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DOJ Defines "Unlawful Discrimination" For Federal Funding Recipients

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On July 30, 2025, the U.S. Department of Justice ("DOJ") published its "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" (the "Guidance") to all federal agencies. The Guidance, dated July 29, 2025, applies to all recipients of federal funds, including colleges and universities, K-12 public schools, and federal contractors. The Guidance outlines what the DOJ considers "unlawful discrimination" practices that federal funding recipients must avoid, including diversity, equity and inclusion ("DEI") programs, transgender athletes, and "proxy" discrimination of assessing a job applicant's "cultural competence."

According to U.S. Attorney General Pam Bondi, the Guidance covers "various discriminatory practices" to which the federal government purportedly has turned a blind eye in recent years. Attorney General Bondi stated that going forward, the federal government will "not stand by while recipients of federal funds engage in discrimination" and that the Guidance "will ensure we are serving the American people and not ideological agendas."

What Does the Guidance Provide?

The Guidance starts by outlining federal antidiscrimination provisions and law, highlighting Title VI, Title VII, Title IX, and the Equal Protection Clause of the Fourteenth Amendment. Notably, however, the Guidance does not include reference to the Americans with Disabilities Act or Section 503 of the Rehabilitation Act which prohibit discrimination based on disability.

The Guidance then details the policies and practices that it labels "unlawful" and "that could result in revocation of grant funding." Importantly, the Guidance refers to its content as "non-binding suggestions," "non-binding best practices," and "not mandatory requirements but rather practical recommendations to minimize risk of violations." Nonetheless, entities that receive federal financial assistance "or that are otherwise subject to federal anti-discrimination laws, educational institutions, state and local governments and public and private employers" should review the Guidance to ensure that their programs comply with their legal obligations.

The Guidance provides a "non-exhaustive" list of "unlawful practices" including (1) granting preferential treatment based on protected characteristics, (2) prohibited use of proxies for protected characteristics, (3) segregation based on protected characteristics, (4) unlawful use of protected characteristics, and (5) training programs that promote discrimination or hostile environments.

1. **Preferential Treatment**

The Guidance states that unlawful preferential treatment occurs when a federally funded entity "provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons."

The Guidance gives the following examples of policies that may violate federal anti-discrimination laws:

- Race-Exclusive Programs: Such as scholarship funds exclusively for students of a specific racial group or internships, mentorship programs, or leadership initiatives that reserve spots for specific racial groups.
- Preferential Hiring or Promotions Practices: For example, having a policy prioritizing candidates from "underrepresented groups".
- Access to Facilities or Resources Based on Race or Ethnicity: Limiting or designating "safe spaces" or lounges exclusively for use by those of a specific race or ethnic group.

2. **Prohibited Use of Proxies**

Signaling a potential expansion of what constitutes unlawful discrimination, the DOJ defines "unlawful proxies" as occurring when a federally funded entity "intentionally uses ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics." The Guidance states that while the criteria may appear facially neutral, they become "legally problematic" when (1) they are selected because they correlate with, replicate, or are used as substitutes for protected characteristics or (2) they are implemented with the intent to advantage or disadvantage individuals based on protected characteristics.

The Guidance provides the following examples of potentially unlawful proxies:

- "Cultural Competence" Requirements: Such as job postings asking applicants to demonstrate "cultural competence," lived experience," or "cross-cultural skills" in ways that effectively evaluate candidates' racial or ethnic backgrounds.
- Geographic or Institutional Targeting: Implementing recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition.
- "Overcoming Obstacles" Narratives or Diversity Statements: Requiring applicants to describe "obstacles they have overcome" or submit a "diversity statement" in a manner that advantage those who discuss experiences intrinsically tied to protected characteristics.

3. **Segregation**

The Guidance provides that segregation based on protected characteristics occur when entities organize programs, activities, or resources (such as training sessions) in a way that separates or restricts access based on race, sex, or other protected characteristics. Here, the DOJ further notes that "failing to maintain sex-separated athletic competitions and intimate spaces" can also violate federal law, giving examples of allowing

men to compete in women's athletic competitions or allowing men, even those self-identifying as women, to access single-sex spaces designed for women.

The Guidance gives the following examples of unlawful segregation practices:

- Race-Based Training Sessions: A federally funded entity or university hosting a DEI training program requiring participants to separate into race-based groups for discussions, prohibiting individuals of other races from participating in specific sessions.
- Segregation in Facilities or Resources: For example, designating an area as "BIPOC-only study lounge," which facially discourages access by students of other races even if access is technically open to all.
- Implicit Segregation Through Program Eligibility: Hosting a DEI-focused workshop series that requires participants to identify with a specific racial or ethnic group or mandates sex-specific eligibility, effectively excluding others who meet objective program criteria.

4. **Unlawful Use of Protected Characteristics**

The Guidance defines "unlawful use of protected characteristics" as any federally funded entity or program considering race, sex, or any other protected trait as a basis for selecting candidates for employment, contracts, or program participation. The DOJ states that this includes policies that explicitly mandate representation of specific groups in candidate pools or implicitly prioritize protected characteristics because such practices create unequal treatment or disadvantage otherwise qualified candidates.

The Guidance provides the following examples:

- Race-Based "Diverse Slate" Policies in Hiring: This includes any policy requiring all interview slates include a minimum number of candidates from specific racial groups or any policy that sets racial benchmarks for candidate pools.
- Sex-Based Selection for Contracts: Any policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses.
- Race- or Sex-Based Program Participation: Any program (scholarships, fellowships, or leadership initiatives) that use race, sex, or any other protected characteristic as a selection criteria, even if framed as addressing underrepresentation.

5. **Training Programs Promoting Discrimination or Hostile Environments**

Last, the Guidance states that unlawful DEI training programs are those that "through their content, structure, or implementation—stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment." As an example, the Guidance highlights a potentially unlawful scenario in which a federally funded entity requires employees to complete DEI training that includes statements stereotyping

individuals based on protected characteristics such as “all white people are inherently privileged” or “toxic masculinity.”

What Are the Potential Impacts of Non-Compliance?

Failure to comply with the DOJ’s Guidance can trigger significant consequences. If found to be in violation of these new provisions, an organization risks termination of the grant or contract, recission and claw back of previously disbursed funding, and potential False Claims Act actions with associated penalties.

Federal funding recipients should note that, in recent matters, the administration, prior to revoking funding, has imposed funding “freezes” while settlement negotiations are underway. Recipients should also be aware that recent federal investigations have been shorter in length than under previous administrations, with findings issued in weeks, rather than months or years. Thus, if a recipient draws federal attention, the repercussions may be swift, which can lead to increased pressure to agree to settle.

What Steps Should Federally Funded Entities Take Moving Forward?

Federally funded entities should ensure ongoing compliance with federal civil rights laws and court precedent, as well as applicable state laws. Federal contractors and grant recipients also should pay close attention to this recent DOJ Guidance and monitor federal civil rights enforcement actions. The Guidance provides specific recommendations on best practices such as ensuring inclusive access, focusing on skills and qualifications, documenting legitimate rationales, and more.

To the extent a review has not already occurred, federally funded entities should consider privileged audits of their programs and policies to ensure compliance and seek legal advice and counsel on best practices. Based on the DOJ Guidance, targeted reviews should focus on:

- Hiring and promotion practices and criteria to ensure they do not inadvertently discriminate against any group or include “diversity slates.”
- Training programs to ensure that participants are not excluded and that information presented during trainings is not based on stereotypes.
- Procurement processes, including considering whether to include nondiscrimination clauses in contracts with third parties.
- Non-discrimination, harassment, and retaliation policies and procedures to ensure prompt reporting and response.
- Admissions, financial aid, and scholarship-awarding practices. This includes reevaluating recruitment strategies that may have relied on geographical proxies for race and assessing scholarship criteria that could be construed as based on the applicant’s race.

For more information or assistance related to this Legal Alert, please contact one of the authors or a member of Kilpatrick’s Government Contracting & Public Procurement or Labor and Employment Team.