

CLIENT ALERT

WHAT EMPLOYERS NEED TO KNOW ABOUT THE NEW EEOC GUIDANCE REGARDING DEI-RELATED DISCRIMINATION

**By: Marc R. Engel, Esq.
Michael J. Neary, Esq.**

On March 19, 2025, the United States Equal Employment Opportunity Commission (EEOC) and the United States Justice Department jointly issued two technical assistance documents focused on educating the public about unlawful discrimination related to diversity, equity, and inclusion (DEI) in the workplace. The first guidance is a high-level summary entitled “*What To Do if You Experience Discrimination Related to DEI At Work*” (**Summary**). The second guidance is in the form of eleven frequently asked questions entitled “*What You Should Know about DEI-Related Discrimination at Work*” (**FAQs**). Below is a list of essential takeaways from the two guidances¹ as well as considerations moving forward.

Takeaways from the Summary

1. The Summary does not explicitly define “DEI” but *describes* it as a broad term that is *not* defined in Title VII of the Civil Rights Act of 1964. The Summary frames the issue in terms of what DEI-related discrimination can look like.
2. The Summary lists various employer practices that might violate Title VII, including the following:
 - Limiting membership in workplace groups, such as employee resource groups (ERCs) or other employee affinity groups to certain protected groups;
 - Separating employees into groups based upon race, sex, or another protected characteristic when administering DEI or other training, or other privileges of employment, even if the separate groups receive the same programming content or the same amount of employer resources;
 - Using quotas or otherwise “balancing” the workforce by race, sex, or other protected traits;
 - Taking an employment action that is motivated, in whole or in part, by an employee’s race, sex, or another protected characteristic; and

¹ The guidances do not have the legal effect or weight of a regulation, statute, or court decision. As a general matter, the guidances provide insights and information to employers, applicants, and employees about how governmental agencies view and enforce applicable laws.

- Classifying, segregating or limiting employees based on their protected characteristics in a manner that affects their job status or deprives them of employment opportunities.
3. The Summary reiterates that unlawful workplace harassment occurs when an employee is subjected to unwelcome remarks or comments based on race, sex, or other protected characteristics and becomes illegal when it results in an adverse change in a term, condition, or privilege of employment -- or is so frequent and severe that a reasonable person would consider it intimidating, hostile or abusive.
 4. The Summary advises that DEI training, depending on the facts, may give rise to a colorable hostile work environment claim;
 5. The Summary reiterates the prohibition in Title VII against retaliation by employers because an individual has engaged in protected activity, such as objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge. According to the EEOC, reasonable opposition to DEI training, for example, may constitute protected activity based upon the facts and circumstances if the employee provides a fact-specific basis for their belief that the training violates Title VII.

Takeaways from the FAQs

1. The FAQs provide a more focused look at facts and circumstances that could give rise to DEI-related discrimination in the workplace.
2. Title VII protections are not limited to individuals who are part of a minority group.
3. The EEOC's position is that there is no such thing as "reverse" discrimination --; instead, there is only discrimination.
4. The EEOC does not require a higher showing of proof for so-called "reverse" discrimination claims.
5. Citing a recent Supreme Court decision, the EEOC reinforces that the prohibition against discrimination (including "DEI – related disparate treatment") applies to a wide variety of aspects of employment including hiring, firing, promotion, demotion, compensation, fringe benefits; access to or exclusion from training; access to mentoring, sponsorship or workplace networking; internships; selection for interviews; and to job duties and work assignments.
6. To order to state a viable claim of discrimination, consistent with a recent Supreme Court decision, the EEOC notes that employees only need to show some injury or "some harm".

7. There is no business justification for otherwise unlawful conduct based upon “business necessity” or an “interest in diversity”.²

Considerations moving forward

In light of the new guidance, employers would do well to consider the following:

- Ensure that employee resource groups, employee affinity groups, etc. are open to all and, more broadly, ensure that such programs do not offer benefits (such as training and mentoring) to one group of employees, but not to another;
- Ensure that third parties which employers engage to provide assistance in hiring and other employment related activities such as training are themselves complying with the new guidance;
- Review the content of employee training materials to verify that they are aligned with the newly issued guidance;
- Train managers on what are lawful and unlawful factors which may be considered in hiring, termination, promotion, and transfer decisions;
- Centralize decision making in terms of hiring, firing, promotions, and transfers;
- Ensure that hiring, promotion, transfer, and employment-related decisions are based on merit; and
- Review existing insurance coverages (including Employment Practices Liability Insurance).

Marc R. Engel is a shareholder at Lerch, Early & Brewer, Chartered where he is a member of the firm’s Employment and Labor Group and Litigation Group. Michael J. Neary is a shareholder at Lerch, Early & Brewer, Chartered where he is also a member of the firm’s Employment and Labor Group and Litigation Group. Marc can be reached at (301) 657-0184 and by email at mrengel@lerchearly.com. Michael can be reached at (301) 657-0740 and by email at mjneary@lerchearly.com. For more information about the firm, please visit our website at www.lerchearly.com. **This article is not intended to provide legal advice, including legal advice as to any specific matter.**

² In its March 19, 2025 Press Release, the EEOC quotes Acting Chair Andrea Lucas: “Far too many employers defend certain types of race or sex preferences as good, provided they are motivated by business interests in ‘diversity, equity, or inclusion.’ But no matter an employer’s motive, there is no ‘good,’ or even acceptable, race or sex discrimination.”