

Employee Relations LAW JOURNAL

Attorney General Bondi Issues Guidance to Federal Agencies Concerning the Interpretation of “Unlawful Discrimination”

By Kris D. Meade, Katie Erno and Elizabeth Hecker

In this article, the authors review guidance issued recently by the Trump administration to all federal agencies that is the most comprehensive articulation of the Trump administration’s view of what constitutes unlawful diversity, equity and inclusion since President Trump’s Executive Order, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, issued on January 21, 2025.

Attorney General Pam Bondi has issued guidance¹ to all federal agencies entitled “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination” (Guidance).

The Guidance purports 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 (‘DEI’) programs.” It declares 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,” and identifies a series of “‘Best Practices’ as non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls.”

The Guidance is the most comprehensive articulation of the Trump administration’s view of what constitutes unlawful DEI released since President Trump’s Executive Order, Ending Illegal Discrimination and Restoring Merit-Based Opportunity,² issued on January 21, 2025.

The authors, attorneys with Crowell & Moring LLP, may be contacted at kmeade@crowell.com, kerno@crowell.com and hecker@crowell.com, respectively.

Though the Guidance is largely consistent with prior statements from the administration, there are some aspects that offer new or more nuanced interpretations of federal civil rights statutes. Of note, the Guidance addresses:

- (1) “[U]nlawful proxy discrimination”;
- (2) Diversity training that creates a “hostile environment”;
- (3) Awarding contracts based on protected characteristics; and
- (4) “[F]ailure to maintain sex-separated athletic competitions and intimate spaces.”

Each of these subjects is highlighted below.

“UNLAWFUL PROXY DISCRIMINATION”

The Guidance states that “[u]nlawful proxies occur when a federally funded entity intentionally uses ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics.” It asserts that such criteria “become legally problematic” when they (1) “are selected because they correlate, replicate, or are used as substitutes for protected characteristics,” or (2) “are implemented with the intent to advantage or disadvantage individuals based on protected characteristics.” The Guidance provides several examples of what the administration views as “unlawful proxies”:

- Requiring job applicants to demonstrate “cultural competence” or “cross-cultural skills” may be unlawful proxy discrimination “if used to evaluate candidates based on race or ethnicity.”
- “A federally funded program [that] requires applicants to describe ‘obstacles they have overcome’ or submit a ‘diversity statement’ in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics” constitutes unlawful proxy discrimination if it “us[es] the narrative as a proxy for advantaging that protected characteristic in providing benefits.”
- An organization’s implementation of “recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition rather than other legitimate factors.” The federal government has not previously taken the view that a facially race-neutral policy targeting certain geographic areas for recruitment – even for purposes of increasing racial diversity – is unlawful. Indeed,

the government's position appears to conflict with existing federal law as interpreted by multiple courts.

The Guidance advises federal funding recipients to “rigorously evaluate and document whether [such criteria] are proxies for race, sex, or other protected characteristics.”

DEI TRAINING

According to the Guidance, DEI training programs are unlawful if they “stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment.” Such an “objectively hostile environment,” the Guidance states, may be created “through severe or pervasive use of presentations, videos, or other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.”

The Guidance recommends that federal funding recipients “ensure trainings are open to all qualified participants,” that they “avoid segregating participants into groups based on . . . protected characteristics,” and that they not “require participants to affirm specific ideological positions or ‘confess’ to personal biases or privileges based on a protected characteristic.”

SEX-BASED SELECTION FOR CONTRACTS

As another example of “unlawful practices,” the Guidance lists a federally funded entity with “a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned business over equally or more qualified businesses without preferred group status. This includes any contract selection process that uses sex or race as a tiebreaker or primary criterion.” This example may be read to implicate subcontracting plans, including those that are included in federal contracts based on existing federal statutes.

SEX-SEGREGATED FACILITIES

In what constitutes the most specific statement by the administration on the issue since President Trump issued the Executive Order, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,³ in January, the Guidance states that permitting transgender women “to access single-sex spaces designed for females – such as bathrooms, showers, locker rooms, or dormitories” – may create a hostile work environment under Title VII of the Civil Rights Act and also runs afoul of Title IX by “denying women access to the

full scope of sex-based protections in education.” The Guidance further opines that “permitting [students assigned male at birth] to compete in women’s athletic events almost invariably denies women equal opportunity by eroding competitive fairness.”

Of note, the Guidance conflicts with the holdings of multiple federal courts of appeals and several state laws prohibiting discrimination based on gender identity, including some that specifically permit transgender individuals to use private facilities, and to compete in school sponsored athletics, consistent with their gender identity. The Supreme Court has recently granted certiorari on the question of transgender women’s participation in women’s athletics.

IN SUMMARY

- *Key Takeaway #1*

The Attorney General has issued new guidance to federal agencies, providing additional details on the administration’s interpretation of “unlawful discrimination,” including with respect to unlawful “DEI.”

- *Key Takeaway #2*

The guidance suggests that a federally funded entity engages in “unlawful proxy discrimination” when it adopts neutral policies or criteria that function as substitutes for the consideration of race, sex, or other protected characteristics.

- *Key Takeaway #3*

According to the guidance, DEI training programs are unlawful if they “stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment.”

- *Key Takeaway #4*

A federally funded entity commits unlawful discrimination under the guidance if it “prioritizes awarding contracts to women-owned businesses” or otherwise employs a “contract selection process that uses sex or race as a tiebreaker or primary criterion.”

- *Key Takeaway #5*

The guidance asserts that a federally funded entity’s failure “to maintain sex-separated athletic competitions and intimate

spaces can also violate federal law.” This provision appears to be in significant tension with the rulings of several courts of appeals and with multiple state laws.

- *Key Takeaway #6*

Courts will continue to grapple with the administration’s views on what constitutes “unlawful discrimination” under federal civil rights statutes. Federally funded entities, and all entities subject to federal antidiscrimination laws, should closely monitor the government’s enforcement efforts in this area.

CONCLUSION

We can expect significant enforcement activity reflecting the administration’s interpretations of “unlawful discrimination” as set forth in this Guidance and for the courts to weigh in on the question of what constitutes unlawful discrimination under federal law, particularly in the areas where the Guidance conflicts with existing authority. Companies should seek knowledgeable counsel for assistance in navigating these evolving requirements and in developing robust compliance strategies to mitigate risk and ensure adherence to federal anti-discrimination laws.

NOTES

1. https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=govdelivery.
2. <https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/>.
3. <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>.

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