

DOJ's New Anti-Discrimination Guidance: Pushing the Legal Envelope?

by Alex Hontos, Nicole Engisch, Chris DeLong, Matthew Gillespie, and Eric Weisenburger

On July 29, 2025, the Department of Justice ("DOJ") released a Memorandum emphasizing the Trump administration's focus on eliminating diversity, equity, and inclusion ("DEI") and DEI-like programs. The Memorandum identifies "Examples of Unlawful Practices" for recipients of federal funds, including universities, contractors, state agencies, and grant recipients, and provides "Recommendations on Best Practices" that DOJ contends will avoid violations of civil-rights law. DOJ warns that these "unlawful practices" could result in "revocation of grant funding," but that is not the only possible consequence. Given DOJ's May 19, 2025 Memorandum explaining that it intends to use the False Claims Act ("FCA") to enforce civil-rights laws, the July 29 Memorandum appears to be a signal from DOJ of policies and practices DOJ is likely to target and enforce through the FCA, among other enforcement methods. The July 29 Memorandum follows not only the May 29 Memorandum, but a series of other DOJ directives aimed at implementing the Trump Administration's anti-DEI policies.^[1]

Organizations should be aware of the five categories of policies and practices that DOJ identifies as discriminatory—though DOJ emphasizes this list is "non-exhaustive":

1. Granting Preferential Treatment Based on Protected Characteristics

DOJ asserts classic DEI-type programs, such as preferential hiring or admissions practices—e.g., a scholarship fund for a specific racial group or hiring practices prioritizing candidates from "underrepresented groups"—are unlawful and discriminatory.

2. Prohibited Use of Proxies for Protected Characteristics

DOJ contends "proxies" for protected characteristics are "ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics." DOJ cites the example of a university that requires applicants to describe "obstacles they have overcome" or an entity requiring job applicants to demonstrate "lived experience" that "effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications." DOJ's description of what qualifies as

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- Alex Hontos
- Nicole Engisch
- Chris DeLong
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a proxy is broad and susceptible to varying interpretations, creating risk for recipients of federal funding.

3. Segregation Based on Protected Characteristics

DOJ posits that “failing to maintain sex-separated athletic competitions and intimate spaces” is illegal, including allowing “males ... self-identifying as ‘women’” to enter bathrooms, showers, locker rooms, or dormitories. DOJ also flags the examples of universities “designat[ing] a ‘BIPOC-only study lounge’” or a “workshop series” that limit participants to certain racial groups.

4. Unlawful Use of Protected Characteristics

DOJ explains that selecting or prioritizing candidates for hiring, promotion, vendor agreements, admissions, scholarships, or training based on protected characteristics is illegal, using the example of a university, when hiring faculty, setting a minimum number of candidates to interview from certain racial groups. DOJ also notes that a “federally funded state agency implement[ing] a DEI policy that prioritizes awarding contracts to women-owned businesses” would be illegal (though this Memorandum does not suggest elimination of “set-aside” federal contracts that sometimes permit preference of women-owned applicants).

5. Training Programs That Promote Discrimination or Hostile Environments

Finally, DOJ contends that certain types of training programs—such as trainings on “toxic masculinity”—that “single out, demean, or stereotype individuals based on protected characteristics” are discriminatory.

DOJ describes its recommendations as non-binding suggestions, and the recommendations do not have the force of law. However, the recommendations reflect current DOJ thinking on these matters, and they should serve as warning with respect to DOJ’s enforcement priorities and how DOJ will interpret the law. Moreover, it appears that courts disagree with the characterization in this Memorandum of some practices deemed “unlawful.” For example, the *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* decision is widely viewed as the foundation for the Trump administration’s anti-DEI policies.^[2] But that decision was limited to holding that universities may not make race-based admissions decisions, and the majority opinion left open the possibility for universities to still consider how race has affected an applicant’s life, so long as that consideration is tied to a quality or characteristic the applicant can describe. Additionally, as the Trump administration has previously acknowledged, both the First Amendment and separate federal laws prohibit the government “from exercising control over the content of school curricula.”^[3] Similarly, several courts across the country have enjoined aspects of the Trump administration’s DEI-related executive orders, and unless those injunctions are dissolved in the future, they prevent enforcement of the executive orders under the fact patterns at issue in those cases.^[4]

As the Trump administration continues to heighten its focus on diversity-like programs

and practices, recipients of federal funding should take action to reduce enforcement risk. In addition to DOJ's "Best Practices," which include "Prohibit Demographic-Driven Criteria," "Document Legitimate Rationales," and "Eliminate Diversity Quotas," among several others, recipients of federal funding should consider:

- Reviewing your organization's policies and practices—regardless of title—for race/sex-based eligibility, preferences, or demographic goals, even if implicit such as "lived experience," and reviewing the policies and practices of subcontractors, subgrantees, and other third parties. DOJ noted that organizations "may also be liable for discrimination if they knowingly fund the unlawful practices" of others.
- Identifying applicable state laws, policies, or contract/grant requirements that may require race/sex-conscious policies or practices, and reconciling those with this Memorandum where possible.
- Reviewing training programs and materials for content that may trigger enforcement actions, such as phrases like "toxic masculinity."
- For colleges and universities, reviewing policies related to athletic programs and spaces that DOJ considers "intimate," such as locker rooms and dormitories.

DOJ's Memorandum in this regard provides useful guidance to recipients of federal funding of DOJ's enforcement priorities and the way that DOJ—this DOJ—interprets the law. And given DOJ's intent to revoke federal funding and use the FCA to enforce compliance with its view of civil-rights law and the harsh penalties resulting from FCA violations, recipients of federal funding should act to reduce enforcement risk.

[1] For background on the prior directives, see Dorsey's related updates: [DOJ's Civil Division Prioritizes Investigations and Enforcement Actions Targeting DEI, Immigration, and Gender-Affirming Health Care | News & Resources | Dorsey](#); [Department of Justice Launches "Civil Rights Fraud Initiative" to Target DEI Through False Claims Act | FCA NOW](#); [EEOC and DOJ Issue Joint Press Release and Technical Assistance Documents on "Unlawful DEI-Related Discrimination" | News & Resources | Dorsey](#); [What Companies and Higher Education Institutions Need to Know Regarding DOJ's New Memoranda to Enforce the Administration's Directive to "End Illegal DEI" Practices and for the "Total Elimination of Cartels and Transnational Criminal Organizations" | News & Resources | Dorsey](#).

[2] https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.

[3] <https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf>.

[4] See, e.g., *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243 (D. Md. 2025); *Chicago Women in Trades v. Trump*, ___ F. Supp. 3d ___, No. 25 C 2005, 2025 U.S. Dist. LEXIS 70459 (N.D. Ill. 2025); *Neeta Thakur v. Trump*, ___ F. Supp. 3d ___, No. 25-cv-04737-RFL, 2025 U.S. Dist. LEXIS 118980 (N.D. Cal. 2025).