

CLIENT ALERT: Department of Justice Issues New Guidance Related to Employers' DEI Programs

On July 29, 2025, the Department of Justice (DOJ) issued a **memorandum**, providing further guidance on the application of federal antidiscrimination laws, policies, programs, and practices, paying particular attention to employers' Diversity, Equity, and Inclusion (DEI) programs. Although the memorandum is applicable to employers who are the recipients of federal funds, the guidance is helpful for all employers to consider as they evaluate the legality of their policies and programs.

The DOJ memorandum signals a continuation of the federal government's enforcement of antidiscrimination laws without regard to the "labels, objectives, or intentions" of an entity's policies and programs. Policies and programs, the DOJ indicates, will be strictly scrutinized based on whether they consider protected characteristics as criteria in employment, admissions, program participation, resource allocation, or other similar activities, opportunities, or benefits. According to the memo, entities may violate federal antidiscrimination laws by engaging in the following practices:

- Establishing race-based scholarships or programs.
- Prioritizing candidates from "underrepresented groups" for admission, hiring, or promotion.
- Evaluating candidates' racial or ethnic backgrounds rather than objective qualifications.
- Using recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition.
- Mandating diverse representation.
- Separating training participants into race-based groups (e.g., "White Ally Group").

On the other hand, the memo directs entities to "affirm sex-based boundaries rooted in biological differences." For example, policies that allow males, "including those self-identifying as 'women'," to access intimate spaces designed for women may create a hostile environment under Title VII.

The guidance also recommends nine "Best Practices," to help entities minimize the risk of engaging in unlawful practices in violation of federal antidiscrimination laws. The recommendations include:

1. Ensure inclusive access to workplace programs, activities, and resources;
2. Focus on skills and qualifications when making selection decisions;
3. Prohibit demographic-driven criteria used to achieve discriminatory outcomes;
4. Document legitimate rationales for criteria used in hiring, promotions, or contract selection;
5. Scrutinize neutral criteria for proxy effects, to ensure facially neutral criteria are not proxies for race, sex, or other protected characteristics;
6. Eliminate diversity quotas;
7. Avoid exclusionary training programs;
8. Include nondiscrimination clauses in contracts to third parties and monitor compliance;
9. Establish clear anti-retaliation procedures and create safe reporting mechanisms.

While much of the guidance is consistent with previous recommendations, some of the guidance follows discourse about DEI practices that has developed in the preceding months, and several of the points made are new to employers (for example, the DOJ's admonition that even recruitment and hiring based on geographic area can be discriminatory). And, though the guidance is clear that it applies to those entities that receive federal funds, it further issues a note of caution to even those employers that do not receive federal funds, as the DOJ states that its guidance provides examples of behavior that would violate Title VII and other federal antidiscrimination laws for all employers. Employers should closely review and, if necessary, revise their policies, procedures, programs, and practices to ensure full compliance with federal antidiscrimination laws, as clarified by the DOJ memorandum.

Should you have any questions on how these changes may affect your workplace and compliance obligations, please reach out to your MBJ attorney.

Catherine "Cat" Scott is a partner and Michael Downey is an associate at Morgan, Brown & Joy, LLP, and may be reached at (617) 523-6666, or cscott@morganbrown.com or mdowney@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on August 11, 2025.

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, should not be construed as legal advice or a legal opinion on any specific facts or circumstances by Morgan, Brown & Joy, LLP and its attorneys. This newsletter is intended for general information purposes only and you should consult an attorney concerning any specific legal questions you may have.