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DOJ Clarifies "Unlawful" DEI in a New Guidance Memo

Insight

In a [Guidance Memo](#) recently issued to all federal agencies, Attorney General Pamela Bondi clarified what the U.S. Department of Justice ("DOJ") considers "unlawful" DEI, as referenced in the [Joint Guidance](#) the DOJ and Equal Employment Opportunity Commission ("EEOC") issued on March 19, 2025. While the July 29, 2025, Guidance Memo and Joint Guidance set forth non-binding suggestions, the documents provide key insights on how the federal government will analyze diversity practices adopted by employers receiving federal funding.

In a prior Alert titled, [New EEOC Guidance Advises on Acceptable Workplace DEI Practices](#), we discussed the background on "unlawful" DEI, including [Executive Order 14173](#), workplace anti-discrimination laws, the [Joint Guidance](#), guidance documents issued by the EEOC on [What To Do If You Experience Discrimination Related to DEI at Work](#) and [What You Should Know About DEI-Related Discrimination at Work](#), and provided helpful FAQs for employers.

Workplace Anti-Discrimination Laws

As a reminder, Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits workplace discrimination based on employees' race, color, national origin, sex and/or religion. Title VII is similar to many states' own workplace anti-discrimination laws, including the New York State and New York City Human Rights Laws, the Massachusetts Law Against Discrimination, and the Connecticut Fair Employment Practices Act. State laws often prohibit discrimination on additional protected characteristics not expressly covered by Title VII, such as discrimination against victims of domestic violence, and discrimination based on ethnic traits closely associated with race (such as hair) and more.

What Does the DOJ Guidance Memo Say?

Fundamentally, discrimination means treating someone differently from another *based on a protected characteristic(s)*. Absent narrow exceptions, employers may not treat applicants and employees differently based on race, color, national origin, sex, religion or other protected characteristic. The Guidance Memo describes four main categories of DEI actions the DOJ deems to be "unlawful" and provides examples of each. We summarize these categories below and provide practical examples of each.

1. **Granting Preferential Treatment Based on Protected Characteristics.** It comes as no surprise that it is impermissible to provide opportunities, benefits or advantages to individuals based on protected characteristics in a way that disadvantages others. This includes workplace initiatives that prioritize hiring and promoting candidates of certain races, a particular sex or other protected characteristic. Federal law does permit race-based remedies, such as preferential treatment, but only in very narrow exceptions, such as where the remedy is for specific documented acts of past discrimination by the specific institution.

Example: An employer receiving federal funding recognizes that women have been historically underrepresented in its field and pilots a DEI initiative to exclusively pursue female candidates for new roles. The DOJ has clarified that such an initiative is unlawful as it necessarily disadvantages male candidates, even if it was done to correct a historical trend in the field.

- 2 **Using “Unlawful Proxies” for Protected Characteristics.** The DOJ defines “unlawful proxies” as “ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics.” Such criteria are problematic when they are intended to function as substitutes for protected characteristics or are implemented in ways that advantage or disadvantage individuals based on protected characteristics.

Example: A federally funded employer operating in a metropolitan area has an opening for a Community Liaison. To be responsive to concerns raised by clients and stakeholders that the employer is not responsive to the needs of its community, the employer recruits for the position from a specific geographic area it believes is populated by the community it serves, indicates on the job posting that the candidate must demonstrate “cultural competence” or “lived experience” and provides that preference will be given to those who submit with their applications statements describing a “social obstacle” they have overcome.

The DOJ explained that while this approach may, on its face, seem neutral, it would be legally problematic if the employer selected the geographic area because of its racial or ethnic composition; uses “cultural competence” or “lived experience” to screen out candidates based on race or ethnicity; or gives preference to those statements that describe “social obstacles” that are intrinsically tied to protected characteristics, such as race or sex.

- 3 **Segregation Based on Protected Characteristics.** The DOJ explained that this includes organizing programs, activities, or resources in a way that separates or restricts access based on protected characteristics, including race and sex, regardless of the stated goal for doing so. The DOJ also explained the inverse is true, meaning organizations should maintain sex-separated intimate spaces – such as bathrooms – to avoid creating a hostile environment under Title VII.

Example: An employer that recently received a federal grant provides workplace discrimination training to staff. The employer received feedback from staff attending a recent training that they would have felt more comfortable actively participating and asking certain questions during the racial and sexual harassment portions of the training if people of different races and the opposite sex were not present. To encourage employee engagement and provide a safe space to meaningfully address historical inequities, the employer schedules multiple sessions for future workplace discrimination trainings – one for men only, one for women only, one for persons of color only, and one general session open to all.

Per the Guidance Memo, while the general session would not be problematic as it is open to all, the other sessions would be legally problematic as the employer has separated employees by protected characteristic (i.e., sex and race/color/national origin), regardless of the motivation for doing so.

- 4 **Training Programs that Stereotype, Exclude or Disadvantage Based on Protected Characteristics.** The Guidance Memo discussed “unlawful DEI training programs,” which it defined as “those that – through their content, structure, or implementation – stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment.”

Example: A federally funded employer requires its employees to participate in DEI training. During the sessions, the employer makes statements generalizing groups of individuals based on protected characteristics and encourages discussion on topics such as toxic masculinity and white privilege. The DOJ explained that such trainings may violate Title VII if they create a hostile environment or “impose penalties for dissent in ways that result in discriminatory treatment.”

Recommendations for Employers

DEI remains a political hot topic, and while many employers feel they have found their footing in this area, the Guidance Memo provides additional clarity – and in some cases confirmation – about what the federal government may perceive as legally problematic DEI efforts.

- **Self-Audit.** Review whether any job opportunities or benefits – such as training initiatives, mentorship programs, networking events, etc. – inadvertently exclude employees based on protected characteristics.
- **Ensure Inclusivity.** Workplace programs, activities, and resources should be open to all, regardless of protected characteristic.
- **Discontinue Facially Neutral Practices Having Discriminatory Effects.** Identify any program or policy that has neutral criteria but is designed to achieve discriminatory outcomes. Watch for job postings that require candidates to demonstrate “cultural competence” or “lived experiences” and include preferences for those from “underserved geographic areas,” when such criteria is intended to target individuals based on protected characteristics.
- **Review References to “DEI” and “Diversity.”** While federal guidance memos on the topic of DEI have not explicitly declared the term “DEI” or the word “Diversity” illegal, employers must still ensure that DEI or diversity efforts are not tailored to specific protected characteristics, treat individuals differently based on protected characteristics, or include any level of exclusivity based on protected characteristics.
- **Focus on Candidates’ Credentials.** As we explained in our prior [alert](#) – and the DOJ confirmed in the Guidance Memo – questions about candidate’s background should be limited to their credentials, like work experience and educational background. Questions designed to elicit information about a candidate’s personal characteristics – such as race, color, national origin, religious affiliation, marital status and/or family status – should be avoided. To this end, employers should discontinue policies mandating representation of specific protected characteristics in candidate pools, hiring panels or final selections. Focus instead on nondiscriminatory performance metrics and merit.
- **Review and Revise Anti-Discrimination and Retaliation Policies.** Employers should ensure their anti-discrimination and retaliation policies are current and explicitly prohibit discrimination based on race, color, national origin, sex and any other protected characteristic. And, that such policies explicitly prohibit retaliation against individuals who engage in protected activities, such as raising concerns about unlawful discrimination, filing complaints or participating in an investigation. The right to be free from retaliation extends to those who refuse to participate in discriminatory programs, including trainings. Additionally, employers should ensure all contracts with third parties providing services to/for the employer also include anti-discrimination clauses.

Should you have questions or need advice regarding this or related matters, please reach out to a member of Harris Beach Murtha’s [Labor and Employment Practice Group](#): attorney [Patricia E. Reilly](#) at (203) 772-7733 and preilly@harrisbeachmurtha.com; attorney [Salvatore G. Gangemi](#) at (203) 653-5436, (212) 425-0630 and sgangemi@harrisbeachmurtha.com; attorney [Eboné Lauren Luciano](#) at (203) 772-7711 and eluciano@harrisbeachmurtha.com; or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

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