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Compliance Update

The Department of Justice's Latest Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination

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Following President Donald Trump's issuance in January 2025 of the "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" executive order, which sought to curb "illegal" diversity, equity and inclusion (DEI) initiatives,¹ the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) released joint guidance on "DEI-Related Discrimination" in March.² DOJ has now published additional guidance on the topic, along with an explicit warning to recipients of federal funding that engaging in such programs could result in revocation of federal funds in addition to other legal, financial and reputational risks.

On July 29, Attorney General Pam Bondi sent a [memorandum to all federal agencies](#) on "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination." The accompanying guidance explains that entities receiving federal funds "must ensure that their programs and activities comply with federal law [Title VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972] and do not discriminate on the basis of ... protected characteristics — no matter the program's labels, objectives, or intentions."³ The guidance urges entities to "review all programs, policies, and partnerships to ensure compliance with federal law, and discontinue any practices that discriminate on the basis of a protected status." Finally, the guidance states that "[b]y prioritizing nondiscrimination, entities can mitigate the legal, financial, and reputational risks associated with unlawful DEI practices and fulfill their civil rights obligations."

Below are the key takeaways from the guidance, including specific practices it deems "unlawful discriminatory policies and practices," as well as "recommendations on best practices."

Unlawful Discriminatory Policies and Practices

The guidance includes a “non-exhaustive list” of “unlawful practices that could result in revocation of grant funding” and notes that “[f]ederal funding recipients may also be liable for discrimination if they knowingly fund the unlawful practices of contractors, grantees, and other third parties.” These unlawful practices include:

- **Granting Preferential Treatment Based on Protected Characteristics**
 - Per the guidance, preferential treatment occurs when an entity “provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons, including such practices portrayed as ‘preferential’ to certain groups. Such practices violate federal law unless they meet very narrow exceptions.”
 - Examples include: race-based scholarships or programs, preferential hiring/promotion practices (including internships, mentorship programs and leadership initiatives that reserve spots for specific racial groups) and access to facilities or resources based on race or ethnicity.
- **Using Proxies for Protected Characteristics**
 - The guidance explains that unlawful proxies are the “intentional[] use[] [of] ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics.” Criteria that may appear facially neutral can become “legally problematic” when (1) they are selected because they correlate with, replicate or are used as substitutes for protected characteristics, or (2) they are implemented with the intent to advantage or disadvantage individuals based on protected characteristics.
 - Examples given in the guidance include: “cultural competence” requirements (i.e., when a federally funded university requires job applicants to demonstrate “cultural competence,” “lived experience” or “cross-cultural skills” in ways that evaluate candidates’ racial/ethnic backgrounds), geographic or institutional targeting (i.e., implementing recruitment strategies targeting specific geographic areas, institutions or organizations primarily because of their racial or ethnic composition) and “overcoming obstacles” narratives or “diversity statements” (i.e., requiring applicants to describe “obstacles they have overcome” or to submit a “diversity statement” in a way that advantages those who discuss experiences intrinsically tied to protected characteristics).
- **Segregation Based on Protected Characteristics**
 - The guidance states that unlawful segregation occurs when an entity “organizes programs, activities, or resources — such as training sessions — in a way that separates or restricts access based on race, sex, or other protected characteristics.” Exceptions are narrow such as “where federal law expressly permits race-based remedies for specific, documented acts of past discrimination by the institution itself[.]” Moreover, “[t]o ensure compliance with federal law and to safeguard the rights of women and girls, organizations should affirm sex-based boundaries rooted in biological difference.”
 - Notably, the guidance explicitly requires sex-separated intimate spaces and states that without them, there is a risk of a hostile environment claim under Title VII, “particularly where they compromise women’s privacy, safety, or professional standing[.]”
 - Examples include: race-based training sessions, segregation in facilities or resources and implicit segregation through program eligibility.
 - The guidance states that “[e]ven if access is technically open to all, the identity-based focus creates a perception of segregation and may foster a hostile environment.”

- **Unlawful Use of Protected Characteristics**

- The guidance details how unlawful use of protected characteristics occurs when an entity or program “considers race, sex, or any other protected trait as a basis for selecting candidates for employment (e.g., hiring, promotions), contracts (e.g., vendor agreements), or program participation (e.g., internships, admissions, scholarships, training).” This includes “policies that explicitly mandate representation of specific groups in candidate pools or implicitly prioritize protected characteristics through selection criteria” and “requirements that contracting entities utilize a specific level of working hours from individuals of certain protected characteristics to complete the contract.”
- Examples include: race-based “diverse slate” policies in hiring, sex-based selection for contracts and race- or sex-based program participation.

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

- Per the guidance, unlawful DEI training programs are defined as those that “through their content, structure, or implementation, stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment.” This includes training that “excludes or penalizes individuals based on protected characteristics,” and those that “create[] an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.”
- Examples include: training programs that promote discrimination based on protected characteristics by stereotyping individuals based on protected characteristics (i.e., all white people are inherently privileged).

Best Practices

The guidance identifies “Best Practices” as “non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls,” including:

- **Ensure inclusive access** for workplace programs, activities and resources, except where sex separation is necessary when biological differences implicate privacy, safety or athletic opportunity.
- **Focus on skills and qualifications** directly related to job performance or program participation for selection decisions.
- **Prohibit demographic-driven criteria** designed to achieve discriminatory outcomes, even those using facially neutral means. “Criteria like socioeconomic status, first-generation status, or geographic diversity must not be used if selected to prioritize individuals” based on protected characteristics or “if the criteria are chosen to increase participation by specific racial or sex-based groups. Instead, use universally applicable criteria, such as academic merit or financial hardship, applied without regard to protected characteristics or demographic goals.”
- **Document legitimate rationale** if using criteria in hiring, promotions or selecting contracts that might correlate with protected characteristics. Entities should also ensure these rationales are consistently applied and related to nondiscriminatory institutional objectives.
- **Scrutinize neutral criteria for proxy effects** before implementing facially neutral criteria.

- **Eliminate diversity quotas** and focus solely on “nondiscriminatory performance metrics,” such as program participation rates or academic outcomes, without reference to protected characteristics. Discontinue policies that mandate representation of specific protected groups in candidate pools, hiring panels or final selections.
- **Avoid exclusionary training programs** and ensure trainings are open to all qualified participants, regardless of protected characteristics, and avoid segregating participants into groups based on protected characteristics.
- **Include nondiscrimination clauses** in contracts to third parties and monitor compliance.
- **Establish clear anti-retaliation procedures** and create safe reporting mechanisms.

What Should Employers Do?

1. Review policies, procedures and contracts for compliance with this guidance, including any practices related to diverse candidate slates or publishing diversity metrics.
2. Review any criteria that may be considered a “proxy” for diversity.
3. Review affinity group policies and practices, and ensure membership is open to all.
4. Review DEI-related trainings in light of the emphasis on hostile work environment claims.

We are here to support and collaborate with employers as they navigate the potential impact of the evolving federal legal landscape and related executive orders (as discussed in our previous client alerts and our [presidential actions hub](#)).



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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¹ For a more detailed recap of the Ending Illegal Discrimination executive order, see [The “Ending Illegal Discrimination” Executive Order: What Does it Mean for Employers](#).

² For a more detailed recap of the DEI Guidance, see [EEOC and DOJ Issue Guidance on “DEI-Related Discrimination”](#).

³ The guidance echoes the Trump administration’s focus on diversity, equity and inclusion practices by stating explicitly that federal antidiscrimination laws apply to programs or initiatives “that involve discriminatory practices, *including those labeled as Diversity, Equity, and Inclusion (‘DEI’) programs.*” (emphasis added).