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CLIENT ALERT: EEOC and Department of Justice Issue Guidance on DEI-Related Discrimination

The first two months of the Trump administration saw a flurry of Executive Orders targeting private and public sector diversity, equity, and inclusion ("DEI") programs, and March has been no different. On March 19, 2025, the U.S. Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ") issued guidance on what the administration believes constitutes illegal DEI programming.

The guidance came in two separate documents: first, a joint EEOC and DOJ directive titled "What To Do If You Experience Discrimination Related to DEI at Work;" and second, a series of questions and answers titled "What You Should Know About DEI-Related Discrimination at Work." This month's guidance suggests workplace DEI programs that take employment actions – including but not limited to hiring/firing, promotion/demotion, exclusion from training, mentorship, sponsorship, or fellowships – motivated in whole or in part by race, sex, or any other protected class, may violate federal anti-discrimination law. The guidance also warns that "business necessity" and "client or customer preference" do not justify treating employees differently based on protected class.

Specifically, the EEOC and DOJ are now targeting Employee Resources Groups ("ERG") and other affinity groups built around shared identities, interests, and community. The March 19, 2025 guidance advises that it is actually unlawful to limit membership in such workplace groups to employees in particular protected classes. Additionally, employers may no longer separate employees into protected groups during DEI or other trainings, even if the programming content is the same. Employers have been instructed to provide "training and mentoring that provides workers *of all backgrounds* the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs."

The EEOC guidance goes so far as to warn that workplace DEI training programs themselves can create a hostile work environment if the training is

"discriminatory in content, application, or context." Employers should also be aware that employees claiming that DEI training violates Title VII may be considered to have engaged in the protected activity necessary to set forth a viable claim of retaliation.

Multiple organizations have already challenged President Trump's DEI-focused Executive Orders, with varying levels of success. While it is too early to determine the staying power of those Executive Orders, it should be noted that many DEI programs remain lawful under existing federal anti-discrimination laws. Federal guidance notwithstanding, employers may not need to eliminate their DEI programs entirely, as employer initiatives and programs (including but not limited to ERGs) can be lawful as long as they are blind as to protected class membership and attendance. Eliminating DEI programs entirely could also create its own legal risks and increase exposure from employees expecting some measure of DEI programming. Employers should consult with legal counsel and audit their DEI programs for potential risks before ultimately making determinations that align with their risk tolerance.

MBJ will be working with employers to assess their obligations with respect to DEI policies and practices, and any other policies addressing hiring, promotion, compensation, training, and inclusivity. MBJ will continue to monitor new developments impacting employers as they become available and provide guidance on navigating the increased risks to workplace DEI programs.

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This alert was prepared on March 24, 2025.

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