DOJ Issues Non-Binding Memorandum on DEI for Recipients of Federal Funding: What is its Potential Impact on Certifying/Licensing Bodies and Associations?

"Third-Party Funding" Discrimination Should Be Avoided

The warnings also extend to "third-party funding":

> Recipients of federal funds should ensure federal funds do not support third-party programs that discriminate.
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> ……
>
> Federal funding recipients may also be liable for discrimination if they knowingly fund the unlawful practices of contractors, grantees, and other third parties.

"Race-Based Scholarships or Programs" Should Be Avoided

> A university's DEI program establishes a scholarship fund exclusively for students of a specific racial group (e.g., "Black Student Excellence Scholarship") and excludes otherwise qualified applicants of other races, even if they meet academic or financial need criteria. This extends to any race-exclusive opportunities, such as internships, mentorship programs, or leadership initiatives that reserve spots for specific racial groups, regardless of intent to promote diversity. Such race-exclusive programs violate federal civil rights law by discriminating against individuals based solely on their race or treating people differently based on a protected characteristic without meeting the strict legal standards required for race-conscious programs.

"Segregation Based on Protected Characteristics" Should Be Avoided

> **Segregation in Facilities or Resources:** A college receiving federal funds designates a "BIPOC [Black, Indigenous, People of Color]-only study lounge," facially discouraging access by students of other races. Even if access is technically open to all, the identity-based focus creates a perception of segregation and may foster a hostile environment. This extends to any resource allocation—such as study spaces, computer labs, or event venues—that segregates access based on protected characteristics, even if intended to create "safe spaces." This does not apply to facilities that are single-sex based on biological sex to protect privacy or safety, such as restrooms, showers, locker rooms, or lodging.

"Unlawful" DEI Training Programs Should Be Avoided, but Not All DEI Training Programs Are Necessarily Unlawful

Not all DEI training programs or continuing education sessions are discouraged by this memorandum. Rather, this memo distinguishes between permissible and impermissible DEI training. Note the following:

> **What Constitutes Unlawful DEI Training Programs?** Unlawful DEI training programs are those that—through their content, structure, or implementation—stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment. This includes training that:

- Excludes or penalizes individuals based on protected characteristics.
- Creates an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.

Examples of Unlawful Practices

Trainings That Promote Discrimination Based on Protected Characteristics: A federally funded school district requires teachers to complete a DEI training that includes statements stereotyping individuals based on protected characteristics—such as "all white people are inherently privileged," "toxic masculinity," etc. Such trainings may violate Title VI or Title VII [of the Civil Rights Act of 1964] if they create a hostile environment or impose penalties for dissent in ways that result in discriminatory treatment.[6]

Footnote 6: Federal law allows for workplace harassment trainings that are focused on preventing unlawful workplace discrimination and that do not single out particular groups as inherently racist or sexist.

What Is the Potential Impact of This Memorandum on Certifying/Licensing Bodies and Associations?

As stated above, this memorandum offers best practices and is not legally binding. Note its concluding paragraph:

> Entities are urged to review all programs, policies, and partnerships to ensure compliance with federal law, and discontinue any practices that discriminate on the basis of a protected status. The recommended best practices provided in this guidance are non-binding suggestions to assist entities in avoiding legal pitfalls and upholding equal opportunity for all. By prioritizing nondiscrimination, entities can mitigate the legal, financial, and reputational risks associated with unlawful DEI practices and fulfill their civil rights obligations.

Regardless of the advisory nature of this memorandum, there are federal antidiscrimination laws that certifying/licensing bodies and associations must be careful to obey. The following are my legal opinions about issues addressed in this memo.

Legal Opinions

1. It is my legal opinion that private sector certifying bodies and associations—regardless of whether they receive federal funding—likely could be sued successfully under Section 1981 of the Civil Rights Act of 1866 if they offer race-based scholarships or programs. Note the following:

> The American Alliance for Equal Rights, a nonprofit founded by conservative activist Edward Blum…has filed three of its own Section 1981 cases. Two target diversity fellowships at law firms Perkins Coie LLP and Morrison & Foerster LLP, and the other claims that an Atlanta-based venture capital fund [Fearless Fund] engaged in 'explicit racial exclusion' by providing grants and resources to Black women who run small businesses. ("Critics of workplace diversity efforts eye Civil War-era law;" The Spokane Review, August 31, 2023).

2. Private sector certifying bodies that require continuing education on DEI, cultural competence, or similar topics—regardless of whether they receive federal funding—would likely not be sued successfully if the continuing education does not "exclude or penalize individuals based on protected characteristics," and does not "create an objectively hostile environment."

3. Although there is less definitive law on the following fact situation, it is my legal opinion that—for private-sector certifying bodies—creating seats for representatives of protected-category populations would likely not be a basis for a successful lawsuit. I base this opinion on the fact that a position on a board or a committee of a certifying body is not a "benefit" as is a scholarship, admission to a school, a job offer, a promotion, or acceptance into a mentorship program or a leadership initiative.

(Because of constitutional issues, this opinion would not necessarily apply to positions on a governmental licensing board. This fact situation is currently being litigated in *Do No Harm v. Jeff Landry, in his official capacity as Governor of Louisiana*.)

(Questions about this article may be directed to the author at dbalasa@aama-ntl.org.)