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¶ 199 FEATURE COMMENT: DOJ Issues July 2025 Guidance On Unlawful Discrimination: Navigating Diversity, Equity, And Inclusion In A New Legal Landscape

From the outset of his current term in office, President Trump has made it a signature policy objective to target and dismantle diversity, equity, and inclusion (DEI) and so-called "gender ideology" in both the public and the private sectors. In litigation challenging the president's executive orders on these subjects, the Government has been questioned about what the phrase "illegal DEI" actually means. For example, in May 2025, the Department of Justice announced a Civil Rights Fraud Initiative (the subject of our June 4, 2025 Feature Comment, see 67 GC ¶ 129) suggesting that it will use the civil False Claims Act to investigate and pursue monetary recoveries based on "illegal DEI." But it may be difficult for the Government or a whistleblower to establish the falsity and scienter elements of an FCA claim if the meaning of "illegal DEI" remains ambiguous.

Perhaps in response to those queries, on July 29, 2025, DOJ issued a memorandum titled "Guidance for Recipients of Federal Funding." The memo's stated objective is to offer "non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls," thereby aiming to "minimize the risk of violations."

This memo provides the most comprehensive insight about DOJ's perspective on DEI and gender ideology practices to date, and thus serves as a valuable resource for recipients of federal funding as they review their current policies. Private employers, too, may find the memo a useful framework to evaluate potential risks associated with DEI initiatives and to discern what actions the Administration considers to be violations of civil rights laws. That said, the DOJ memo does not address certain practical questions that entities will face in trying to adhere to its guidance. Below, we summarize the memo and provide our analysis of its most significant aspects for federally funded entities and companies.

Key Takeaways from DOJ's July 29, 2025 Memo—*Equal Treatment Is Paramount:* DOJ emphasizes that everyone must be treated equally according to their merit/qualifications. Protected characteristics such as race, color, national origin, sex, and religion cannot form the basis for recruitment, hiring, admissions, internal programs, or other "preferential treatment" except in very specific circumstances.

- DEI Labels Do Not Excuse Discrimination: The language an organization uses to describe its programs will not shield it from legal scrutiny. The memo warns that DOJ will look behind seemingly neutral language for potential violations where the purpose of a particular practice is to "advantage or disadvantage individuals" based on a protected characteristic. DOJ warns that any initiative that results in preferential treatment based on protected characteristics presents risk.

- Strict Scrutiny for Race- and Sex-Based Policies: Race-based classifications are subject to strict scrutiny, and sex-based classifications to heightened scrutiny. Only in rare, narrowly defined circumstances can such policies be justified.

- Review Hiring Practices: The memo calls for eliminating geographic, institutional, and other targets if meant to increase "underrepresented groups" in candidate pools, and calls for focusing only on neutral business factors.

- Retaliation Is Prohibited: Individuals who object to or refuse to participate in discriminatory programs are protected from adverse actions.

Specific Examples of Unlawful Practices Identified by DOJ—The memo states that the Federal Government has historically "turned a blind eye" to or even promoted practices that are—in this Administration's view—discriminatory, and that "going forward" the Government "will not stand by while recipients of federal funds engage in discrimination." The memo provides numerous examples of practices that DOJ considers unlawful under existing anti-discrimination law:

- Race-Based Scholarships or Programs: Scholarships, internships, or leadership initiatives exclusively for specific racial or ethnic groups, or reserving spots for specifically identified individuals or groups based on protected characteristics.

- Preferential Hiring or Promotion: Prioritizing candidates from "underrepresented groups" for hiring or promotion or using demographic benchmarks in candidate pools based on protected characteristics. All employers should review policies that focus on increasing diversity in candidate talent pools. The memo suggests that recruiting strategies focused on increasing minority representation without other legitimate business reasons could be viewed as discriminatory.

- Segregated Spaces or Resources: Designating "safe spaces" or lounges for specific racial or ethnic groups or organizing training sessions that separate participants by race or sex.

- Compelled Participation in Discriminatory Training: Mandating participation in workplace training that stereotypes, excludes, or penalizes individuals based on protected characteristics, or creates a hostile environment, including, for example, references to white privilege or toxic masculinity.

New and Unanswered Questions from DOJ's July 29, 2025 Memo—DOJ takes a number of affirmative stances in the memo, but it does not offer companies practical guidance on how to answer or reconcile issues they are likely to face if they are inclined to adopt DOJ's recommended best practices.

Potential Conflicts with Contractual Subcontracting Goals: The tenor of the DOJ memo creates tension with longstanding Government programs designed to aid historically disadvantaged small businesses. Since the Business Opportunity Development Reform Act of 1988, Federal Government agencies have been required to establish contracting goals to benefit small businesses owned by socially and economically disadvantaged persons. Social disadvantage "refers to persons who have been subjected to racial, ethnic, or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." See 13 CFR § 124.103. And, unless further tailored by an agency, the default small business subcontracting plan goals are: 23 percent to small businesses; 5 percent to small, disadvantaged businesses; 5 percent to women-owned small businesses; and 5 percent to service-disabled veteran-owned small businesses. 15 USCA § 644(g)(1). At the federal level, small disadvantaged businesses receive more than $50 billion in prime and subcontract awards, and many states also set similar goals for minority- and woman-owned subcontractors.

Choosing small business suppliers or subcontractors in order to meet contractual goals for woman- or minority-owned participation appears to conflict with DOJ's memo, leaving federally funded entities uncertain about the prospect of enforcement for alleged noncompliance with antidiscrimination laws. The memo does not address this issue. Adding to the uncertainty is the fact that most small business subcontracting requirements are statutory, which means that only Congress can eliminate preference categories or the program itself. Until such changes occur, subcontracting rules remain in effect, subjecting federal contractors to an uncertain state of affairs.

Recommended Monitoring of Business Partners, Subcontractors, and Subawardees: DOJ's memo includes suggestions for "best practices" by recipients of federal funding, to include:

- Flowing Down Anti-Discrimination Contract Clauses. Incorporating express nondiscrimination clauses in grant agreements, contracts, or partnership agreements to require that business partners and subcontractors comply with federal anti-discrimination laws.
- Contractual Recognition of Unallowed Use of Federal Funds. Specifying in those same business agreements that federal funds "cannot be used for programs that discriminate based on protected characteristics."
- Third-Party Monitoring. Monitoring the practices of business partners, subcontractors, and subgrantees that receive federal funds to ensure their ongoing compliance with federal anti-discrimination law. DOJ proposes that this monitoring include reviewing program materials, participant feedback, and outcomes to identify potential discriminatory practices.

The notion of private companies "monitoring" the DEI or gender-based practices of other private companies, even when working together on Government-funded contracts or projects, is unusual and casts prime contractors and awardees in a new, much more intrusive role. It is unclear how engaging in DOJ's proposed monitoring of third-party business partners' internal practices improves—or perhaps negatively impacts—risks for federally funded entities.

The DOJ memo does not address these issues. Nor does it answer the practical question of how and why a subcontractor or subawardee would agree to willingly provide another business with the data that DOJ suggests is needed for "monitoring." Even if a company's business partners agreed to recognize their responsibility to adhere to federal antidiscrimination laws within a contract, many would be hesitant to disclose their internal operational data (i.e., "program materials, participant feedback, and outcomes") to enable their prime contractor to analyze and take a position on their compliance with antidiscrimination laws. Organizations are generally reluctant to share such details with third parties, especially when such information is unrelated to the primary engagement. This reluctance is particularly evident in Government contracting, where companies collaborating on one project may become direct competitors on other projects.

It is not apparent that any existing Federal Acquisition Regulation flow-down clauses would afford a prime contractor access to the type of subcontractor data needed to carry out the monitoring activities that DOJ recommends in this memo. Notably, the DEI Certification requirement in EO 14173 (which we previously analyzed in our March 12, 2025 Feature Comment, see 67 GC ¶ 50), has not undergone any formal rulemaking process, has not been standardized among federal agencies, and is not a mandatory flow-down clause. Thus, a recipient of federal funding seeking to engage in the "monitoring" that DOJ recommends would have to negotiate the terms of access with what are likely to be resistant subcontractors.

For these reasons, it is important to bear in mind that DOJ stated that the guidance provided in its memo is "non-binding" and that DOJ's suggestions should be evaluated for real-world feasibility.

Documenting Lack of "Unlawful Proxy"

Discrimination: DOJ warns that companies should not conceal discriminatory practices through the use of "unlawful proxies"—i.e., they cannot use "ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics." The memo provides three examples of unlawful proxy discrimination: (1) requiring descriptions of "cultural competence" in a way that assesses racial or ethnic background rather than objective skills, (2) targeting recruitment to areas or institutions mainly due to their racial or ethnic makeup, and (3) asking job applicants for narratives about obstacles they've overcome or diversity statements that favor discussion of protected characteristics.

The memo does not state DOJ's position on hosting job fairs at women's colleges, Christian colleges, or HBCUs. Organizations should be ready to justify recruiting from these institutions with legitimate, nondiscriminatory business reasons—such as finding talent and skills necessary for the position—rather than aiming to increase diversity or religious representation within the workplace.

Additionally, DOJ advises, as a "best practice," that organizations "rigorously evaluate and document" whether their stated criteria for programs or positions are proxies for race, sex, or other protected characteristics. While DOJ frames this suggestion as a straightforward compliance measure, in practice this could involve an exhaustive, resource-intensive audit of every policy, practice, and decision-making process—far more extensive an undertaking than the memo appears to acknowledge.

Practical Steps for Organizations to Promote Inclusion While Minimizing Legal Risk—DOJ's memo introduces new complexities for federally funded entities—and even private employers—who value diverse and inclusive workplaces. DOJ's memo signals the Government's appetite for enforcement and underscores that the risk of enforcement is not eliminated simply by using facially neutral language or by ending legacy DEI programs. It is critical to conduct internal program assessments in light of the guidance in DOJ's memo, and this work should be done through counsel to maintain attorney-client privilege. Additionally, federally funded entities and private employers should consider the following steps:

1. Ensure Inclusive Access

- Open all programs, activities, and resources to all qualified individuals, regardless of race, sex, or other protected characteristics.
- Avoid organizing groups, sessions, or events that exclude participants based on protected traits.

2. Focus on Objective, Job-Related Criteria

- Base selection decisions (e.g., hiring, promotion, admissions, scholarships) on specific, measurable skills and qualifications directly related to the opportunity at hand.

3. Eliminate Demographic-Driven Quotas and Benchmarks

- Discontinue any policy or practice that mandates representation of specific racial, sex-based, or other protected groups in candidate pools, hiring panels, or final selections.

4. Avoid Exclusionary or Stereotyping Training

- Ensure all training programs are open to all qualified participants and do not segregate or stereotype based on protected characteristics.
- Do not convey the idea that certain individuals possess certain biases based on their protected traits.

5. Establish Clear Anti-Retaliation Policies

- Implement and communicate policies prohibiting retaliation against individuals who raise concerns or refuse to participate in offered programs.
- Provide confidential, accessible channels for reporting concerns.

Final Thoughts on Fostering Inclusion in a New Era—It remains possible to promote inclusion, belonging, and opportunity by focusing on universal access, objective merit-based criteria, and a culture of respect for all. By carefully reviewing and updating policies, providing robust training on nondiscrimination, and documenting legitimate, nondiscriminatory rationales for all decisions, federally funded entities can adhere to and advance their values while minimizing legal risk.

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