

Key Takeaways: Department of Justice's "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination"

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On July 30, 2025, the Department of Justice ("DOJ") released a memorandum entitled "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" ("the Guidance"). Although non-binding, this memorandum outlines the current administration's views regarding (1) obligations of federal funds recipients under federal antidiscrimination laws; (2) policies that violate federal antidiscrimination laws; and (3) how federal funds recipients can comply with antidiscrimination laws.

Organizations that receive federal funding or that are otherwise subject to federal antidiscrimination laws, including academic institutions and public and private employers, should review this guidance carefully.

KEY TAKEAWAYS FROM DOJ'S GUIDANCE

- The use of protected characteristics such as race, sex, color, national origin, or religion for "employment, program participation, resource allocation, or other similar activities, opportunities, or benefits" is presumptively unlawful—regardless of intent to promote diversity.
- Failure to maintain sex-based segregation in "intimate spaces" or allowing transgender women to participate in women's athletic competitions risks violating Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.
- DOJ advises federal funds recipients against implementing policies that DOJ views as designed to achieve discriminatory outcomes through neutral means.
- Federal funds recipients may be liable for discrimination if they knowingly fund unlawful discriminatory practices of their contractors, grantees and other third parties. DOJ suggests incorporating explicit nondiscrimination clauses in third-party agreements, specifying that federal funds cannot be used for programs that discriminate based on protected characteristics.

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- Federal funds recipients that implement training programs discussing topics such as privilege or implicit bias risk violating Title VI or Title VII of the Civil Rights Act of 1964 if they “create a hostile environment or impose penalties for dissent in ways that result in discriminatory treatment.”

POLICIES THAT VIOLATE FEDERAL ANTIDISCRIMINATION LAWS

The Guidance sets out practices that DOJ views as unlawfully discriminatory and the adoption of which may result in grant revocation. Federal funds recipients may also be liable for discrimination if they “knowingly fund the unlawful practices of contractors, grantees, and other third parties.” According to the guidance, discriminatory practices include:

Unlawful Preferential Treatment. Providing opportunities, benefits or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons, including practices that are “preferential” to specific groups.

- Examples: Race-based scholarships or programs; preferential hiring of members of “underrepresented groups”; and provision of “safe spaces” exclusively for certain racial or ethnic groups.

Use of Unlawful Proxies. Intentional use of neutral criteria as substitutes for explicit consideration of protected characteristics.

- Examples of potentially unlawful proxies: Cultural competence requirements; targeting of specific geographic areas or institutions selected primarily because of their racial or ethnic composition; diversity statements or “overcoming obstacles” narratives.

Unlawful Segregation. Organizing programs, activities or resources in a manner that separates or restricts access based on protected characteristics. DOJ explicitly notes, however, that sex separation in athletic competitions and intimate spaces is not unlawful.

- Examples: Training sessions segregated by race; facilities or resources aimed at groups based on protected characteristics, even when nominally open to all; and implicit segregation through program eligibility.

Unlawful Use of Protected Characteristics. Consideration of protected characteristics as a basis for selecting candidates for employment, contracts or program participation.

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- Examples: Race-based “diverse slate” requirements in hiring; giving priority to women-owned businesses in contract awards; and quotes or targets for “underrepresented racial groups” in program participation.

Training Programs That Promote Discrimination. Training programs that stereotype, exclude or disadvantage individuals based on protected characteristics or create a hostile environment.

- Examples: Training sessions that stereotype individuals based on protected characteristics, including by reference to “white privilege” and “toxic masculinity,” if they create a hostile environment or penalize dissent in a discriminatory way.

COMPLIANCE WITH FEDERAL ANTIDISCRIMINATION LAWS

The guidance provides several recommendations on best practices for federal funds recipients to minimize the risk of violating antidiscrimination obligations. These recommendations include:

- Ensuring that all workplace programs, activities and resources are open to all qualified individuals regardless of protected characteristics.
- Basing selection decisions on skills and qualifications directly related to job performance and program participation rather than on criteria like socioeconomic status, first-generation status or geographic diversity.
- Discontinuing programs and policies designed or intended to influence demographic representation.
- Documenting rationales for selection decisions that are consistently applied and are unrelated to protected characteristics.
- Evaluating whether certain neutral criteria are proxies for protected characteristics.
- Eliminating diversity quotas.
- Ensuring that training sessions are open to all qualified participants and do not require them to “affirm specific ideological positions or ‘confess’ to personal biases or privilege based on a protected characteristic.”

- Incorporating explicit nondiscrimination clauses in contracts with third parties and monitoring compliance.
- Establishing non-retaliation procedures for individuals raising concerns about or refusing to participate in diversity or inclusivity programs, as well as safe reporting mechanisms.

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Please do not hesitate to contact us with any questions.



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