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Employee Benefit Plan Review

Deloitte Settles DEI-Related Claims for $21.5 Million: How to Protect Your Business From Similar Risks

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Deloitte is the latest major federal contractor to enter a multi-million-dollar settlement with the Department of Justice (DOJ) over allegedly unlawful DEI practices. The False Claims Act allegations stem from Deloitte's efforts to elevate minority groups in hiring, leadership, and educational programs. The $21.5 million settlement is part of the Trump administration's Civil Rights Fraud Initiative, which has focused on what the administration calls illegal and discriminatory diversity, equity, and inclusion (DEI) programs within the federal government. Deloitte's settlement resolves DOJ allegations that it falsely certified compliance with federal contractor equal employment opportunity (EEO) requirements while using race- and sex-based employment practices. It also provides a cautionary tale for other employers looking to avoid similar risks. This article explains everything you need to know about the settlement and key takeaways for your business.

What Happened?

The DOJ recently announced that it had reached a settlement[1] with Deloitte and several affiliates to resolve allegations it violated the False Claims Act through its employment programs and policies directed towards "underrepresented minorities." Importantly, the case was a result of a whistleblower qui tam claim filed by the American Alliance for Equal Rights, so the whistleblower (or relator) will receive $4.3 million of the settlement. No determination of liability was made.

Federal contractors are typically required to certify that they will provide equal employment opportunities and make employment decisions without regard to race or sex. According to the DOJ's investigation, however, Deloitte allegedly made race- and sex-conscious decisions in hiring, promotion, staffing, compensation-related evaluations, and access to development programs. The government argued that, as a result, Deloitte's equal opportunity certifications in its federal contracts were fraudulent in violation of the False Claims Act because they favored employees based on their race or sex.

Important Reminder

Be aware of the federal and state anti-discrimination laws that apply to your business. Federal contractors, and covered employers in general, are prohibited from taking race, gender, color, national origin, and other protected characteristics into account when making employment decisions.

4 Key Lessons From the Settlement

The DOJ identified several alleged practices that employers – particularly federal contractors – should consider carefully in the wake of the settlement. These include those discussed below.

1. Workforce-Composition Goals Tracked by Business Unit

Deloitte allegedly tracked each business unit's progress toward non-public demographic workforce goals through monthly reports using green, yellow, and red indicators. DOJ alleged that Partners, Principals, and Managing Directors were evaluated partly on contributions toward workforce-composition goals and that 150 of Deloitte's most senior leaders' compensation could be impacted if their business units did not meet the demographic goals.

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Lesson

Demographic data analysis is not off limits, but it should not become a performance mandate or hard rule that influences individual employment decisions. Tying performance assessments, bonuses, incentive compensation, or promotions to certain demographic goals can increase your liability if protected characteristics affected decision-making.

2. Promotion-Class Demographic Targets

DOJ alleged that business units had racial and sex-composition goals for annual promotion classes and that candidate lists identified race and sex, including a suggestion to promote employees to "equitably maintain the current mix."

Lesson

Promotion processes should be grounded in documented, job-related criteria and individualized assessments, not diversity goals.

3. Staffing and Utilization Practices

DOJ alleged that Deloitte identified employees available for project assignments by race and sex and suggested managers consider staff whose placement would advance parity goals.

Lesson

Staffing, utilization, project-assignment, and client-opportunity decisions are employment decisions. Employers shouldn't use demographic characteristics as a factor when making these choices.

4. Race- or Sex-Limited Development Programs

DOJ alleged that certain Deloitte training, mentoring, leadership-development, educational, sponsorship, and networking programs were limited by race or sex.

Lesson

Restricting eligibility for career-enhancing opportunities based on protected characteristics is a major litigation risk, especially when the programs can offer sponsorship, visibility, and promotion opportunities, or access to leadership.

What This Means for Your Business

While the settlement and recent DOJ actions have focused on companies that contract with the federal government, there are key takeaways for both contractors and private employers. The Equal Employment Opportunity Commission (EEOC) issued guidance last year[2] for all employers warning that DEI practices may be unlawful under Title VII of the Civil Rights Act if they involve "an employment action motivated – in whole or in part – by an employee's race, sex, or another protected characteristic."

And there are signs that the DOJ's Civil Rights Fraud Initiative is gaining steam. Deloitte is not the first large federal contractor to have settled with the government over such False Claims Act allegations. IBM and other companies have entered into similar multi-million-dollar agreements with the DOJ over similar practices.

The DOJ's position is that federal contractors may not "circumvent" equal-employment commitments through demographic goals or programs that allocate opportunities based on protected characteristics. Implementing or maintaining such goals or programs can result in the DOJ finding that you've falsified your agreement to promote equal employment opportunity under the False Claims Act, which can lead to steep damages and penalties, as well as risk to your federal contractor status.

4 Quick Action Steps for Employers

- *Audit Programs and Decision Metrics*

  Conduct an attorney-client privileged breakdown of every program, metric, or policy that references race, sex, gender, ethnicity, underrepresented groups, demographic representation, or other similar factors. The review should go beyond just hiring and staffing policies to cover all aspects of the employee's career with the company, such as:

  - Succession planning;
  - Performance-management systems;

- Compensation, bonus, and incentive plans;
- Mentorship, sponsorship, leadership, fellowship, and training programs;
- Employee resource group activities and related benefits; and
- Vendor, fellowship, scholarship, and internship programs where employment-related opportunities are involved.

Programs that offer mentoring, leadership development, networking access, specialized training, educational resources, or high-visibility assignments may materially affect career outcomes. As alleged in the Deloitte matter, limiting these opportunities by race or sex could invite legal scrutiny.

- *Consider Other Metrics When Selecting Candidates for Programs, Promotions, or Other Career-Building Opportunities*

The increased attention on these programs from the federal government doesn't mean employers should abandon lawful efforts to build inclusive workplaces. You should evaluate whether opportunities can be made broadly available or based on neutral, documented criteria, such as tenure, performance, business need, geography, demonstrated interest, or other objective considerations. Outreach can remain inclusive and intentional without reserving the opportunity or benefit for certain protected groups.

- *Know What Your Contractual Obligations Explicitly Require*

Federal contractors should audit their internal process for reviewing and approving required EEO certifications for all federal agreements, including subcontracts and grants.

Organizations should be able to answer, with supportable documentation:

- What EEO or nondiscrimination commitments apply to this contract?
- Who makes or approves related certifications?
- What controls support the accuracy of those certifications?

- *Consult Your Attorney*

Experienced legal counsel can help you review and potentially revise your employment, contracting, and related materials, policies, and procedures. You may also want to work with counsel to determine best practices for documenting and showing compliance.

Notes

1. https://www.justice.gov/opa/pr/deloitte-agrees-pay-215m-resolve-alleged-employment-discrimination-violations.
2. https://content.govdelivery.com/accounts/USEEOC/bulletins/3d7be2f.

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