

# Employee Benefit ■ Plan Review

## “Illegal DEI”: New Department of Justice Guidance and Its Implications for All Employers

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**W**hat constitutes “illegal DEI” under the Trump administration? Many employers have been wrestling with this question since the president took office and immediately issued several executive orders (EOs) criticizing diversity, equity, and inclusion (DEI) programs as discriminatory.

Now, the U.S. Department of Justice (DOJ) has offered answers, publishing a memorandum from the Attorney General<sup>1</sup> titled “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination” (the AG Memo), which explains how the administration plans to apply federal antidiscrimination laws to DEI programs and initiatives. In an accompanying press release,<sup>2</sup> the DOJ clarified that its purpose in issuing the AG Memo is to ensure that taxpayer-funded institutions do not engage in unlawful discrimination and instead use federal funds “for the public good.”

The AG Memo is nominally directed at federal agencies and recipients of federal funding – i.e., government contractors already on high alert due to prior announcements regarding plans for aggressive enforcement under a Civil Rights Fraud Initiative launched earlier this year featuring actions under the False Claims Act.<sup>3</sup> But the AG Memo is pertinent to almost all U.S. employers, given that enforcement priorities at multiple agencies, such as the

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Indeed, the AG Memo specifically states that all entities subject to federal antidiscrimination laws – including private employers – “should review this guidance carefully to ensure [compliance] with their legal obligations.” This article offers employers a discussion of the AG Memo and its implications for employers.

### RATIONALES FOR NEW GUIDANCE

The AG Memo advances the Trump administration’s interpretation of federal

antidiscrimination laws with respect to DEI in greater depth and specificity than prior guidance issued jointly with the EEOC, providing both an overview of existing law and examples of what it considers to be unlawful conduct. In its introduction, the AG Memo states that its purpose is to provide a non-binding list of potential violations and alternative “Best Practices” to help employers comply with federal anti-discrimination laws, though its list is neither mandatory nor all-inclusive. The new guidance specifically targets DEI programs and other initiatives that prioritize underrepresented groups.

Emphasizing that federal anti-discrimination laws prohibit discrimination on the basis of protected characteristics, the AG Memo leads with a citation of *Students for Fair Admissions, Inc. v. Harvard (SFFA)* – the 2023 decision<sup>4</sup> issued by the Supreme Court of the United States that effectively eliminated affirmative action in college admissions – to support its point that race-based classifications, in particular, are subject to the highest level of judicial scrutiny (i.e., “strict scrutiny”). The holding in *SFFA* was grounded in the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, but did not consider any of the other antidiscrimination statutes enumerated by the AG Memo, namely, Title VI and Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

In addition to espousing a very broad application of *SFFA*’s holding that affirmative action constitutes unlawful discrimination, the AG Memo evokes the Supreme Court’s recent decision in *Ames v. Ohio Department of Youth Services*, in which the Court unanimously held<sup>5</sup> that members of “majority” groups are not subject to a heightened evidentiary standard to prevail on discrimination claims. While the AG Memo does not reference *Ames* by name, the examples of unlawful

differential treatment it contains signal to employers that they should be aware of potential liability for “reverse discrimination.”

## HIGHLIGHTED POLICIES AND PRACTICES

Against the backdrop of relevant federal laws and recent legal developments – and with no mention of any EOs – the AG Memo lists four categories of unlawful practices that can put employers at risk.

### (1) Preferential Treatment Based on Protected Characteristics

The AG Memo’s first example of an unlawful practice is preferential treatment of individuals in a manner that disadvantages qualified individuals outside of any class based on protected characteristics. This can take several forms. In the context of employment, these include the following:

- **Race-Based Programs.** Opportunities such as “internships, mentoring programs, or leadership initiatives” with reserved spots for members of a certain race might violate federal law. For example, it is unlawful to host a “Summer Diversity Leadership Program” that is available to all students, if a specified number of seats are required to go to students of a particular race or “diverse” participants.
- **Certain Hiring and Promotion Practices.** For example, prioritizing applicants from “underrepresented groups” for a position would constitute unlawful discrimination against those not in such groups.
- **Exclusive Access to Facilities or Resources.** The AG Memo cites “safe spaces” based on race or ethnicity, found on some campuses, as an example, but noted that this could also apply to employee resource groups (ERGs) that are not equally open to all employees.

### (2) Proxies Masked as Facially Neutral Criteria

The AG Memo identifies “proxies for protected characteristics” as conduct that can constitute “illegal DEI,” defining this term as the use of facially neutral criteria to stand in for “explicit consideration” of a protected characteristic. Neutral criteria become unlawful proxies if used due to correlation with a protected characteristic or with the intent to filter individuals on the basis of a protected characteristic. For employers, this likely signals that mere “rebranding” of DEI initiatives won’t pass muster under DOJ scrutiny. The AG Memo specifically calls out the following practices, implicating them as possible code for DEI-based discrimination:

- **Job Postings Requiring “Cultural Competence,” “Lived Experience,” or “Cross-Cultural Skills” That Are Used to Evaluate Applicants’ Race and Ethnicity.** Such requirements are permissible, however, if used to assess an applicant’s language skills or other credentials.
- **Recruitment Strategies Targeting Geographic Areas or Institutions Due to Their Racial and Ethnic Composition.** This practice might include initiatives such as internships for “underserved communities” that are selected because their inhabitants are predominantly of one race. The AG Memo leaves open to question employer efforts to expand the applicant pool through recruiting at Historically Black Colleges and Universities (HBCUs), but it suggests that if recruitment at HBCUs displaces recruitment from other universities, this may constitute illegal DEI.
- **Requests for Diversity or Adversity Statements.** Use of such statements may unlawfully advantage applicants who discuss life experiences that are “intrinsically tied” to the applicant’s protected characteristics.<sup>6</sup>

### (3) Segregation Amounting to Unequal Treatment

The AG Memo characterizes the organization of programs, activities, or resources that address a specific characteristic as unequal treatment that amounts to segregation, unless such separation applies to “athletic competitions and intimate spaces” designed for females. Although not mentioned, such protected spaces would likely include facilities for breast milk expression as required under the PUMP Act.

In contrast, unlawful segregation could occur through programs or resources that separate participants or limit access on the basis of a protected class, “creating unequal treatment or reinforcing stereotypes.” For example, a training session may not split participants into discussion groups based on their race. Other employment practices listed in the AG Memo as potentially unlawful include:

- “[D]iverse slate” requirements for open positions;
- Contracting or hiring policies favoring “minority- or women-owned” businesses; and
- Fellowship or leadership programs based on race or sex, “even if framed as addressing underrepresentation.”

### (4) Training That Promotes Discrimination

Finally, the AG Memo notes that DEI training programs that “stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment” are unlawful. This includes trainings that exclude, penalize, demean, or stereotype individuals on the basis of protected characteristics.

The AG Memo explicitly identifies statements that white people are “inherently privileged” or discussion of “toxic masculinity” as examples of training that could create a hostile

work environment. It also notes that programs that “impose penalties for dissent” could violate Title VII if they “result in discriminatory treatment,” without defining “dissent.” However, a footnote provides that workplace harassment and discrimination trainings remain lawful, so long as the programs “do not single out particular groups as inherently racist or sexist.”

### RECOMMENDED “BEST PRACTICES” AND COMPLIANCE COMPLICATIONS

The AG Memo includes nearly two pages of recommended “Best Practices” to avoid violating federal antidiscrimination laws through “illegal DEI.” These focus on inclusivity for “all qualified individuals,” prioritizing skills and performance metrics over attention to individual identity and protected characteristics, and eliminating attempts to “influence demographic representation” in candidate pools or hiring panels. Some of the AG’s directives exhort an employer to:

- Eliminate diversity quotas as part of performance metrics, applicant pools, hiring panels, and final selections for employment positions;
- Keep workplace harassment, discrimination, and DEI trainings open to all qualified individuals; and
- Incorporate explicit nondiscrimination clauses into third-party agreements if the employer is a federal contractor.

While the AG Memo’s examples consistently refer to race and sex as implicated protected characteristics, it is important to note that color, national origin, and religion are also protected under federal law, as are pregnancy, military/veteran status, age, and disability. Employers should be cautious of programs and initiatives that may show preference to

individuals on the basis of these characteristics as well.

Moreover, state and local laws may present some employers with compliance complications. For example, some states (including California,<sup>7</sup> Illinois,<sup>8</sup> Massachusetts,<sup>9</sup> and New York<sup>10</sup>) impose diversity requirements on contractors in certain sectors.

### WHAT EMPLOYERS SHOULD DO NOW

While the AG Memo provides insight into specific programs and initiatives that the DOJ characterizes as “illegal DEI,” this document is not binding. Courts are not required to adhere to this guidance and may adopt separate constructions or draw different conclusions.

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Nevertheless, the examples provide considerable information regarding the types of programs and activities that could spark an enforcement action by the DOJ, EEOC, or other federal agencies. Accordingly, employers should do the following:

- Review existing recruitment materials, activities, and hiring selection criteria to ensure that they do not run afoul of prohibitions on affirmative action, diversity quotas, or improved representation of underrepresented populations at the expense of qualified candidates outside the particular protected class(es).

- Analyze whether any employee training programs or workplace initiatives, including ERGs or affinity groups, could be interpreted as exclusionary in design or in practice, on the basis of protected characteristics.
- Be mindful of potential legal challenges to DEI or affirmative action efforts, particularly in the context of “reverse discrimination” suits after the Supreme Court’s elimination of a heightened evidentiary standard for “majority group” plaintiffs who assert discrimination claims in the *Ames*.
- Take into account relevant state or local laws and whether they create compliance obligations that conflict with the AG Memo or other federal guidance regarding DEI, and consider discussing with counsel how to navigate such situations.

## CONCLUSION

As the definitions of both “illegal DEI” and other forms of unlawful discrimination will undoubtedly continue to develop, employers should make every effort to stay current. 🌟

## NOTES

1. [https://www.justice.gov/ag/media/1409486/dl?inline=&utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=govdelivery).
2. <https://www.justice.gov/opa/pr/justice-department-releases-guidance-recipients-federal-funding-regarding-unlawful>.
3. President Trump issued an EO on August 7, 2025, regarding federal contracting that explicitly addresses discrimination-related factors as a basis for denying federal funding, available at <https://www.whitehouse.gov/presidential-actions/2025/08/improving-oversight-of-federal-grantmaking/>.
4. [https://www.supremecourt.gov/opinions/22pdf/20-1199\\_hgdj.pdf](https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf).
5. [https://www.supremecourt.gov/opinions/24pdf/23-1039\\_c0n2.pdf](https://www.supremecourt.gov/opinions/24pdf/23-1039_c0n2.pdf).
6. Note that the AG Memo’s advice conflicts with the majority opinion written by Chief Justice John Roberts in the SFFA decision, which stated that “nothing in this opinion should be construed as prohibiting universities from

considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230, 143 S. Ct. 2141, 2176 (2023).

7. [https://www.dgs.ca.gov/PD/About/Page-Content/PD-Branch-Intro-Accordion-List/Statewide-Supplier-Diversity-Program/Statewide-Supplier-Diversity-Program#:~:text=The%20Statewide%20Supplier%20Diversity%20Program%20\(SSDP\)%20aims,get%20fair%20access%20to%20California%20contracting%20opportunities](https://www.dgs.ca.gov/PD/About/Page-Content/PD-Branch-Intro-Accordion-List/Statewide-Supplier-Diversity-Program/Statewide-Supplier-Diversity-Program#:~:text=The%20Statewide%20Supplier%20Diversity%20Program%20(SSDP)%20aims,get%20fair%20access%20to%20California%20contracting%20opportunities).
8. <https://cdb.illinois.gov/business/minoritybusiness.html>.
9. <https://www.mass.gov/info-details/dcomm-contract-compliance>.
10. <https://ogs.ny.gov/mwbe/minority-and-women-owned-business-enterprises-frequently-asked-questions>.

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