

July 29 DOJ DEI Memorandum Analysis

On July 29, 2025, the Department of Justice (DOJ) distributed a Memorandum (Memo) titled, [“Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination.”](#) The Memo seeks to clarify and serve as a guide that identifies certain practices that may run afoul of the Administration’s approach to DEI principles. The Memo is non-binding and courts will ultimately decide what constitutes unlawful discrimination. However, importantly, the Memo contains guidance on how an entity receiving federal funding can reduce the risk of a potential False Claims Act (FCA) enforcement investigation. The Memo provides a “non-exhaustive” list of discrimination practices that could lead to revocation of federal funding, including, among other examples, using traits like race, sex, or other federally protected characteristics for purposes of employment or program participation. It also highlights suggestions to avoid risk, including focusing selection decisions on specific skills and qualifications, and eliminating demographic quotas or outcome-driven targets.

The Memo expands upon a January 2025 Executive Order, [“Ending Illegal Discrimination and Restoring Merit- Based Opportunity,”](#) which directed the government to consider using the FCA as a tool to regulate Diversity, Equity, and Inclusion (DEI) programs among federal funding recipients, while also mandating that “the employment, procurement, and contracting practices of Federal contractors and subcontractors shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws.” The Memo aligns with the position taken by the Administration in the Executive Order and by the DOJ in other recent guidance documents, including the [DOJ’s May 19 announcement of a Civil Rights Fraud Initiative](#) that seeks to use the FCA as its primary tool to investigate claims against entities who “knowingly violate civil rights laws.”

The National Council recently engaged outside counsel to address several questions related to the memo. **The following does not constitute legal advice, but rather guidance based upon outside counsel's analysis.**

1. If the Memo applies to “federal programs,” does this also include Medicaid?

The Memo does not specify exactly which federal programs it is intended to cover. To the extent Medicaid is implicated as a “federal program,” state Medicaid programs must determine the application of these new policies. However, to mitigate risk, it may be advisable for all federal funding recipients (regardless of the specific source of funds) to conduct a programmatic review to ensure compliance with the best practices outlined by the Memo.

2. How Strictly Should the Memo’s Requirements for Third-Party Compliance Be Construed?

The Memo states that “federal funding recipients may also be liable for discrimination if they knowingly fund the unlawful practice of contractors, grantees, and other third parties.” Given the use of the term “knowingly,” it seems that if federal funding recipients operate with enough due diligence in reviewing third party compliance with anti-discrimination laws, in some instances the recipient may be able to avoid FCA liability due to third party practices. Strategies to demonstrate due diligence may include:

- Including a term or condition in a subrecipient contract that the vendor must comply with all federal anti-discrimination laws.
- Developing an extra amendment or form that the third party would have to sign attesting that it does not violate any federal antidiscrimination laws.
- Engaging in an annual self-audit analyzing outward-facing activities/websites of third parties to gauge compliance and creating a “memo to file” with the results.

It is likely further clarification on this question would come after any potential litigation on this issue. It will also be key for the funding recipient to evaluate any specific language related to the relevant contracts or funding programs.

A related question involves whether the definition of “third party” would include a landlord paid through Department of Housing and Urban Development (HUD) rents. While the Memo does not directly address this issue, considering that the Memo states its list of examples is “non-exhaustive,” it may be advisable to develop some level of knowledge related to the practices of **any** third party paid with grant funding.

3. State Law Requirements vs. the Memo’s Guidance on Women and/or Minority-Owned Small Businesses

As an example of “segregation based on protected characteristics,” the Memo describes a scenario where a federally funded state agency notes a preference for awarding contracts to women-owned businesses. It should be noted that this example applies only to federally funded state agencies (those that receive considerable federal funding). But beyond this specific example, it seems clear that minority or women set-aside programs with quotas conflict with the Administration’s approach to DEI policy and will likely be considered unlawful. As such, funding recipients may wish to consider developing nondiscriminatory criteria for awarded contracts. However, compliance with state laws always trumps applications for federal funding. Organizations should be aware of state law requirements and may wish to ensure they do not certify compliance with any federal policies that specifically conflict with state law when applying for federal funding.

4. Does the Memo’s Prohibition on “No Affinity Groups” Apply to Medicaid-Funded Groups?

The Memo states that organizing programs, activities, or resources in a way that separates or restricts access based on race, sex, or other protected characteristics may be illegal. In considering compliance with this component of the Memo, it seems that if a group is open to all members and does not separate based on these characteristics, the group may still exist and support a specific demographic; the only change is that membership in the group can no longer be limited solely to that demographic. This approach tracks guidance provided by a [March 2025 Equal Employment Opportunity Commission \(EEOC\) memo](#) (which took this approach with respect to Employee Resource Groups).

5. Concern Over Impact on Hiring Practices and Recruitment Strategies

The Memo’s section on recommended best practices emphasizes the type of hiring and recruitment strategies that are permissible. This includes:

- Focusing on skills and qualifications;
- Prohibiting demographic-driven criteria; and
- Documenting legitimate rationales for the use of criteria corresponding to protected characteristics.

Of these suggestions, documenting legitimate rationales may be the clearest way to show compliance. For example, if an organization chooses to attend job fairs at HBCUs as part of a recruitment strategy, the strategy should document why recruitment at an HBCU is desired, with a rationale unrelated to race or other protected characteristics. This might mean recognizing this practice as casting a wide recruiting net/expanding outreach efforts in order to ensure selection decisions are based on specific, measurable skills and qualifications directly related to job performance.

The Memo also specifically addresses hiring preferences for candidates with “lived experience,” stating that lived experience is an unlawful proxy if “designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics.” It appears the Memo does not intend to use “lived experience” to mean individuals with lived experience of a mental health or substance use challenge. As such, it seems this should **not** prohibit organizations from hiring a peer support specialist, for example, with lived experience as a person in recovery. Requirements may also vary among states, and organizations should defer to relevant state statutes on this issue.

Conclusion

Overall, the Memo does not itself make DEI programs illegal, but it is the clearest statement yet of the Administration's enforcement stance. For many organizations, the greatest risk may be exposure under the FCA if the government believes federal funds were obtained while knowingly violating civil rights laws. Compliance may entail periodic programmatic reviews, strong documentation (including "memos to file"), and remaining cognizant of potential conflicts between state and federal legal requirements.