LEGAL UPDATES

Federal Agencies Issue Guidance Identifying DEI Policies and Practices That May Be Unlawful

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What Employers Should Know

Last month, the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) issued guidance that aims to educate the public about conduct and programs related to diversity, equity and inclusion (DEI) efforts in the workplace that may constitute unlawful discrimination under federal law.

In a technical assistance document, "What To Do If You Experience Discrimination Related to DEI at Work," the agencies summarized Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on protected characteristics such as race and sex, and concluded that "DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action **motivated** — in whole or in part — by an employee's race, sex, or another protected characteristic." The EEOC and DOJ also stated that "DEI" is a broad term and employers who unlawfully use quotas or otherwise "balance" a workforce by race, sex or other protected traits may be in violation of the law.

Additionally, the EEOC and DOJ stated that DEI-related discrimination in the workplace might include the following:

- **Disparate Treatment** –Where an employer takes a DEI-based employment action against applicants or employees in the terms, conditions, or privileges of employment that is motivated (in whole or in part) by race, sex, or another protected characteristic.
- **Limiting, Segregating, and Classifying** – When employers limit, segregate, or classify individuals based on race, sex or other protected characteristics in a way that affects their status or deprives them of employment opportunities.
- **Harassment** – Where an an employee is subjected to unwelcome remarks or conduct based on a protected characteristic, including DEI training which may give rise to a colorable hostile work environment claim.

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- **Retaliation** – Where an employer retaliates against an individual who 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. 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.

The second publication issued by the agencies, "What You Should Know About DEI-Related Discrimination at Work," includes 11 questions and answers regarding DEI programs and policies in the workplace. The Q&A document advises employee about their rights under Title VII, educates them on how to file a charge of discrimination or retaliation with the EEOC and obtain a "right to sue" letter prior to filing a lawsuit, and broadly provides guidance on the EEOC's and DOJ's perspective on potentially unlawful DEI initiatives, policies, programs or practices under Title VII.

The Q&A document also states that an employment action is unlawful even if race, sex or another Title VII protected characteristic was just one factor among other factors contributing to the employer's decision or action. The guidance also states that demonstrating an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination. Finally, the Q&A document states that a claimant 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, and by opposing unlawful employment discrimination related to an employer policy or practice labeled as "DEI."

In response to these publications, 10 former EEOC officials issued a statement on "Employer Diversity, Equity, and Inclusion Efforts." In their letter, the former EEOC officials voiced their position that "federal civil rights offices and officials should not be intimidating or discouraging employers who are working to advance these goals. Instead, these offices and officials should endorse the lawful proactive steps to identify and address discrimination that we have discussed in this statement." Although the authors of the letter include former EEOC general counsel, attorneys, and a commissioner, it bears no legal significance as to the current EEOC's enforcement position and strategies.

What Should Employers Do Now?

Given this guidance from the EEOC and DOJ, as well as recent Executive Orders regarding DEI in the workplace, employers with DEI initiatives, policies, programs or practices should review them to ensure they are not running afoul of Title VII or related state laws. Auditing DEI initiatives, policies, programs or practices should be conducted with the assistance of legal counsel so that communications regarding current practices and policies, as well as any changes to what the employer currently has in place, are protected by the attorney-client communication privilege. Employers should be careful when auditing their current policies and practices so as not to create documentation that may serve as harmful evidence if a lawsuit is filed based on the impact of the employer's DEI initiatives.

Many legal challenges have already been filed in state and federal courts that have caused some uncertainty related to DEI programs in the workplace. Lathrop GPM is closely monitoring developments on this topic, and we will provide future updates as they become available. In the meantime, if you have questions about the impact of these documents from the EEOC and DOJ on your company, please contact Michael Manoukian, or your regular Lathrop GPM attorney.