

**ALERT**

# DOJ Clarifies Administration's Stance on What Constitutes "Illegal DEI"

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On July 29, 2025, the U.S. Department of Justice (DOJ) released a memorandum titled "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" (the Memorandum) that provides clarity on what the Administration will view as "illegal DEI" and how enforcement actions under the False Claims Act; Title VI and Title VII of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution might proceed. The Memorandum provides a non-exhaustive list of policies and practices, including diversity, equity, and inclusion (DEI) policies, that DOJ considers illegal or legally risky and offers several best practices and examples to minimize risk. Much of the Memorandum repeats well-settled legal principles related to federal anti-discrimination laws and the March 2025 guidance jointly issued by the U.S. Equal Employment Opportunity Commission (EEOC) and DOJ, titled "What to Do If You Experience Discrimination Related to DEI at Work." However, there is also a significant amount of new information in the Memorandum with wide-ranging implications for recipients of federal funds and all private-sector employers.

## Background

In January, President Trump issued Executive Order 14173 (EO 14173), titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." As we discussed when the EO was issued and following DOJ's creation of the Civil Rights Fraud Initiative to utilize the False Claims Act to enforce the EO, the EO created significant new potential legal risks for federal government contractors, federal grantees, and private employers concerning the Administration's efforts to eradicate "illegal DEI," but the EO did not provide a clear

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explanation of what the Administration believed might constitute "illegal DEI" under existing federal law.

In March, the EEOC and DOJ jointly issued guidance (the March Memorandum) on DEI-related discrimination at work, primarily addressing Title VII and offering some clarity regarding permissible workplace practices but leaving certain areas – such as the legality of specific DEI trainings and recruitment methods – uncertain. Notably, it did not address the application of Title IX or Title VI, nor did it provide guidance on reconciling potentially conflicting state affirmative action and equal employment opportunity laws, such as those mandating supplier diversity for state contractors and licensees.

## **What the Memorandum Says**

The DOJ Memorandum focuses on four categories with several subcategories of DEI-related practices that could lead to liability and the revocation of federal funding and offers nine best practices concerning numerous DEI-related workplace, hiring and recruitment, and programmatic issues. Although the Memorandum focuses on potential legal issues for recipients of federal funds, it may also serve as a roadmap for how the Administration might interact with private entities because the guidance reflects DOJ's interpretation of federal anti-discrimination and civil rights laws that apply to non-recipients of federal funds and specifically addresses workplace, hiring, and recruitment issues that are universal.

Below we provide our analysis and key takeaways concerning each category and relevant subcategory within the Memorandum.

### **Preferential Treatment Based on Protected Characteristics**

The Memorandum states that "[p]referential treatment occurs when a federally funded entity provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons." The Memorandum specifically focuses on:

*Protected Characteristic-Based Scholarships and Programs.* Groups, clubs, or programs that require participants to be members of a specific protected class to participate, such as scholarships, fellowships, or leadership initiatives maintained by colleges, universities, and employers, will be under increased scrutiny. The government's focus on programs that could be construed as offering beneficial opportunities to specific groups based on their protected characteristics could also alter how companies operate supplier diversity programs that require membership in a specific protected class to participate.

*Resource Allocation Based on Protected Characteristics.* Entities that restrict or provide access to facilities or resources based on protected traits will also face potential liability. One notable potential expansion of the general understanding of federal anti-discrimination law is DOJ's position that practices or policies that "facially discourag[e]" access by potential users outside of a given protected group are unlawful. That interpretation likely means, for example, that a university's decision to create a "safe space" or lounge intended solely for students from specific racial or ethnic backgrounds, such as a room reserved for BIPOC students, could be considered unlawful. The legal implications also extend to the use of workplace facilities by employee resource groups, suggesting that granting one group an opportunity to utilize company resources or

spaces and denying another group the opportunity under similar circumstances could be deemed unlawful.

### **Use of Proxies for Protected Characteristics**

Unlawful proxies occur when an entity intentionally uses ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics. Federal anti-discrimination and civil rights laws have always prohibited the use of proxies to obscure the fact that an entity engaged in unlawful discrimination based on protected characteristics. DOJ's examples in the Memorandum, however, appear to expand the universe of potential adverse actions that could lead to liability.

According to the Memorandum, it could be "legally problematic" for an entity to select facially neutral criteria in instances where they were "selected because they correlate with, replicate, or are used as substitutes for protected characteristics" or "are implemented with the intent to advantage or disadvantage individuals based on protected characteristics." Examples include:

*Geographic and Institutional Targeting.* Employers and educational institutions have traditionally worked to increase recruiting pipelines and to recruit as widely as possible, with the understanding that efforts at certain institutions or in specific regions could identify qualified minority and female candidates. Such practices will require close review going forward, as DOJ will carefully scrutinize the use of "recruitment strategies targeting specific geographic areas, institutions, or organizations ... primarily because of their racial or ethnic composition rather than other legitimate factors."

Under DOJ's interpretation of the law, what was once a standard practice could create liability for entities if they do not contemporaneously memorialize a legitimate, nondiscriminatory purpose for engaging in certain recruitment activities. This creates significant implications for regional recruitment, on-campus recruitment efforts at educational institutions with large minority populations or that have historically served minority populations, and academic or career fairs that focus on creating opportunities for entities to meet minority and women candidates. Typically, entities would face potential liability if their decision to select or not select a candidate was based on protected characteristics. Under DOJ's interpretation of the law, entities could be liable for discrimination based on their decision to recruit from a specific source of candidates as well.

*Cultural Competence Requirements, "Overcoming Obstacles" Narratives, and "Diversity Statements."* The Memorandum also cautions against use of cultural competency requirements as proxies for race (e.g., asking applicants to demonstrate "cultural competence," "lived experience," or "cross-cultural skills" or to write statements explaining their diversity or "obstacles they have overcome") that effectively solicit candidates' protected characteristics and facilitate evaluation based on those characteristics rather than "objective qualifications."

### **Segregation Based on Protected Characteristics**

*Segregated Training, Facility Use, or Programs.* DOJ asserts that entities that separate or deny participation or access to training, facilities, or programs based on protected traits are unlawful. The Memorandum confirms the position in the March Memorandum that the EEOC and DOJ would view the act of restricting access to a

training or exclusively presenting a training to a particular group and excluding other groups based on their protected traits as unlawful, even if all groups ultimately receive the same benefits.

DOJ's examples of potentially unlawful segregation include restrictions on the use of facilities or participation in programs that are based on protected traits or that "facially discourage" access based on protected traits. DOJ's emphasis on "facially discouraging" access appears to be an expansion of existing legal interpretations concerning what might constitute and adverse action under federal anti-discrimination statutes. Program eligibility restrictions based on protected characteristics (e.g., a federally funded community group's DEI workshop that limits participation to specific races or sexes) are also unlawful. These principles are likely to be applied to private entities that are subject to federal anti-discrimination and civil rights laws, which could implicate private employer programs like supplier diversity programs that actually or facially restrict access based on protected characteristics.

#### **Use of Protected Characteristics in Candidate Selection**

*Protected Trait-Based Contract Selection.* The federal statutes cited in the Memorandum do not prohibit selection of an entity to perform a contract based on sex. Section 1981 of the Civil Rights Act of 1866, which is not cited in the Memorandum, prohibits racial discrimination in the making and enforcing of contracts but does not prohibit discrimination based on sex. However, DOJ specifically highlights, as an example of practices it interprets as unlawful, contract selection based on sex – which appears to suggest that the Administration intends to interpret other federal laws (and potentially the Equal Protection Clause of the Fourteenth Amendment) in a way that would prohibit such conduct. In addition to suggesting that the Administration may seek to apply existing laws in novel ways, the focus on sex- and race-based selection for contracts could create potential conflicts between compliance with federal law and compliance with supplier diversity programs or affirmative action requirements that are mandated by state law for entities that contract with certain states.

*Diverse Slate/Preferential Placement Selection Policies.* Entities that employ a diverse slate or preferential placement selection policy typically set a benchmark for underrepresented minorities' selection for interview for a given opportunity or make other efforts to ensure or prioritize minority representation in a candidate pool (such as requiring that some percentage of the selected candidates be from an underrepresented group). Preferential placement policies that set specific targets for minority candidates' selection for a position have always been unlawful based on federal law; however, the Memorandum's focus on diverse slate policies that create *interview* benchmarks is novel. Traditionally, the practice or policy of attempting to ensure minority representation on an interview panel or in a candidate pool has been viewed as low-risk so long as the entity in control of the process does not reach an ultimate decision because of a candidate's protected characteristics. The Memorandum makes clear, however, that DOJ views any use of diverse slates as a potential civil rights violation – even if the use of protected characteristics to identify potential qualified candidates is strictly confined to ensuring that qualified minority candidates are identified and interviewed – because of the advantage it gives to the minority group and the disadvantage to those outside it.

### **Training Programs That Promote Discrimination or Hostile Environments**

*Exclusionary, Punitive, or Stereotypical DEI Training.* DOJ considers DEI trainings that exclude individuals based on protected characteristics or include language, content, or practices that necessarily exclude, penalize, or stereotype people based on their protected class (e.g., terms like "toxic masculinity" or concepts asserting that "all White people are inherently privileged") to be unlawful. Importantly, the training itself, as well as penalties imposed against individuals who oppose a training, could create a basis for a hostile work environment claim or other discrimination and retaliation claims.

### **DOJ's Recommended Best Practices**

At the close of the Memorandum, DOJ also presents nine "recommendations on best practices." Many of the best practices reinforce earlier elements of the guidance – e.g., avoiding exclusionary training programs and ensuring inclusive access to all workplace programs, activities, and resources. Other best practices supplement the earlier guidance and include incorporating explicit nondiscrimination clauses in all third-party agreements, monitoring third-party compliance with federal anti-discrimination law, and establishing clear anti-retaliation procedures and safe reporting mechanisms for individuals who raise concerns about potentially discriminatory programs.

### **Conclusion**

All entities subject to federal anti-discrimination laws should engage in a privileged assessment of their current affirmative action and DEI-related programs, policies, and obligations (including obligations under state or international law that could potentially conflict with federal law) to ensure compliance with federal anti-discrimination laws, to limit their potential exposure to costly investigations and litigation, and to ensure a clear plan for how to proceed concerning DEI-related matters while maintaining their legitimate, non-discriminatory practices and goals. Importantly, the Memorandum highlights several novel issues that may warrant revisiting previous program, practice, or policy audits to ensure compliance with the most up-to-date understanding of how the Administration intends to advance its agenda concerning "illegal DEI."

Wiley has a team of skilled practitioners with knowledge and experience in relevant areas (including Employment & Labor, Litigation, Government Contracts, and White Collar Defense & Government Investigations) to help clients navigate changes to DEI and related federal policies. Please contact our DEI Counseling and Support Team with questions about the lawfulness of existing DEI-related programs, policies, or practices, or if you need assistance with civil compliance investigations, litigation defense, or other matters arising from these EOs.

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