financial advantage to which such insured was not legally entitled. Although liability under the FCA can be sustained on the basis of reckless conduct, falling short of a knowing, willful violation, a CID investigating and alleging a false certification under EO 14173 and liability under the FCA against a federally funded employer may, all other things being equal, prompt an insurer to invoke either or both of the above-referenced exclusions. Typically, such exclusions have and should have exceptions providing that coverage is only excluded once there is a final adjudication in the underlying claim establishing the excluded conduct against the insured. Policies may also include similar terms stating that such exclusions do not apply to an insurer's duty to defend underlying claims. Either way, corporate insureds facing the risk of investigation or claims for FCA liability under the Justice Department's Civil Fraud Initiative should ensure that fraud and illegal profit exclusions are appropriately limited and include "final adjudication" language to allow for the defense of a potential CID or other claim arising from DEI activity.

There may be any number of other terms and issues that corporate policyholders may also want to consider in evaluating coverage for the risks associated with DEI activity in the current regulatory environment. Given the ongoing issuance of CIDs, risk managers and counsel should ensure that "claims" triggering coverage include subpoenas and related demands for investigations against, not only individuals, but corporate parents and subsidiaries as well. Because EPLI and D&O coverages are typically written on a claims-made basis, notice should be promptly given as soon as a CID or subpoena has been received. The point is that DEI-related exposure is an emerging issue, and in order to appropriately protect against this new liability threat, corporate EPLI and D&O coverages should be reviewed and, where appropriate, adapted to meet this new risk.

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<sup>1</sup> "Ending Radical and Wasteful Government DEI Programs and Preferencing," *available at* <https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/>

<sup>2</sup> "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," *available at* <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>

<sup>3</sup> "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," *available at* <https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity>

<sup>4</sup> Memorandum re: "Ending Illegal DEI and DEIA Discrimination and Preferences," *available at* <https://www.justice.gov/ag/media/1388501/dl?inline>

<sup>5</sup> Joanna Colosimo, DOJ's DEI Investigations Are Here—Here's What Employers Should Know (JD Supra Sept. 17, 2025), *available at* <https://www.jdsupra.com/legalnews/doj-s-dei-investigations-are-here-here-7318482/>.

<sup>6</sup> U.S. Dep't of Justice, Justice Department Establishes Civil Rights Fraud Initiative (May 19, 2025), *available at* <https://www.justice.gov/opa/pr/justice-department-establishes-civil-rights-fraud-initiative>.

<sup>7</sup> Carolyn Small, Betsy Henthorne, and Rebekah Lee, *Defending DEI programs against DOJ's civil rights fraud initiative*, Reuters (Aug. 18, 2025), available at <https://www.reuters.com/legal/litigation/defending-dei-programs-against-dojs-civil-rights-fraud-initiative-2025-08-18/>.

<sup>8</sup> See generally *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 781 F. Supp. 3d 380 (D. Md. 2025).