

PUBLICATION

DOJ Attempts to Define Illegal DEI: Warning Recipients of Federal Funds to Take Notice

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In our previous Baker Donelson client alerts, we examined (1) the emerging compliance and enforcement risks stemming from the January 21, 2025 Executive Order 14173 "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"; Attorney General Pam Bondi's February 5, 2025 Memorandum directing Department of Justice (DOJ) personnel to investigate "preferences, mandates, policies, programs, and activities" related to diversity, equity, and inclusion (DEI) in the private sector and federally funded institutions; and DOJ's May 19, 2025 announcement establishing its "Civil Rights Fraud Initiative," outlining how the administration plans to use the False Claims Act, 31 U.S.C. § 3729 (FCA), among other tools, to target entities receiving federal funding that "knowingly violate federal civil rights laws."

On July 29, 2025, U.S. Attorney General Pam Bondi further emphasized DOJ's crackdown on "unlawful discrimination" efforts with a new [Memorandum providing "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination"](#) (the "Memo"). This latest Memo expands the government's enforcement theory to include "proxy discrimination" – previously accepted language, policies, and practices that DOJ has taken the position may serve as substitutes for programs intended to achieve "racial or sex-based outcomes." The Memo also broadens DOJ's enforcement reach to include the practices of third-party entities or programs that a direct recipient of federal funding might engage and share funding with, such as a vendor, consultant, or partner.

Failure to comply with this guidance can result in the revocation of any and all federal funding – including federal grants related to Stafford Act disaster-related programs. In addition, an FCA action could result in retroactive revocation of federal funding, with the added possibility of treble damages. Recipients of federal funding should stay vigilant and seek counsel.

Background: DOJ's New Focus on Proxies and Indirect Recipients

A.G. Bondi's July 29 Memorandum chiefly emphasizes that "all Americans must be treated equally" and that "[e]ntities receiving federal funds . . . 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." The Memo then outlines "non-binding suggestions" as guidance for compliance with federal antidiscrimination laws.

The Memo then highlights several [Examples of Unlawful Practices](#), which include:

1. Programs that place preference on "underrepresented groups," including (a) race-based scholarships; (b) preferential hiring or promotion; (c) and access to facilities or resources based on ethnicity.
2. "Unlawful proxies" for protected characteristics, including (a) requirements like "cultural competence," "lived experience," "obstacles overcome," "low-income," or "cross-cultural skills"; or (b) the targeting

of regions or institutions known to reflect certain "racial or ethnic composition."

3. Segregation by protected characteristics, including (a) race-based training or discussions; (b) segregation intrinsic to facilities or resources, such as a "BIPOC-only study lounge," even where access may be open to all; and (c) limiting programs to "underrepresented minorities" or similar restrictions – with an exception for "sex-separated intimate spaces and athletic competitions."
4. "Unlawful use of protected characteristics," including (a) race-based hiring quotas; or (b) limitation of contract bids to "women-owned businesses."
5. "Unlawful DEI training programs," which include any training program that promotes or includes messaging stereotyping a protected characteristic, such as "white privilege" or "toxic masculinity."

The Memo also includes Recommendations for Best Practices for compliance. Entities and groups that receive federal funding should ensure inclusive access while focusing on merit-based skills and qualifications. Any demographic-driven criteria, quotas, or exclusions should be prohibited, and any legitimate selection criteria or restrictions should be well documented.

Even "facially neutral criteria," the Memo emphasized, should be rigorously scrutinized to ensure that it is not an "unlawful proxy" and that no protected characteristics are disproportionately affected by the policy or program to be implemented. Further, the guidance suggests that compliant "nondiscrimination clauses" should be added to third-party contracts of any recipient of federal funding, and that such contracts should be monitored for compliance.

In support of this guidance, DOJ invokes Title VI of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Equal Protection Clause of the Fourteenth Amendment, and Executive Order 14173 instructing agencies to identify sectors, entities, and policies that may advance DEI under the guise of neutral language.

Enforcement Implications and Emerging Risks

The Memo directs federal agencies to reexamine existing grants and contracts, revise compliance certifications to prohibit "proxies" for identity preferences, and identify potential civil enforcement targets. A federally funded entity may potentially be subject to revocation of federal funding and liability for discrimination if such entities "knowingly fund the unlawful practices of contractors, grantees, and other third parties." It also signals the potential for future regulatory actions and, in certain cases, referrals for civil or criminal investigation.

Notably, the Memo emphasizes that its directives apply not just to traditional federal contractors or grantees, but also to affiliated entities and partners. This means that entities or groups receiving federal funding – including corporations, non-profits, and universities – that contract with or collaborate alongside third parties or other associated entities with which the recipient may share those federal funds could face DOJ scrutiny and enforcement actions associated with the actions of the third party and not the recipient itself.

While the guidance does not carry the force of law, it heightens the risk that facially neutral initiatives with DEI intentions or outcomes will be treated as unlawful, with serious consequences ranging from civil FCA liability to suspension or termination of federal funding. However, despite the aggressive posture of the Memo, DOJ's theory of proxy-based DEI enforcement remains legally untested. As yet, it is unclear how the guidance may interact with First Amendment protections and under what circumstances FCA liability may be proven.

Recommendations and Next Steps

Organizations should respond to this evolving enforcement landscape with care and deliberation. While there is no need to overreact, companies and groups receiving federal funds – directly or indirectly – should take this guidance seriously and promptly evaluate their risk exposure.

We recommend conducting a legal review of existing statements, hiring policies, training programs, compliance certifications, and any partnerships with mission-aligned non-profit or advocacy organizations that may include language or initiatives associated with diversity, equity, and/or inclusion. Equally important is documenting the organization's good faith basis for any related programming in place, especially where language has evolved in response to changing legal standards.

Entities should also prepare for possible investigative inquiries or subpoenas by establishing protocols, reviewing whistleblower policies, and ensuring that internal compliance teams are engaged with legal counsel. Additionally, federal grants are likely to see a heightened level of scrutiny and additional reviews surrounding any DEI-related practices or policies.

Conclusion

The July 29 DOJ Memo marks a new and aggressive chapter in the administration's campaign against DEI. By targeting "proxy" language and indirect federal relationships, DOJ is advancing a theory of liability that is sweeping in scope. Entities and groups receiving any federal funding are urged to review all programs, policies, and partnerships to ensure compliance with federal anti-discrimination laws. What the DOJ may view as "discriminatory practices" – whether explicit or implemented through proxies – may result in loss of funding and legal liability, regardless of whether the federal funding itself is involved in such "discriminatory practice."

At Baker Donelson, we advise clients across sectors on how to navigate this uncertain environment, minimize legal exposure, and prepare for both enforcement and litigation. For guidance tailored to your organization, please contact the authors of this alert or your regular Baker Donelson attorney.