

LEGAL UPDATES

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# DOJ Issues Sweeping Guidance on "Illegal DEI": Key Legal Risks and Compliance Priorities for Federal Funds Recipients

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On July 29, 2025, the Department of Justice (DOJ) issued updated guidance setting forth the administration's position on how federal antidiscrimination laws—including Title VI and Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—apply to recipients of federal funding. This guidance, which explains some terms and concepts from Executive Order 14173 ("Ending Illegal Discrimination and Restoring Merit-Based Opportunity"), clarifies DOJ's position on the application of federal antidiscrimination laws to Diversity, Equity, and Inclusion (DEI) practices the federal government now considers "unlawful" or "legally risky."

The guidance is not binding, nor does it have the force of law. However, it signals a new and aggressive DOJ enforcement posture in light of currently existing federal case law and is likely to serve as a roadmap for future investigations, including those under the False Claims Act (FCA) as part of the DOJ's Civil Rights Fraud Initiative. Entities that receive federal contract or grant funds or are otherwise subject to federal antidiscrimination laws, including educational institutions, state and local governments, and public and private employers, should review their employment and procurement programs and policies in light of this guidance.

## Key legal takeaways

### *DOJ's "non-exhaustive list of unlawful practices"*

The guidance identifies five categories of DEI-related practices that DOJ considers “unlawful” or presenting “significant legal risks” for federal funds recipients unless they meet narrow exceptions under federal law:

1. *Granting preferential treatment based on protected characteristics:* DOJ states it is unlawful for federally funded entities to provide opportunities, benefits, or advantages based on protected characteristics (e.g., race, sex, ethnicity, national origin, religion) in a way that disadvantages other qualified individuals. Examples include:

Scholarships or programs exclusively for specific racial groups;

Hiring or promotion preferences for “underrepresented” groups defined by race or sex;

“Safe spaces” or resources restricted by race or ethnicity.

2. *Prohibited use of proxies for protected characteristics:* DOJ takes the position that facially neutral criteria—such as “lived experience,” “cultural competence,” “overcoming obstacles,” or geographic/institutional targeting—may be unlawful if selected or applied with the intent to advantage or disadvantage based on protected characteristics, or if they function as substitutes for explicit race/sex-based criteria. Examples include:

Requiring “diversity statements” or “overcoming obstacles” essays that advantage candidates based on protected traits;

Targeting recruitment to geographic areas or institutions chosen primarily for their racial or ethnic composition.

3. *Segregation based on protected characteristics:* DOJ considers it unlawful to organize programs, activities, or resources in a manner that separates or restricts access based on protected characteristics. Examples include:

Training sessions or workshops limited by race or sex;

“BIPOC-only” study lounges;

Eligibility restrictions for programs based on protected traits.

4. *Use of protected characteristics in candidate selection:* DOJ identifies as unlawful the use of protected characteristics as a basis for selecting candidates for employment, contracts, or participation in programs. Examples include:

“Diverse slate” requirements;

Contract awards prioritized for minority- or women-owned businesses;

Quotas or benchmarks for participation based on race or sex.

5. *Training programs that promote discrimination or hostile environments:* DOJ warns that DEI training programs that stereotype, exclude, or disadvantage individuals based on protected characteristics, or that require affirmation of ideological positions, may create a hostile environment and violate federal law. Examples include mandatory training that includes concepts such as “white privilege” or “toxic masculinity” or that penalize dissent from such concepts.

### ***DOJ’s “proxy” theory and legal risk***

A key new element of DOJ’s interpretation of federal antidiscrimination laws is its focus on “proxy” criteria, i.e., facially neutral policies or practices that are designed, selected, or applied to achieve demographic outcomes tied to protected characteristics. While the guidance does not revive “disparate impact” liability, it emphasizes that facially neutral criteria may be unlawful if intentionally used as proxies for protected characteristics or if they function as such in practice.

Organizations must therefore carefully document the legitimate, non-discriminatory rationales for all selection criteria and be prepared to show that such criteria are not used as stand-ins for protected characteristics.

### ***Sex-segregated facilities and athletics***

The guidance states that federally funded entities that allow males, including those self-identifying as women, to access single-sex spaces designed for females, such as bathrooms, showers, locker rooms, or dormitories, may be in violation of Title VII of the Civil Rights Act and Title IX of the Education Amendments. DOJ asserts that affirming sex-based boundaries rooted in biological differences is required to avoid hostile environments or denial of equal opportunity for women and girls.

This position is likely to conflict with some federal court decisions and state or local laws, requiring organizations to navigate a complex and evolving legal landscape.

### ***Third-party liability and FCA risk***

The guidance asserts that recipients of federal funds may be held liable for discriminatory practices by contractors, grantees, and other third parties, especially if they “knowingly fund” such practices. DOJ encourages, but does not expressly require, recipients to include explicit nondiscrimination clauses in all contracts, monitor compliance, and terminate funding or relationships as needed.

Importantly, DOJ's Civil Rights Fraud Initiative signals that the FCA will be used as a primary enforcement tool: knowingly false certifications of compliance with anti-discrimination laws may trigger FCA investigations and liability.

### ***Anti-retaliation protections***

The DOJ emphasizes robust anti-retaliation protections and encourages the creation of confidential, accessible reporting mechanisms for employees, program participants, and beneficiaries. Individuals who object to or refuse to participate in potentially discriminatory programs are protected from retaliation, and whistleblower reports may trigger investigations, including under the FCA.

### **DOJ's "best practices"—non-binding but highly relevant**

The guidance provides nine advisory "best practices," which, although non-mandatory, are likely to guide enforcement:

1. Ensure inclusive access to all programs, resources, and activities, regardless of protected characteristics.
2. Focus selection decisions on specific, measurable skills, and qualifications directly related to job or program performance.
3. Prohibit demographic-driven criteria, even if facially neutral, if intended to achieve outcomes tied to protected characteristics.
4. Document clear, legitimate rationales unrelated to protected traits for any potentially correlated criteria.
5. Scrutinize all neutral criteria for potential proxy effects before implementation.
6. Eliminate diversity quotas and demographic benchmarks in favor of nondiscriminatory performance metrics.
7. Avoid exclusionary or segregated training programs.
8. Include nondiscrimination clauses in all third-party agreements and monitor compliance.
9. Establish clear anti-retaliation procedures and safe, confidential reporting channels.

### **Implications and action items for your organization**

The guidance signals increased DOJ scrutiny and clarifies its enforcement posture regarding DEI-related policies and practices. In light of this, organizations should:

Conduct a comprehensive audit of all DEI, hiring, admissions, contracting, and training programs, including those implemented, maintained, or administered by third parties, to ensure compliance with both the letter and spirit of federal antidiscrimination laws, as interpreted by the DOJ.

Reexamine the use of facially neutral criteria (such as “lived experience,” “first-generation status,” or “geographic diversity”) to ensure they are not functioning as proxies for protected characteristics and document the race- and gender-neutral rationale for any such criteria.

Review and revise all contracts with third parties to ensure all required flow-down clauses are in place and determine whether additional explicit nondiscrimination clauses are necessary.

Establish ongoing monitoring protocols of all third-party contracts.

Strengthen internal compliance protocols, including documentation practices, reporting mechanisms, and anti-retaliation safeguards.

Monitor developments in federal and state law regarding sex-segregated facilities and athletics and be prepared for potential legal and stakeholder challenges.

Train managers and compliance officers on the new DOJ enforcement posture and the heightened risk of FCA liability for false certifications of compliance.

Engage with counsel to review and, where necessary, revise any policies that may now be considered high risk under the new guidance.

Be prepared not only to respond to potential DOJ investigations and enforcement but also be prepared to defend against possible qui tam relator lawsuits under the False Claims Act.

## **Conclusion**

DOJ’s guidance clarifies its enforcement approach and signals increased scrutiny around DEI practices for all entities receiving federal funds, with a particular focus on whether seemingly neutral policies conceal impermissible consideration of protected characteristics. Even well-intentioned practices have the potential to trigger enforcement risk if not carefully structured and justified. Proactive review with the assistance of counsel and documentation are essential to mitigate legal, financial, and reputational risks.

## **Contact us**

If you have questions regarding DOJ's guidance and its relevance to entities that receive federal contract or grant funds, please contact your Husch Blackwell attorney.