

# LEGAL ALERT

SEPTEMBER 2, 2025



## DEPARTMENT OF JUSTICE ISSUES GUIDANCE ON UNLAWFUL CONDUCT IN EXECUTIVE ORDER 14173

BY MATTHEW K. GRASHOFF, SONJA C. RICE, MATTHEW F.  
WAGNER AND J. PATRICK WHITE

HAHN LOESER & PARKS LLP

The Department of Justice recently released a memorandum titled “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination.” In this blog post, Hahn Loeser attorneys **Sonja Rice**, **Matthew Wagner**, **J. Patrick White**, and **Matthew Grashoff** analyze that memorandum, discuss what it does—and doesn’t—say about what may constitute “unlawful discrimination,” and provide key takeaways for federal contractors and recipients of federal funds going forward.

### EXECUTIVE ORDER AFTERMATH

In the aftermath of President Trump signing Executive [Order 14173](#) (the “Order”), titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” numerous questions remained regarding the impact of the Order on federal grantees and contractors. Chief among those questions was what exactly the Order prohibits. The Order requires that the head of each federal agency, in the issuance of any grant or contract, require that each recipient certify that it does not operate any programs promoting “DEI that violate any applicable Federal anti-discrimination laws.” Other sections of the Order state that its intent is to end “illegal DEI and DEIA policies.” However, the Order does not define what “illegal DEI and DEIA” policies are. Because of the lack of clarity from the Order, many contract and grant recipients have been understandably concerned about the prospect of certifying that they are in compliance with applicable federal anti-discrimination laws when it has been unclear what precisely the Order was seeking to proscribe.

### DOJ MEMO:

At the time, [we predicted](#) that it was likely that additional guidance was likely to be released regarding what exactly was prohibited by the Order. On July 29, 2025, we saw the clearest answer about how the Trump administration intends the Order to be interpreted when the U.S. Department of Justice (“DOJ”) Office of the Attorney General released a memorandum titled “[Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination](#)” (the “Memo”), which was directed to “all federal agencies[.]” The Memo’s stated purpose was to clarify “the application of federal antidiscrimination laws to programs or initiatives that may

involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion... programs.” In order to ensure that recipients of federal funds remain in compliance with federal antidiscrimination laws, the Memo “identifies ‘Best Practices’ as non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls[.]” Importantly, the Memo specifies that these “Best Practices” are not mandatory requirements but rather “practical recommendations to minimize the risk of violations.”

Specifically, the Memo provides guidance in broad categories of what it terms unlawful conduct. These include:

- Unlawful Discriminatory Policies and Practices;
- Unlawful Proxies;
- Unlawful Segregation
- Unlawful use of Protected Characteristics; and
- Unlawful DEI Training Programs.

## UNLAWFUL DISCRIMINATORY POLICIES AND PRACTICES

The Memo explains that unlawful discriminatory policies and practices are those that result in unlawful preferential treatment, such as 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.

## UNLAWFUL PROXIES

The Memo outlines certain practices it deems to be “unlawful proxy discrimination.” This includes practices that provide “facially neutral criteria...that function as proxies for protected characteristics” which “violate federal law if [they are] designed with the intention of advantaging or disadvantaging individuals based on protected characteristics.” The Memo provides a handful of examples that could constitute unlawful proxies including (1) cultural competency requirements; (2) lived experience requirements; (3) cross-cultural skills requirements; (4) geographic or institutional targeting; (5) overcoming obstacles narratives; and (6) diversity statements.

As an example provided by the Memo, a scholarship program that targets “financial hardship” is permissible, but a scholarship program that targets an “underserved geographic area” is unlawful *if* the criterion was “chosen” to increase participation by specific racial groups.

A significant difficulty with this guidance is that it does not explain precisely how a “facially neutral” practice might be interpreted as having been “designed” with an unlawful “intention” and how it is determined whether certain criteria were “chosen” for unlawful purposes. Such determinations typically involve fact-intensive investigation to determine the underlying intent. Federal contractors and grantees should conduct a careful examination of any practices – including descriptions of those practices – to determine if these practices are in fact acting as proxies for unlawful discrimination.

## UNLAWFUL SEGREGATION

The Memo explains that “unlawful segregation” is segregation based on protected characteristics. The Memo provides examples of what constitutes “unlawful segregation,” including training sessions, programs, or activities that separate or restrict access based on a protected characteristic. For example, a DEI training

program that requires participants to separate into race-based groups constitutes “unlawful segregation.” The Memo recognizes that there are exceptions to the general impermissibility of compelled segregation; sex-separated athletic competitions and bathrooms are one such exception to the prohibition against segregation based on protected characteristics.

## UNLAWFUL USE OF PROTECTED CHARACTERISTICS

The Memo explains that “unlawful use of protected characteristics” occurs when a federally funded entity or program considers a protected characteristic as a basis for selecting candidates for employment, contracts, or program participation. This extends to the selection of vendors or subcontractors as well as program participation such as an internship or scholarship opportunity. The Memo provides three examples of what the DOJ considers to be unlawful practices. These include: (1) race-based diverse slate hiring policies wherein a recipient of federal funds has a policy to interview certain candidates from specific racial groups; (2) sex-based selection for contracts wherein the recipient prioritizes awarding contracts to minority and women owned businesses (“MWBEs”); and (3) race- or sex-based program participation wherein a recipient of federal funds requires that a certain percentage of program participants belong to or come from underrepresented groups.

The Memo’s discussion of the second point appears to be primarily directed toward state-level grant recipients of federal funds. The example given is: “[a] federally funded state agency implements a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses without preferred group status.” But nothing in the Memo suggests that its recommendations for best practices are solely confined to federally funded state agencies. Thus, to the extent that federal contractors or grant recipients utilize goals or targets for MWBEs, such goals are likely considered unlawful by the DOJ. The Memo does not, however, provide guidance for what happens if a grant recipient receives funds from both federal agencies (that prohibit the use of MWBE targets or goals) and state or local agencies (that may lawfully set MWBE targets or goals). Further complicating the matter is that the certification provision requires federal contractors and grant recipients to certify that they do not operate any “DEI programs that violate applicable federal anti-discrimination laws,” which suggests it could implicate conduct beyond any single project. It seems likely that a federal contractor that certifies that it does not engage in unlawful DEI practices (as an entity) would be prohibited from utilizing MWBE targets and goals on a project funded in part by a state or local agency, even if that project does not receive federal funding. This issue remains a developing one, and recipients of federal contracts and grants should continue to monitor changes to stay informed about any additional guidance that may be released.

## UNLAWFUL DEI TRAINING

The Memo defines unlawful DEI training programs as those that “through their content, structure, or implementation-stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment.” The example provided by the Memo is a recipient of federal funds that conducts DEI training that “stereotypes individuals based on protected characteristics” such as the use of terms such as “white privilege” or “toxic masculinity.” While the Memo states in a footnote that federal law permits “workplace harassment trainings that are focused on preventing unlawful workplace discrimination and that do not single out particular groups as inherently racist or sexist,” to the extent that such trainings create a hostile work environment or impose penalties for dissent, they may be considered unlawful by the DOJ.

## KEY TAKEAWAYS

Based on the Memo's guidance, recipients of federal funds and federal contractors should:

1. In conjunction with legal counsel, conduct a privileged assessment of DEI policies. Be scrupulous about evaluating the purpose of programs, initiatives, scholarships, and practices and how they are described. Carefully evaluate wording – even facially-neutral wording – to assess if it operates as a proxy for targeting a protected class or characteristic.
2. Maintain careful documentation about any changes in programs, practices, and initiatives. The Trump Administration has made it clear that [it intends to use the False Claims Act](#) as a basis to enforce the certification provision. Because the violations of the False Claims Act must be made knowingly, documentation that shows what changes were made in an effort to comply with the Order and guidance from the federal government, including from the Memo, could be crucial in showing that a recipient of a federal funds did not, in fact, knowingly violate the law.
3. Address risks and ensure compliance with anti-discrimination laws. Understand that the Memo outlines the government's view of what constitutes unlawful discriminatory policies and practices and may differ from how courts interpret those same policies and practices under applicable laws. The Memo provides some insight into the circumstances under which the DOJ may take action relating to certain policies and practices. Seek legal advice from an attorney if you are unsure whether your policies and practices may be considered unlawful.
4. Stay up to date with any and all guidance issued by the federal government. Because this is a rapidly evolving space, it is important for recipients of federal funds to know what changes are being made so as to avoid any potential legal pitfalls.

## CONCLUSION

As has been the case since the Order was signed, significant gray areas remain in how the Order will be interpreted and enforced. As such, the most responsible action is for continued vigilance as changes continue to occur and announcements continue to be made regarding what is and is not permissible going forward.

Hahn Loeser & Parks will continue to monitor changes announced in the government contracting and grants space to keep our clients and our readers apprised of the latest developments.

## AUTHORS



**MATTHEW K. GRASHOFF, PARTNER**  
[mgrashoff@hahnlaw.com](mailto:mgrashoff@hahnlaw.com)  
216.274.2205



**SONJA C. RICE, PARTNER**  
[scrice@hahnlaw.com](mailto:scrice@hahnlaw.com)  
216.274.2211



**MATTHEW F. WAGNER, ASSOCIATE**  
[mfwagner@hahnlaw.com](mailto:mfwagner@hahnlaw.com)  
216.274.2345



**J. PATRICK WHITE, OF COUNSEL**  
[pwhite@hahnlaw.com](mailto:pwhite@hahnlaw.com)  
312.637.3092

*This legal alert was created for general informational purposes only and does not constitute legal advice or a solicitation to provide legal services. This information is current as of the date of the alert. The information in this legal alert is not intended to create, and receipt of it does not constitute, a lawyer-client relationship or reinstate a concluded lawyer-client relationship. Readers should not act upon this information without consulting legal counsel admitted in the state at issue.*