

Strategies for Balancing Compliance with Federal Mandates & Existing Civil Rights Obligations

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Presented by:

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Strategies for Balancing Compliance with Federal Mandates & Existing Civil Rights Obligations

Meet our Speaker



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Agenda

Strategies for Balancing Compliance with Federal Mandates & Existing Civil Rights Obligations

- Antidiscrimination – Considerations of Race in Higher Education
 - 2023 U.S. Supreme Court Decision – Race-conscious decisions in Admissions
 - 2025 Dept. of Education, Dear Colleague Letter – Limiting Access to Other College Resources Based on Race
- Federal Contractor/Grantee Affirmative Action Obligations
- Diversity, Equity, and Inclusion (DEI)
- Antidiscrimination – Gender Identity
- Questions

Antidiscrimination – Considerations of Race in Higher Education

- **2023 U.S Supreme Court Decision – *Students for Fair Admissions v. Harvard***
 - FACTS:
 - Petitioner Students for Fair Admissions (SFFA) sued Harvard College over its admissions process, alleging that the process violates Title VI of the Civil Rights Act of 1964 by discriminating against Asian American applicants and white applicants in favor of “underrepresented” minority applicants.
 - Harvard admits that it uses race as one of many factors in its admissions process but argues that its process adheres to the requirements for race-based admissions outlined in the Supreme Court’s decision in *Grutter v. Bollinger*
 - ISSUE:
 - May higher education institutions use race as a factor in admissions?
 - HOLDING (6-2 majority):
 - No, using race as a factor in admissions violates Title VI

Antidiscrimination – Considerations of Race in Higher Education

- **Feb. 14, 2025: Dept. of Education - Office for Civil Rights, "Dear Colleague Letter"**
 - Issued in follow-up to the *SFFA v. Harvard* decision, shortly after the current Administration takes office
 - "Although *SFFA* addressed admissions decisions, the Supreme Court's holding applies more broadly."
 - " If an educational institution treats a person of one race differently than it treats another person because of that person's race, the educational institution violates the law. "
 - "Federal law thus prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life."

Antidiscrimination – Considerations of Race in Higher Education

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Antidiscrimination – Considerations of Race in Higher Education

- **Feb. 14, 2025: Dept. of Education - Office for Civil Rights, "Dear Colleague Letter"**
 - "All educational institutions are advised to: (1) ensure that their policies and actions comply with existing civil rights law; (2) cease all efforts to circumvent prohibitions on the use of race by relying on proxies or other indirect means to accomplish such ends; and (3) cease all reliance on third-party contractors, clearinghouses, or aggregators that are being used by institutions in an effort to circumvent prohibited uses of race."
 - "The Department intends to take appropriate measures to assess compliance with the applicable statutes and regulations based on the understanding embodied in this letter beginning no later than 14 days from today's date, including antidiscrimination requirements that are a condition of receiving federal funding..."

Antidiscrimination – Considerations of Race in Higher Education

- **Feb. 28, 2025: Dept. of Justice, "Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act"**
 - "While the facts of the case before the Supreme Court [in *SFFA v. Harvard*] were specifically about racial preferences in university admissions, the Court applied broad reasoning to its decision, which has implications for race-based policies in education generally."
 - "The SFFA Court meant that when there is a limited number or finite amount of educational benefits or resources—such as, inter alia, admissions spots in an incoming class, financial aid, scholarships, prizes, administrative support, or job opportunities—a school may not take account of a student's race in distributing those benefits or resources, even if race is only being considered as a positive or plus factor"

Antidiscrimination – Considerations of Race in Higher Education

- Feb. 28, 2025: Dept. of Justice, "Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act"
 - "[S]chools with programs focused on interests in particular cultures, heritages, and areas of the world would not in and of themselves violate Title VI, ***assuming they are open to all students regardless of race***. Nor would educational, cultural, or historical observances— such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate or recognize historical events and contributions, and promote awareness, so long as they do not engage in racial exclusion or discrimination." (emphasis added)

Antidiscrimination – Considerations of Race in Higher Education

- **Feb. 28, 2025: Dept. of Justice, "Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act"**
 - Potential Hostile Work Environment based on race may be created if a College or University:
 - Requires students "to participate in 'privilege walks' that are designed to make them feel guilty about being part of a certain race";
 - Segregates students "by race for presentations and discussions with guest speakers";
 - Pressures students "to participate in protests or take certain positions on racially charged issues";
 - Investigates or sanctions students "for dissenting on racially charged issues through DEI or similar university offices"
 - Mandates "courses, orientation programs, or trainings that are designed to emphasize and focus on racial stereotypes" and;
 - Assigns "them coursework that requires them to identify by race and then complete tasks differentiated by race."

Antidiscrimination – Considerations of Race in Higher Education

- In 2025, Dept. of Education, Office for Civil Rights (OCR) has initiated investigations for alleged impermissible race-based scholarships and race-based segregation at:
 - Grand Valley State University
 - Ithaca College
 - New England College of Optometry
 - University of Alabama at Birmingham
 - University of Minnesota, Twin Cities
 - University of South Florida
 - University of Oklahoma, Tulsa School of Community Medicine
 - And others...

Federal Contractor/Grantee Affirmative Action Obligations

- **Executive Orders**

- **EO 14173 – “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”**

- Rescinded EO 11246
 - Also rescinded the federal regs that flow from EO 11246
 - Ended race/sex affirmative action plan (“AAP”) requirements for federal contractors
 - Effective April 2025, prohibits affirmative action based on race or sex by federal contractors and subcontractors
 - D. Ct. issues injunction; 4th Circuit reverses upholding EO 14173



Federal Contractor/Grantee Affirmative Action Obligations



- **Statutory AAP Obligations**

- **Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)**
 - \$150,000 or more
 - AAP obligations for veteran applicants and employees
- **Section 503 of the Rehabilitation Act**
 - \$50,000 or more
 - AAP obligations for disabled applicants and employees

Federal Contractor Affirmative Action Obligations

- Affirmative Action Enforcement
 - **DOL, Office of Federal Contractor Compliance Programs (OFCCP)**
 - Oversee enforcement of VEVRAA and Section 503
 - Require annual submission of AAPs
 - Authority to rescind or cancel federal contracts
 - Downsized under current Administration



Diversity, Equity, and Inclusion (DEI) in the Workplace

- **EO 14173**

- Also "encourages" private sector to end "illegal DEI" programs
- Directs federal agencies to make this a priority, and identify large companies for enforcement actions
- Requires federal contractors "to certify that they do not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."



By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Diversity, Equity, and Inclusion (DEI)

WHAT TO DO IF YOU EXPERIENCE DISCRIMINATION RELATED TO DEI AT WORK



Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on protected characteristics such as race and sex. Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, no matter which employees are harmed. Title VII's protections apply equally to all racial, ethnic, and national origin groups, as well as both sexes.

Before you can sue in federal court, you first must file a charge of discrimination with the EEOC. The U.S. Equal Employment Opportunity Commission (EEOC) investigates charges of discrimination and can file a lawsuit under Title VII against businesses and other private sector employers. The Department of Justice can file a lawsuit under Title VII against state and local government employers based on an EEOC charge, following an EEOC investigation.

What can DEI-related discrimination look like?

Diversity, Equity, and Inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

Disparate Treatment

DEI-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including:

- Hiring
- Firing
- Promotion
- Demotion
- Compensation
- Fringe benefits
- Exclusion from training
- Exclusion from mentoring or sponsorship programs
- Exclusion from fellowships
- Selection for interviews (including placement on candidate slates)

Harassment

Title VII prohibits workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics. Harassment is illegal when it results in an adverse change to a term, condition, or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive. Depending on the facts, DEI training may give rise to a colorable hostile work environment claim.

Who can be affected by DEI-related discrimination?

Title VII protects employees, potential and actual applicants, interns, and training program participants.

What should I do if I encounter discrimination related to DEI at work?

If you suspect you have experienced DEI-related discrimination, contact the EEOC promptly because there are strict time limits for filing a charge. The EEOC office nearest to you can be reached by phone at 1-800-669-4000 or by ASL videophone at 1-844-234-5122.



www.EEOC.gov

DEI Federal Guidance:

- 3/19/25: “EEOC and Justice Department Warn Against Unlawful DEI-Related Discrimination: Employers’ DEI Policies, Programs and Practices Can Violate Title VII of the Civil Rights Act of 1964”
 - “What To Do If You Experience Discrimination Related to DEI at Work”
 - Q&A “technical assistance” document, “What You Should Know About DEI-Related Discrimination at Work”

Diversity, Equity, and Inclusion (DEI)



Office of the Attorney General
Washington, D. C. 20530

July 29, 2025

MEMORANDUM FOR ALL FEDERAL AGENCIES

FROM: THE ATTORNEY GENERAL 

SUBJECT: GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING
REGARDING UNLAWFUL DISCRIMINATION

I. INTRODUCTION

One of our Nation's bedrock principles is that all Americans must be treated equally. Not only is discrimination based on protected characteristics illegal under federal law, but it is also dangerous, demeaning, and immoral. Yet in recent years, the federal government has turned a blind eye toward, or even encouraged, various discriminatory practices, seemingly because of their purportedly benign labels, objectives, or intentions. No longer. Going forward, the federal government will not stand by while recipients of federal funds engage in discrimination.

This guidance clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion ("DEI") programs.¹ Entities receiving federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race, color, national origin, sex, religion, or other protected characteristics—no matter the program's labels, objectives, or intentions. In furtherance of that requirement, this guidance identifies "Best Practices" as non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls; these are not mandatory requirements but rather practical recommendations to minimize the risk of violations.

Entities 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, should review this guidance carefully to ensure all programs comply with their legal obligations.

DEI Federal Guidance (Continued):

- 7/29/25: "Justice Department Releases Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination"
 - Memorandum addressed to all federal agencies
 - Focused on DEI in the workplace

Diversity, Equity, and Inclusion (DEI)

DEI Federal Guidance (Continued):

- 7/29/25: “Justice Department Releases Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination”
 - Cites to employers anti-discrimination obligations under Title VI, Title VII, and Title IX
 - Unlawful discriminatory policies and practices, according to the July 2025 guidance:
 - Granting Preferential Treatment Based on Protected Characteristics (Sex, Race, National Origin)
 - Race-Based Scholarships or Programs
 - Preferential Hiring or Promotion Practices
 - Access to Facilities or Resources Based on Race or Ethnicity

Diversity, Equity, and Inclusion (DEI)

DEI Federal Guidance (Continued):

- Unlawful discriminatory policies and practices, according to the July 2025 Guidance:
 - Prohibited Use of Proxies for Protected Characteristics
 - "Cultural Competence" Requirements
 - Geographic or Institutional Targeting
 - "Overcoming Obstacles" Narratives or "Diversity Statements"
 - Segregation Based on Protected Characteristics
 - Race-Based Training Sessions
 - Segregation in Facilities or Resources
 - Implicit Segregation Through Program Eligibility

Diversity, Equity, and Inclusion (DEI)

DEI Federal Guidance (Continued):

- Unlawful discriminatory policies and practices, according to the July 2025 Guidance:
 - Race-Based "Diverse Slate" Policies in Hiring
 - Sex-Based Selection for Contracts
 - Race- or Sex-Based program Participation
- Training Programs That Promote Discrimination or Hostile Environments
 - Training that promotes discrimination based on protected characteristics

Diversity, Equity, and Inclusion (DEI)

DEI Federal Guidance (Continued):

- Recommendations on Best Practices, according to the July 2025 Guidance:
 - Ensure Inclusive Access
 - Focus on Skills and Qualifications
 - Prohibit Demographic-Driven Criteria
 - Document Legitimate Rationales
 - Eliminate Diversity Quotas
 - Avoid Exclusionary Training Programs
 - Include Nondiscrimination Clauses in Contracts to Third Parties and Monitor Compliance

Diversity, Equity, and Inclusion (DEI)

EEOC / DOJ Guidance:

- Encourages employees to file charges and engage in private litigation if they believe they have experienced illegal discrimination "related to DEI at work...."
- States that employers may not engage in illegal DEI towards applicants, apprentices, or interns
- Explicitly states that Title VII and other antidiscrimination laws do not protect *only* minority groups



Diversity, Equity, and Inclusion (DEI)



EEOC / DOJ Guidance:

- FAQ: "When is a DEI initiative, policy, program, or practice unlawful....?"
 - "Taking an employment action motivated—in whole or in part—by race, sex, or another protective characteristic."
 - "Employment action" includes hiring, firing, promotion, demotion, compensation, fringe benefits, access to or exclusion from training programs, mentoring, employee resource groups, internships, or assignment of job duties or work projects
 - "Client or customer preference is not a defense to race or color discrimination."
 - There also is no "diversity exception" to these rules."

Diversity, Equity, and Inclusion (DEI)



EEOC / DOJ Guidance:

- FAQ: "When is a DEI initiative, policy, program, or practice unlawful....?"
 - Additional examples include:
 - Racially “balancing” the workforce;
 - Limiting, segregating, or classifying employees based on race; or
 - Diverse interview slates.

Diversity, Equity, and Inclusion (DEI)

EEOC / DOJ Guidance:

- DEI Training in the Workplace
 - Title VII prohibits workplace harassment, which may occur when an employee is subjected to severe or pervasive conduct based on their race, sex, or other protected characteristics that a reasonable person would consider hostile or abusive
 - "*Depending on the facts*, an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in *content, application, or context.*" (emphasis added)



Diversity, Equity, and Inclusion (DEI)

Private Litigation

- Actions have been brought alleging violations of:
 - Title VI – prohibits race/national origin discrimination in the use of federal funds
 - Title VII – prohibits race/national origin discrimination in employment
 - 42 U.S.C. § 1981 – prohibits race/national origin discrimination in private contracts
 - False Claims Act – civil statute that prohibits fraud against the government; *qui tam* provisions

Gender Identity / Antidiscrimination



- **EO 14168 – “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”**
 - Instructs the EEOC and other federal agencies to only recognize two sexes: male and female
 - EEOC has submitted request to eliminate optional disclosure of non-binary data for EEO-1 reporting
 - *But see Bostock v. Clayton County*, 590 U.S. 644 (2020) (holding that Title VII and other federal laws prohibit discrimination based on gender identity and sexual orientation)

Key Takeaways

- **Continue to prohibit discrimination and harassment against individuals based on their gender identity and/or sexual orientation**
 - While there may be reduced regulatory scrutiny for such claims, individuals may still bring private right of action
- **Continue to prohibit discrimination and harassment against *all* individuals based on their race or sex, including those in "majority" race or sex groups (e.g., white males)**

Key Takeaways

- **If Federal Contractor, end AAPs for women and racial minorities**
 - Consider whether the College or University will continue to track race and sex data of employees, and who has access to that information and why
 - Continue to comply with AAP requirements for disabled individuals and veterans

Key Takeaways

- Review any race-conscious or DEI programs or practices, and end any that may be considered "illegal"
 - EO does not change existing law regarding discrimination in employment, contracting, or otherwise, but it does signal increased investigation and enforcement activities relating to DEI programs and increased risk of whistleblower claims
 - Ensure DEI policies align with Title VII and other federal discrimination laws
 - Race or national origin considerations; workforce balancing or quotas = very high risk
 - Other areas to review:

Race and/or DEI references on website or other publicly available materials	Admissions
Scholarships and financial aid	Mentoring and succession planning
Recruitment and hiring practices	Student/ Employee resource and affinity groups
Career development and promotion	Supplier diversity requirements

Questions?

Thank you!