

EEOC and DOJ Issue Guidance on “Unlawful DEI-Related Discrimination” under Title VII

On March 19, 2025, the U.S. Equal Employment Opportunity Commission (“EEOC”) and the U.S. Department of Justice (“DOJ”) released guidance documents warning that employers’ Diversity, Equity, and Inclusion (“DEI”) policies, programs, and practices can violate Title VII of the Civil Rights Act of 1964 (“Title VII”).

Both documents (together, “guidance”) are non-binding¹ technical assistance documents that the authors assert is based on Title VII, Supreme Court precedent, and prior EEOC guidance documents. The first, titled [“What To Do If You Experience Discrimination Related to DEI at Work,”](#) is a one-page summary issued jointly by the DOJ and EEOC that describes types of “DEI-related discrimination,” who is covered under Title VII, and what to do if a person experiences discrimination at work. The second, issued solely by the EEOC and titled [“What You Should Know About DEI-Related Discrimination at Work,”](#) describes in greater detail the circumstances under which an employee may raise a DEI-based Title VII discrimination claim.

While “DEI” is a “broad term” that is “not defined in Title VII,” the joint guidance cautions that DEI-related employment actions may be unlawful if “motivated” by an employee’s or job applicant’s “race, sex, or another protected characteristic.” (The guidance does not reference “protected characteristics” other than race, sex, religion, and national origin.) Consistent with Title VII and prior EEOC guidance, an employer is still liable for unlawful discrimination even if a “protected characteristic was just one factor among other factors contributing to the employer’s decision or action.”

The guidance states that certain practices or programs which have not been previously considered problematic are illegal. In addition to using quotas or otherwise “balancing a workforce by race, sex or other protected traits,” the EEOC and DOJ also consider the following “DEI-related” policies, programs, or practices to be unlawful:

1. Disparate Treatment

“Disparate treatment” refers to discrimination against applicants or employees in hiring, firing, compensation, or any term, condition, or privilege of employment. The EEOC guidance provides examples of unlawful disparate treatment, which can include:

- Selection of diverse interview slates: An employer cannot use race or other protected characteristics as a “screening criterion” when creating a candidate pool for interviews. The EEOC also cautions employers about the use of “pre-employment questions” about protected characteristics as these questions “can suggest that [protected characteristics] will be used as a basis for making selection decisions.” Such inquiries “can constitute evidence of discrimination” if the information is used to screen candidates and if members of protected groups are excluded.
- Access to or exclusion from training (including “leadership development programs”): Prior EEOC guidance has stated that opportunities to receive training, leadership development, or job advancement are “term[s], condition[s], or privileges of employment” under Title VII. The EEOC reiterates that it is unlawful for an employer to make opportunities for training and development available only to certain protected groups.

¹ The Administrative Procedure Act (“APA”) establishes procedures for the issuance of rules and regulations, which generally include a notice-and-comment period prior to the publication of a final rule. See [5 U.S.C. § 553](#).

- Access to mentoring, sponsorship, or workplace networking/networks: Similarly, an employer may not provide or limit access to “work assignments, performance measurements, pay, training, mentoring or networking” based on a protected characteristic.
- Internships (including internships labeled as “fellowships” or “summer associate” programs): According to the guidance, “volunteers” and “unpaid interns” are also covered “if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity.”

2. Limiting, Segregating, and Classifying

The guidance prohibits employers from “limiting, segregating, or classifying employees or applicants based on . . . protected characteristics.” In the DEI context, this can arise when employers use protected characteristics to “separate workers into groups” to administer “DEI or any trainings, workplace programming, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources.”

The EEOC clarified that this prohibition applies to “employer-sponsored” activities that “mak[e] available company time, facilities, or premises.” This interpretation raises the specter of conflicts with state and/or local laws that require employers to provide time and/or spaces at work for certain activities engaged in by members of a protected group. For example, New York state law requires employers to provide to employees a paid break and a non-bathroom place to express breast milk.² Employers might find themselves in a bind between complying with state law and avoiding “unlawful segregation” on the basis of sex or other protected characteristics.

The guidance also states that it is unlawful to limit “membership in workplace groups” such as Employee Resource Groups or other affinity groups, which typically provide professional training, networking, and mentoring opportunities to certain protected groups. The EEOC therefore recommends that employers provide workers “of all backgrounds . . . equal access” to workplace networks, training, and mentoring opportunities.

3. Harassment

The guidance states that DEI-related training, “such as unconscious bias training,” can constitute unlawful harassment in violation of Title VII if an employee is subjected to “unwelcome remarks or conduct” based on protected characteristics. The EEOC cautions that DEI training can give rise to a hostile work environment claim if an employee can show that the training was discriminatory in “content, application, or context.”³

4. Retaliation

The EEOC reminds workers and employers that Title VII prohibits retaliation by an employer because an individual has engaged in protected activity, such as opposing and reporting discriminatory conduct. The guidance makes clear that “reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.”

² See N.Y. Lab. Law § 206-c.

³ To support this view, the EEOC cites an amicus brief it filed in the Seventh Circuit this past February. [Brief of the Equal Employment Opportunity Commission As Amicus Curiae in Support of Neither Party, Vavra v. Honeywell International, Inc.](#), No. 23-2823 (7th Cir. Feb. 6, 2024) at 21. While the brief stated that “anti-discrimination trainings are not inherently discriminatory,” *id.* at 13, it provided examples of discriminatory training. For example, one court found a “cultural diversity” workshop requiring participation in a “role-reversal exercise” that let women touch parts of plaintiff’s (a man) body to be discriminatory. *Id.* at 21. Another court found trainings addressing racial issues, which consistently and categorically disparaged White people, created a hostile work environment. *Id.* at 22.

Exceptions and Other Nuances

The guidance recognizes that Title VII permits some employment decisions made based on protected characteristics in “very limited circumstances.” Employers may justify hiring or classifying workers based on “religion, sex, or national origin” when one of these protected characteristics is a bona fide occupational qualification “reasonably necessary to the normal operation of that particular business or enterprise.”

The guidance, however, cautions that employers may not “justify taking an employment action based on race, sex, or another protected characteristic because the employer has a business necessity or interest in ‘diversity.’” Citing Title VII, prior EEOC guidance, and Supreme Court precedent, the guidance elaborates that “business interests in diversity and equity (including perceived operational benefits or customer/client preference)” do not constitute a valid exception to Title VII’s protections and that such interests have never “been found by the Supreme Court or the EEOC to be sufficient to allow race-motivated employment actions.”

The guidance does not discourage all DEI-related initiatives in the workplace. In a footnote, the guidance provides that “Title VII permits diversity efforts designed to open up opportunities to everyone,” “promote an inclusive workplace,” and “create a culture of respect for individual differences.” The EEOC and DOJ advise that “very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law.”

Key Takeaways

While the guidance illustrates many examples of unlawful “DEI-related discrimination,” it also clarifies that not all forms of DEI are prohibited under Title VII. Employers should conduct a privileged and ongoing review of their DEI and employment policies and practices to ensure that opportunities in hiring, promotion, training, mentorship, advancement, affinity groups, and other “privileges of employment” are open to every person and not limited to certain protected groups.

The EEOC also states that the so-called “DEI-related discrimination” has always been prohibited by federal law under Title VII, EEOC guidance and rules, and Supreme Court precedent. Employers, however, may find themselves in a catch-22 whereby they could face enforcement and litigation risks under state or local law requiring them to provide time, space, and/or other resources only to workers of certain protected characteristics (e.g., lactation break and room).

In addition, we previously covered a recent federal court’s decision holding that [Title IX](#) does not protect discrimination on the basis of gender identity or sexual orientation and an [Executive Order](#) that declares that “sex” does not include “gender identity” in the view of the federal government. It remains to be seen how these developments will impact the enforcement of Title VII in the context of discrimination based on gender identity and sexual orientation, which are currently protected characteristics under Title VII, according to the Supreme Court in *Bostock v. Clayton County*, 590 U.S. 644 (2020).⁴

Please contact us for further guidance on these developing issues.

⁴ The EEOC [previously recognized](#) gender identity and sexual orientation as protected characteristics. But the agency has signaled a marked departure from the previous administration on this topic. See EEOC Press Release, “[Removing Gender Ideology and Restoring the EEOC’s Role of Protecting Women in the Workplace](#),” (Jan. 28, 2025).

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

<u>Lisa E. Cleary</u>	212.336.2159	<u>lecleary@pbwt.com</u>
<u>Jacqueline L. Bonneau</u>	212.336.2564	<u>jbonneau@pbwt.com</u>
<u>Catherine J. Djang</u>	212.336.2817	<u>cdjang@pbwt.com</u>
<u>Charles Tso</u>	212.336.2321	<u>ctso@pbwt.com</u>

To subscribe to any of our publications, call us at 212.336.2000, email mktg@pbwt.com or sign up on our website, <https://www.pbwt.com/subscribe/>.

This publication may constitute attorney advertising in some jurisdictions.
© 2025 Patterson Belknap Webb & Tyler LLP

Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036-6710
212.336.2000
www.pbwt.com