

U.S. Department of Justice Defines “Illegal DEI”

July 30, 2025

On July 30, 2025, the Department of Justice (“DOJ”) released [guidance](#) from the Attorney General on the application of federal antidiscrimination laws to entities receiving federal funds. The guidance provides a detailed list of Diversity, Equity, and Inclusion (“DEI”) policies and practices that DOJ considers unlawful. It also provides a list of “Best Practices” entities can adopt to minimize legal risk.

The memorandum addresses a number of examples specific to educational institutions, but makes clear that the guidance is directed broadly, encouraging all “[e]ntities that receive federal financial assistance or that are otherwise subject to federal anti-discrimination laws, including educational institutions, state and local governments, and public and private employers,” to review the memorandum “to ensure all programs comply with their legal obligations.” The guidance is non-binding and does not have the force of law, but it reflects how DOJ interprets and intends to apply federal antidiscrimination statutes.

The document provides a “non-exhaustive” list of policies and practices DOJ considers unlawful. The document notes that these policies and practices could “result in revocation of grant funding,” and also states that federal funding recipients may be liable for discrimination if they knowingly fund the unlawful practices of third parties. The practices that DOJ identified as unlawful include what it characterizes as:

Programs that grant preferential treatment based on protected characteristics, including:

1. Programs or scholarships exclusively for students of a specific race;
2. Hiring or promotion practices that prioritize candidates from “underrepresented groups”;
and

3. Policies that designate access to facilities or resources based on race (e.g. lounges exclusively for minority students).

Policies that use facially-neutral proxies for protected characteristics, such as:

1. Policies requiring job applicants to explain their “cultural competence,” “lived experience,” or “cross-cultural skills” when doing so “effectively evaluate[s] candidates’ racial or ethnic backgrounds rather than objective qualifications”;
2. Policies requiring applicants to describe “obstacles they have overcome” or submit a “diversity statement” if those statements result in advantage to applicants based on protected characteristics; and
3. Recruitment strategies that target specific geographic areas, institutions, or organizations primarily because of their racial or ethnic composition.

Practices that segregate individuals based on protected characteristics, such as:

1. Conducting trainings that separate participants into race-based groups (e.g. “Black Faculty Caucus” or “White Ally Group”);
2. Segregating access to facilities or resources based on protected characteristics (e.g. a “BIPOC-only study lounge”); and
3. Basing program eligibility on protected characteristics (e.g. mandating sex-specific eligibility and excluding others who meet objective program criteria).

Note: The guidance provides an exception for sex-separated athletic competitions and intimate spaces, noting that allowing “males, including those self-identifying as ‘women,’ to access single-sex spaces designed for females—such as bathrooms, showers, locker rooms, or dormitories” may violate Title IX or create a hostile environment under Title VII.

Policies that unlawfully consider protected characteristics in selection decisions, including:

1. Policies requiring a “diverse slate” for hiring or setting “racial benchmarks or mandat[ing] demographic representation” in candidate pools;
2. Policies requiring a set number of participants in a program (e.g., a scholarship, fellowship, or leadership initiative) be from a specific demographic group; and
3. Policies prioritizing women- or minority- owned businesses for contracts.

Trainings that promote discrimination or hostile environments, including:

1. Trainings that exclude or penalize participants based on protected characteristics; and

2. Trainings that include “severe or pervasive use” of materials that “single out, demean, or stereotype” based on protected characteristics (e.g., “toxic masculinity” and “white privilege”).

The guidance ends with a recitation of what DOJ recommends as best practices, including:

1. Ensuring all programs, activities, and resources are open to all qualified individuals and do not exclude participants based on protected characteristics (except when “necessary where biological differences implicate privacy, safety, or athletic opportunity”);
2. Basing selection decisions on measurable skills and qualifications;
3. Discontinuing the use of policies designed to favor specific demographic groups, even if phrased using neutral language;
4. Documenting the legitimate rationale for decisions and ensuring those reasons are consistently applied;
5. Scrutinizing neutral criteria for whether they serve as proxies for protected characteristics;
6. Eliminating diversity quotas, including for applicant pools;
7. Ensuring all trainings are open to all and do not “segregate” participants or create a hostile environment by requiring participants to affirm ideological positions or “confess” biases or privileges;
8. Including non-discrimination clauses in agreements with third parties; and
9. Implementing non-retaliation policies for individuals who refuse to participate in potentially discriminatory programs or complain about them.

The guidance urges the recipients of federal funds to review their policies and practices to ensure compliance with federal law and recommends the best practices listed above.

Gibson Dunn’s Workplace DEI Task Force aims to help our clients navigate the evolving legal and policy landscape following recent Executive Branch actions and the Supreme Court’s decision in *SFFA v. Harvard*. Prior issues of our DEI Task Force Update can be found in our [DEI Resource Center](#).

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