Patterson Belknap

Employment Law Alert
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U.S. Attorney General Issues New Guidance on DEI Programs and Policies

On July 29, 2025, the U.S. Attorney General issued a memorandum that "clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) programs."

The memorandum, titled "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination," outlines a non-exhaustive list of DEI policies and practices that the U.S. Department of Justice ("DOJ") deems unlawful. It applies to all recipients of federal funding, including non-profits, philanthropies, and higher education institutions, offers nonbinding "best practices" for complying with federal anti-discrimination laws, and warns that non-compliance could lead to not only revocation of federal funding, but also federal enforcement actions. It also reflects the administration's broader goal of eliminating DEI efforts in the private sector. The memorandum does not carry the force and effect of law but instead represents the DOJ's current interpretation of these matters.

Key Takeaways

- The memorandum states that:
    - Federal scrutiny and enforcement efforts will focus on compliance with Title VI and Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.
    - It is unlawful to give "preferential treatment" to individuals or groups based on protected characteristics. This includes the use of facially neutral "proxies" to achieve that end. Instead, employers and federal fund recipients must use merit- or skill-based criteria in hiring and all federally funded endeavors.
    - Federal fund recipients may face liability risks if they provide federal funds to third parties that have programs or policies that unlawfully discriminate.
    - Programs, activities, or spaces that segregate people or restrict access based on protected traits are also prohibited. Failure to maintain sex-separated athletic contests and intimate spaces, such as bathrooms or locker rooms, can also be illegal.
- Federal fund recipients and employers may want to review and, if necessary, update their DEI, employment, or admissions policies to ensure that they are applied equally to all qualified candidates and that opportunities in admissions, hiring, promotion, training, and mentorship are open to all individuals without consideration of any protected characteristics.
- The guidance raises the specter of conflicts with state and/or local laws that prohibit discrimination based on gender identity or require employers to provide resources or spaces at work for certain activities engaged in by members of a protected group, as we noted in previous client alerts on the President's Executive Orders and agency guidance on DEI-related discrimination.

Background

Shortly after his second inauguration, President Trump signed a series of executive orders to end DEI policies and programs within the federal government and direct agencies to use their enforcement authority to encourage federal contractors and grantees to follow suit.

In February 2025, Attorney General Pam Bondi issued an internal memorandum directing DOJ's Civil Rights Division to "investigate, eliminate, and penalize illegal DEI" practices in the private sector and in educational institutions.

In March 2025, the EEOC and DOJ released guidance documents warning that employers' DEI policies, programs, and practices may be unlawful under Title VII if they are "motivated" by an employee's or job applicant's "race, sex, or another protected characteristic." That same month, the U.S. Department of Education ("ED") opened investigations into 45 universities, based on allegations that these institutions violated Title VI by partnering with an organization that provides doctoral students with networking opportunities and insights but limits eligibility based on race.

In May, DOJ issued a memorandum stating that it will use the False Claims Act ("FCA") to investigate and pursue claims against recipients of federal funds who "knowingly violate civil rights laws." That memorandum referenced Executive Order 14173, which requires federal contractors and grantees to certify compliance with federal nondiscrimination laws. In the same month, the Trump Administration opened an FCA investigation into Harvard University's admissions process, alleging the university had defrauded the federal government by failing to comply with the Supreme Court's 2023 decision to curtail the consideration of race in college admissions.[1]

On July 28, 2025, the Department of Health and Human Services and ED initiated an investigation into Duke University, alleging that the university "illegally gives preferential treatment to law journal and medical school applicants" based on protected characteristics.

Now, consistent with the Executive Orders, the Attorney General has issued guidance on what activities DOJ believes constitute illegal DEI practices and offered recommendations to help recipients of federal funds and private employers regarding the same.

DEI Policies and Practices that DOJ Deems Unlawful

The memorandum outlines a "non-exhaustive list of unlawful practices that could result in revocation of federal funding" in five categories as follows:

1. Preferential Treatment Based on Protected Characteristics

    - It is unlawful for an employer or a federally funded recipient to provide "opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons." The memorandum notes that "very narrow exceptions" exist but does not provide any additional details.

    - Examples:

        - Race-exclusive scholarships, internships, fellowships, or mentorship programs;

        - Hiring or promotion practices that prioritize candidates from "underrepresented groups" based on a protected characteristic; and

        - Access to facilities or resources based on race or ethnicity.

[1] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA v. Harvard*").

2. Use of Proxies for Protected Characteristics

    - It is unlawful to use "proxies"—i.e., intentionally use "ostensibly neutral criteria that function as substitutes for explicit consideration of . . . protected characteristics."

    - Examples of potentially unlawful proxies:

        - "Cultural competence" or "lived experiences" requirements that effectively evaluate the candidate's racial or ethnic background rather than objective qualifications;

        - Recruitment strategies targeting specific geographic areas or institutions "primarily because of their racial or ethnic composition"; and

        - Diversity or "overcoming obstacles" statements that would "advantage[] those who discuss experiences intrinsically tied to protected characteristics."

3. Segregation Based on Protected Characteristics

    - The memorandum finds it "generally impermissible" when programs, activities, or resources "separate[] or restrict[] access based on race, sex, or other protected characteristics" but notes that "narrow exceptions" exist. The memorandum, however, emphasizes that "failing to maintain sex-separated athletic competitions" and "intimate spaces" such as "bathrooms, showers, locker rooms, or dormitories," can also violate federal law.

    - Examples:

        - Race-based training programs that separate participants into race-based groups;

        - Segregation in facilities or resources, such as creating a students-of-color-only study lounge; and

        - Programs that are available only to those who identify with a specific racial or ethnic group.

4. Unlawful Use of Protected Characteristics

    - It is unlawful to consider protected traits in employment, contracting, or program participation decisions, whether explicitly or implicitly.

    - Examples:

        - "Diverse" interview slates or candidate pools based on protected characteristics;

        - Awarding contracts based on race or sex—for example, women-owned or minority-owned businesses; and

        - Racial quota or race-based program participation criteria in scholarships, fellowships, or leadership initiatives.

5. Training Programs that Promote Discrimination or Hostile Environments

    - DEI training programs that "stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment" are unlawful.

In addition, the document states that recipients of federal funding may face legal risks if they knowingly fund "the unlawful practices of contractors, grantees, and other third parties."

DOJ's Recommended Best Practices for Federal Funds Recipients and Employers

The memorandum concludes by providing nine non-binding recommendations that employers and federally funded entities can adopt to assess their DEI practices and potentially avoid enforcement actions. These best practices "are not mandatory requirements but rather practical recommendations to minimize the risk of violations."

i. **Ensure inclusive access** to all workplace programs and resources for all individuals, regardless of protected characteristics. But the guidance claims some sex separation is "necessary" in intimate spaces, such as bathrooms, or athletic competitions.

ii. **Focus on skills and qualifications** "directly related to job performance or program participation" for employment and other decisions. Other criteria, such as "socioeconomic status, first-generation status, or geographic diversity," must not be used if selected to prioritize individuals based on protected characteristics, such as race or sex.

iii. **Prohibit demographic-driven criteria** for participation or eligibility and use instead "universally applicable criteria, such as academic merit or financial hardship, without regard to protected characteristics."

iv. **Document legitimate rationales** for using criteria that "might correlate with protected characteristics" in employment and other decisions.

v. **Scrutinize neutral criteria** to eliminate proxies for protected characteristics.

vi. **Eliminate diversity quotas** and discontinue policies that mandate representation based on protected characteristics.

vii. **Avoid exclusionary training programs** and ensure all training is open to *all* qualified participants.

viii. **Include explicit nondiscrimination clauses in contracts with third parties** that receive federal funding and monitor compliance.

ix. **Establish clear anti-retaliation and safe reporting procedures** to protect employees who raise concerns or refuse to participate in potentially discriminatory programs or activities.

Conclusion

The Attorney General's memorandum provides the clearest guidance to date on the administration's view of what constitutes illegal DEI practices and takes the position that even seemingly neutral criteria may be illegal "proxies" for discrimination if used with the intent to give preferential treatment to individuals or groups based on protected characteristics. However, this memorandum does not carry the force of law, and the lawfulness of DEI practices will ultimately depend on the Supreme Court's interpretation of existing federal anti-discrimination laws.

The memorandum, together with the Trump Administration's probe into dozens of universities—most recently, Duke University—sends a strong signal that federal scrutiny of DEI practices will not be

limited to a handful of northeastern schools, and that loss of federal funds and legal action are real risks for violations.

Employers, particularly federal fund recipients, may wish to consider mitigating risks by conducting a privileged review of policies and practices to ensure that they are applied equally to all qualified individuals and that opportunities in admissions, hiring, promotion, training, or mentorship are not limited to certain protected groups. Policies and programs may need to be updated to focus on objective and measurable qualifications. Equally important, decisionmakers and staff may need training to understand the definitions and examples of what the administration views as illegal DEI practices and to monitor third-party compliance, if applicable.

Please contact us for further guidance on these developing issues.

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.

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