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DEI and Discrimination: What Employers Should Know

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Warning of unlawful DEI-related discrimination in the workplace, the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Justice (DOJ) issued guidance this week outlining when a DEI initiative, policy, or practice may be unlawful under Title VII.

The guidance includes a joint one-page technical assistance document titled "What To Do If You Experience Discrimination Related to DEI at Work" and an EEOC-issued question-and-answer technical assistance document titled "What You Should Know About DEI-Related Discrimination at Work." Technical assistance documents do not carry the force of law and are not legally binding, but do provide insight and guidance on agency policy.

Key Takeaways

1. DEI programs cannot segregate or exclude employees based on a protected characteristic.

Prohibited conduct may include

- "Limiting membership in workplace groups, such as Employee Resource Groups (ERG) or other employee affinity groups, to certain protected groups"; and
- "Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources[.]"

Note the guidance that "other privileges of employment" cannot segregate or exclude employees based on a protected characteristic. As detailed below, the guidance specifies that this applies to exclusion from training, mentorship programs, and fellowships.

2. Diversity training may create a hostile work environment

"Depending on the facts, DEI training may give rise to a colorable hostile work environment claim." An employee may be able to "plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context."

As a reminder, under Title VII and many attendant state laws, harassment is illegal when it results in an adverse change to a term, condition or

privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile or abusive.

3. Employees who oppose unlawful DEI practices are protected from retaliation under Title VII

"Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII."

4. Business necessity or customer preference is not a defense

Basing employment decisions on client or customer preference is not a defense to discrimination and "are just as unlawful as decisions based on an employer's own discriminatory preferences."

5. Title VII applies to all workers and all privileges of employment

Any employment decisions based on race, sex, or other protected characteristics may be unlawful. This applies to hiring, firing, promotion, compensation, as well as

- exclusion from training or leadership programs
- exclusion from mentoring or sponsorship programs
- exclusion from fellowships
- selection for interviews (including placement on candidate slates)

Unlawful discrimination exists even if a protected characteristic is "just one factor among other factors contributing to the employer's decision or action." The EEOC's position is that there is no such thing as "reverse" discrimination, only discrimination.

What Now?

Employers should review and update their DEI policies and practices to ensure compliance with Title VII, taking into consideration the issued EEOC guidance. Action steps may include consideration of the following:

1. Do not use protected categories to determine who may participate in trainings and mentorship programs. Instead, open programs to all demographic groups, or use objective criteria (like seniority, level, merit, skills, etc.) to determine who may participate.
2. Make employment decisions (hiring, firing, interviewing, promotions, compensation, etc.) based on objective criteria. Do not use any protected characteristic as a factor, specifically including but not limited to, a plus factor.
3. Review employee trainings, programs, and other internal employment practices. Focus trainings on anti-harassment/anti-discrimination, sexual harassment, and fostering a respectful work environment.

It is prudent for companies to seek experienced legal counsel for

assistance navigating these complex issues.

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