

U.S. DOJ issues guidance on ‘unlawful discrimination’ related to DEI programs for recipients of federal funding

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On July 30, 2025, the U.S. Department of Justice (DOJ) issued guidance on “unlawful discrimination” for recipients of federal funding and other entities subject to federal antidiscrimination laws, further underscoring Trump administration officials’ commitment to pursuing investigations and enforcement activity in this area.

DOJ cautions against the use of “unlawful proxies,” which it defines as the use of “ostensibly neutral criteria that function as substitutes for ... protected characteristics.”

This guidance comes on the heels of the creation of DOJ’s “Civil Rights Fraud Initiative” (<http://bit.ly/3JJ7y9V>), which seeks to use the False Claims Act to investigate and pursue claims against recipients of federal funds that knowingly violate laws via “racist preferences, mandates ... and activities”; news of a DOJ investigation into whether Harvard University is complying with the Supreme Court’s 2023 decision in *Students for Fair Admissions v. Harvard*; and Executive Order 14173 (<https://bit.ly/42bMijn>), which directs the Attorney General (and Secretary of Education) to issue guidance on what measures and practices are needed to comply with *Students for Fair Admissions*.

Specifically, the July 30, 2025, guidance — which is not mandatory but rather states that it provides “non-binding suggestions” to assist entities in “avoid[ing] legal pitfalls” — addresses DOJ’s views on the application of federal antidiscrimination laws to diversity, equity, and inclusion (DEI) (and similar) programs.

Key takeaways from the guidance are as follows.

The guidance has broad applicability: DOJ encourages careful review by all entities that receive federal

financial assistance or are otherwise subject to federal antidiscrimination laws, including educational institutions, state and local governments, and public and private employers.

The guidance observes that federal laws prohibit such entities from discrimination based on protected characteristics (such as race, sex, color, national origin, or religion) and then provides examples of unlawful practices.

Terminology may increase the risk of DOJ scrutiny, and even “facially neutral” criteria might not be safe: According to DOJ, “[t]he use of terms such as ‘DEI,’ ‘Equity,’ or other euphemistic terms does not excuse unlawful discrimination or absolve parties from scrutiny regarding potential violations” of antidiscrimination laws.

Likewise, DOJ cautions against the use of “unlawful proxies,” which it defines as the use of “ostensibly neutral criteria that function as substitutes for ... protected characteristics.”

For example, DOJ cautions that it may view “facially neutral criteria” such as “lived experience” and other “cultural competence” requirements (“underserved” or “first-generation”); recruitment strategies “targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition rather than other legitimate factors”; and “overcoming obstacles” narratives or “diversity statements” as “potentially unlawful proxies” for discrimination.

Relationships to third parties should be examined: DOJ will potentially seek to hold entities accountable for discrimination “if they knowingly fund the unlawful practices of contractors, grantees, and other third parties.”

The guidance emphasizes protection against retaliation: DOJ emphasizes that entities should not take adverse action based on objections to, refusal to participate in, or engaging in protected activities relating to “DEI practices” that individuals or entities “reasonably believe violate federal antidiscrimination laws.”

DOJ’s examples of “unlawful practices” include hosting affinity groups, workshops, and race-based training

sessions: The guidance states that unlawful discrimination occurs when an entity provides, segregates, or restricts access to “opportunities, benefits, or advantages” on the basis of protected characteristics.

The guidance also states that “preferential” practices are unlawful. DOJ’s examples of unlawful practices include preferential hiring or promotion (including quotas and tiebreakers); characteristic-based scholarships or programs; characteristic-based access to or segregation of facilities, programming, and other resources; and characteristic-based training sessions (including training offered only to a group or training that demeans a group).

Unlawful discrimination occurs when an entity provides, segregates, or restricts access to opportunities, benefits, or advantages on the basis of protected characteristics.

According to DOJ, groups and programming should be open to, for example, all students and faculty, and access to facilities should not be limited based on sex, race, or ethnicity.

DOJ states that this rule against segregation does not apply to facilities or programming “that are single-sex based on biological sex to protect privacy or safety” and that “failing to maintain sex-separated athletic competitions and intimate spaces can also violate federal law.”

“Best practices” described by DOJ may offer some protection: The guidance emphasizes ensuring “inclusive” access, focusing selection decisions (for hiring and promotion, etc.) on “specific, measurable skills and qualifications directly related to job performance,” prohibiting “demographic-driven criteria” and discontinuing programs or policies — even those with facial neutrality — that could be perceived to have “discriminatory outcomes,” documenting “legitimate” rationales for decisions, scrutinizing neutral criteria for “proxy effects,” eliminating diversity quotas, avoiding “exclusionary training programs,” incorporating nondiscrimination clauses in third-party contracts, and establishing nonretaliation procedures (against people who wish to opt out of DEI programs, i.e.) and reporting mechanisms.

In sum, if entities find themselves in the government’s crosshairs based on allegations of unlawful discrimination, they should expect that DOJ will closely scrutinize not only compliance with the letter of the law, but also their informal policies and practices that DOJ may perceive as “proxies” — and even the policies and practices of third-party contractors and suppliers.

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