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EEO Leaders' Response to the July 2025 DOJ Memo on "Unlawful Discrimination"

November 2025

I. Introduction

In July 2025, Attorney General Pam Bondi issued a document titled "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" ("DOJ Memo" or "Memo"). Although its stated goal is to achieve grantee and contractor "compliance" with employment anti-discrimination laws, the July 2025 DOJ Memo ignores or misstates key legal principles and significantly misleads readers. Where the Memo's advice departs from well-established law, employers follow it at their legal peril. Where the Memo chills lawful efforts to advance equal employment opportunity, employers that follow its advice actually undermine compliance with civil rights laws and miss out on practices that could advance their missions and operations.

The misstatements and exaggerations in the July 2025 Memo unfortunately follow a familiar pattern. As we have explained previously, prior actions by the President, the Chair of the Equal Employment Opportunity Commission, and Department of Labor officials consistently attempt to paint as dangerous and even as illegal various lawful and appropriate employer actions that can open doors of opportunity and ensure nondiscrimination. Statements by the Administration mischaracterize or flatly contradict existing federal statutes, court decisions, and established legal guidance – and the Administration has used the resulting confusion, along with more explicit threats and pressure campaigns, to push private employers to abandon lawful practices the Administration disfavors. EEO Leaders have consistently documented and called attention to these Administration tactics and have set the record straight about what the law allows and requires. This document does the same for the July 2025 DOJ Memo.

Our goal is to help employers and employees; lawyers, human resources (HR) and diversity, equity, and inclusion (DEI) staff; and the general public to understand what employers can, and should, still be doing to lawfully advance equal employment opportunity as envisioned by this nation's aspirational founding principles and federal employment law.[1]

In sum, the following practices, among others,[2] are entirely lawful and appropriate, despite claims in the DOJ Memo:

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[1] This document contains general legal information and is not legal advice. Readers should seek advice from qualified counsel for their specific situations.

[2] We have not specifically addressed every single practice described in the memo, focusing on the most significant workplace-related concerns. We recommend employers carefully review the government's assertions about practices we did not address instead of assuming the government's assertions are, in fact, correct applications of the law. In addition, we focus here on workplace practices, recognizing that many of the DOJ Memo's deficiencies also apply in the context of educational institutions and federal grant programs. Others have addressed the July 2025 DOJ Memo as it affects areas beyond employment. See, e.g., the fact sheet by the NAACP Legal Defense Fund and five other legal organizations, The Department of Justice's "Guidance for Recipients of Federal Funding on Unlawful Discrimination: What You Need to Know."

- **Recruitment**

  Expanded outreach strategies designed to achieve a broad applicant pool are clearly lawful and advance non-discrimination goals.

- **Hiring**

  Using cultural competency as a hiring criterion is entirely consistent with equal employment opportunity.

  The Supreme Court has explicitly approved of using individualized descriptions of personal experiences for merit-based evaluation.[3]

  Employers can and should actively evaluate applicant pools, interview panels and candidate slates, if applicable, as well as other aspects of the hiring process, to ensure they reflect a commitment to equal opportunity for all.

- **Inclusive and Welcoming Workplaces**

  Standard employer approaches to employee resource groups make them inclusive of all employees and aligned with legal requirements of opportunity for all.

  Courts – and the EEOC – have clearly approved of well-designed training programs to support non-discriminatory and inclusive workplaces that address racial, gender-based, and other forms of bias.

- **Rights of Transgender Employees**

  Transgender employees' right to use facilities consistent with their gender identity has been upheld by courts and the EEOC.

- **Protecting the Right to Raise Discrimination Concerns Free from Retaliation**

  It is illegal to retaliate against employees for any protected activities raising concerns about discrimination – whether those concerns align with the government's viewpoint on DEI or oppose it.

II. Overarching Problems with the DOJ Memo

A. The DOJ Memo Improperly Characterizes Programs That Foster Diverse, Equitable and Inclusive Workplaces

The DOJ Memo repeatedly claims that typical DEI programs are used to justify explicit racial and other preferences; that those who design or administer those programs mistakenly believe they are allowed to do so under the law; and therefore that there is a critical need for federal enforcement to root out these discriminatory practices.

[3] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 230 (2023).

This characterization is fundamentally wrong. Properly designed and implemented DEI employment programs are not a cover for illegal employment discrimination. They are designed and implemented to advance core principles of anti-discrimination law in legal ways.

This mischaracterization of DEI programs draws a false equivalence between the Supreme Court's recent decisions about programs to promote diversity in college admissions and the legal basis for well-established workplace diversity programs. Title VII has never permitted "diversity interests" to override non-discrimination. Both before and after the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, workplace diversity, equity and inclusion programs must be implemented against a backdrop of laws that protect the rights of employees of all backgrounds to be free from discrimination.

Describing DEI efforts in this misleading way is designed to discourage employers from engaging in lawfully designed DEI efforts, or even using the terminology "DEI." And yet, increasing diversity in the workplace; ensuring an inclusive and safe workplace for all; and committing to equity in the workplace are all valid and important goals.

B. The DOJ Memo's Advice Is Contrary to Employers' Operational Success

If employers decide to abandon lawful DEI programs, they are likely to compromise important and legitimate business objectives. Research and experience show these programs benefit the bottom line – they promote innovation,[4] expand opportunities to reach customers, clients, and markets, and ultimately yield improved financial performance.[5] Inclusive workplaces can increase engagement and retention, which also has a direct financial benefit.[6] Employers who pull back on their commitments to diversity, equity, and inclusion may lose the competitive advantages they have developed through significant long-term investments, and may compromise business and operational success.

And because the majority of Americans believe these programs align with fairness and opportunity at work,[7] reducing or eliminating them could result in costly consumer backlash, as several American companies have already discovered – while seeing their competitors benefit from staying the course.[8]

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[4] Leveraging new and broader perspectives can boost innovation. Alison Reynolds and David Lewis, *Teams Solve Problems Faster When They Are Cognitively Diverse*, Harvard Business Review (March 30, 2017). *See* Sylvia Ann Hewlett, Melinda Marshall and Laura Sherbin, *How Diversity Can Drive Innovation*, Harvard Business Review (Dec. 2013).

[5] Ample research documents the benefits of diverse leadership on firm financial performance. For example, McKinsey analyzed over ten years of global data and found the companies with the most gender and ethnic diversity in executive leadership were nearly 40% more likely to financially outperform those with the lowest levels of diversity. McKinsey, *Diversity Matters Even More: The Case for Holistic Impact* (2023).

[6] Francis X. Frei and Anne Morriss, *10 Reasons Why Inclusion Is a Competitive Advantage*, Harvard Business Review (2023); Catalyst, *Why Diversity and Inclusion Matter*, (summarizing research).

[7] *Most Americans Approve of DEI, According to Post-Ipsos Poll*, Washington Post (June 18, 2024); Jessica Stillman, *Inc.* (March 12, 2025) (citing data from Univ. of Wisconsin at Madison).

[8] The boycott of Target over its move to eliminate DEI has cost the company billions while retailer Costco has seen a boom in customers and revenue by staying the course.

C. The DOJ Memo Misstates and Mischaracterizes Title VII Law and Practices, Creating Legal Risk for Employers

There is another way the DOJ Memo's advice is likely to harm employers (and employees). Decades of experience have shown how proactive work to expand opportunity and prevent discrimination supports sound risk management. This work includes, for example, reviewing internal data on hiring practices, evaluating pay equity, and assessing employee engagement – as well as promoting inclusive culture, training on respectful workplaces, and strengthening trust and feedback processes through employee resource groups. The work also encompasses key policy innovations such as expanding recruitment sources and updating hiring and promotion practices to ensure they promote equal opportunity. Since many of these practices are designed to result in more equitable workplaces and reduce the likelihood of discrimination, employers may face additional risk if they dismantle those programs.

As we describe in detail below, numerous examples in the DOJ Memo of "illegal discrimination" are either not supported by, or are inconsistent with, the case law. Instead of providing strong risk management advice based on existing law, the Memo's advice deviates from the law and potentially increases legal risk for employers.

III. Specific Problematic Aspects of the Memo

A. Recruitment

The Memo states that employers may not use "unlawful proxies," which it defines as "intentionally using ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics." DOJ Memo at page 5.

It is certainly possible for an employer to intentionally discriminate on the basis of race, sex, or another protected characteristic and then label that decision as something else. But the DOJ Memo incorrectly portrays common and appropriate strategies to advance equal opportunity and business objectives as risky and even intentionally discriminatory - with no supporting authority.

> **Expanded Recruitment:** Many employers expand their recruitment to historically Black colleges and universities (HBCUs) and women's colleges – in addition to other colleges and universities – as a strategy to source the broadest possible range of talent. For this reason, courts have ruled that expanded recruitment is consistent with increasing equal opportunity and is not illegal under Title VII.[9]
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> The DOJ Memo, however, uses the label "**geographic or institutional *targeting***" to describe what is actually an ***expansion* or *addition* of recruitment sources in order to ensure a broad pool of qualified applicants**. DOJ Memo at page 5.[10] Under the Attorney General's theory, an employer could violate Title VII simply by deciding to *expand* its recruitment to additional institutions, such as HBCUs and women's colleges.

[9] *Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1557-58 (11th Cir. 1994), S*huford v. Alabama State Bd. of Educ*., 897 F. Supp. 1535 (M.D. Ala. 1995).

[10] "Geographic or Institutional Targeting: A federally funded organization implements recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition rather than other legitimate factors." DOJ Memo at page 5.

This makes no sense. Making outreach more expansive and inclusive and then hiring the best qualified candidate is not discrimination. Courts have long recognized that competing against a larger pool of qualified applicants does not disadvantage anyone.

An employer that chooses not to expand its recruitment based solely on an assertion by the DOJ that such expanded recruitment is a proxy for discrimination risks losing an opportunity to expand its applicant pool in a positive manner.

B. Hiring

The DOJ Memo expands its erroneous perspective on the use of "proxies" to the hiring context.

Cross-Cultural Skills: Employers often seek employees who can demonstrate an ability to understand and work with individuals from different cultures. The DOJ Memo, however, warns employers that seeking applicants with "cultural competence" or "cross-cultural skills" in "ways that effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications," may be considered proxy discrimination.[11]

Cultural competency is not per se a proxy for race, sex, or any other protected characteristic. Cultural competency can be an important qualification for many jobs. There is no basis to presume that employers that use cultural competency as a criterion are using it as a cover for race- or national origin-based discrimination. It is also incorrect to presume that only persons of a particular identity could meet a cultural competency criterion. Hiring based on relevant skills and qualifications rather than identity is the touchstone of equal opportunity. Cultural competency can be one of those skills.

Personal narratives, including diversity statements. To obtain a holistic view of an applicant, employers may ask for a personal narrative that reflects the experience and perspective the applicant would bring to the job. The Supreme Court has specifically recognized that the use of these types of narrative statements to support detailed, individual considerations of merit can be consistent with Equal Protection requirements in the context of college admissions.[12] They are equally valid in the employment context.

The DOJ Memo, however, seeks to instill fear in employers that solicit such personal narratives by implying that these narratives "necessarily advantage[] those who discuss experiences intrinsically tied to protected characteristics, using the narrative as a proxy

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[11] "'Cultural Competence" Requirements: A federally funded university requires job applicants to demonstrate "cultural competence," "lived experience," or "cross-cultural skills" in ways that effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications. This includes selection criteria that advantage candidates who have experiences the employer associates with certain racial groups. For instance, requiring faculty candidates to describe how their "cultural background informs their teaching" may function as a proxy if used to evaluate candidates based on race or ethnicity." DOJ Memo at page 5.

[12] See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 230 (2023) ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.")

for advantaging that protected characteristic in providing benefits."[13] The assumption that use of such narratives is a proxy for unlawful discrimination is simply not supported by any facts or case law.[14]

Active Oversight of Equal Opportunity Throughout the Hiring Process. The DOJ Memo also casts doubt on any mechanism that considers demographic data, even in the aggregate, when an employer works to expand its opportunity to hire the most qualified applicants and to disrupt the potential for bias. The DOJ Memo criticizes the "implicit use of protected criteria" – identifying policies that promote diverse candidate slates or the use of a variety of diverse perspectives as per se illegal and improper, and strongly implies that the awareness of identity operates as an implicit and illegal preference based on race or sex. This paints with far too broad a brush. Employers can and should be aware of the makeup of their applicant pools, interview panels, and candidate slates, and take active steps to identify and remove barriers to equal opportunity at each stage of the hiring process. For example, interviewers with a range of experiences can improve the accuracy and fairness of the decision-making process. Evaluating candidate pools at each step of the hiring process - up to and including the interview phase - can operate as a safeguard to flag situations for further investigation to avoid a risk of discrimination. *See* Open Letter to the Federal Contractor Community from Former U.S. Department of Labor Officials (April 15, 2025).

C. An Inclusive and Welcoming Workplace

Employers use a range of established and legal mechanisms to create a welcoming and inclusive environment.This can include training that explains forms of discrimination, including harassment, that will be prohibited in the workplace, and the establishment of employee resource groups.

But the DOJ Memo implies that any use or mention of identity in practices designed to achieve a welcoming and inclusive workplace will be viewed as "unlawful segregation." It does so by describing actions not commonly taken by employers in trainings or employee resource groups and then labeling those actions "unlawful segregation." It also uses vague language to describe "unlawful DEI training" that provides little guidance and seems designed simply to instill fear in employers.

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[13] "'Overcoming Obstacles' Narratives or 'Diversity Statements'": A federally funded program requires applicants to describe "obstacles they have overcome" or submit a "diversity statement" in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics, using the narrative as a proxy for advantaging that protected characteristic in providing benefits." DOJ Memo at page 5.

[14] The DOJ Memo also states that "[c]riteria like socioeconomic status, first-generation status, or geographic diversity must not be used if selected to prioritize individuals based on racial, sex-based, or other protected characteristics." DOJ Memo at page 8. Employers may value a range of perspectives they think provide a benefit to their workplaces for a variety of reasons that do not involve racial preferences. For example, geographic and socioeconomic diversity may help in broadening the customer base or bringing in a more innovative lens. Employers may value the resilience and grit of individuals who are the "first generation" of their family to participate in higher education. And, a company might want to express its social values by increasing economic opportunity.

Training.

The DOJ memo describes an "unlawful DEI training" as one that "excludes or penalizes individuals based on protected characteristics." DOJ Memo at page 7. It is unclear what type of training would fit this definition. However, in the educational context, the Memo describes this as a training that "requires participants to separate into race-based groups (e.g., "Black Faculty Caucus" or "White Ally Group") for discussions, prohibiting individuals of other races from participating in specific sessions." DOJ Memo at page 6.[15]

This is not the template that most employers use to conduct their training. Instead, training is provided to all employees to improve their understanding of workplace issues, and issues relating to sex, race, or other protected characteristics are part of that training.

Another form of illegal training, according to the DOJ Memo, is one that "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." DOJ Memo at page 7.

In light of the high standard necessary to establish a hostile work environment under Title VII,[16] the content of a training would have to be extremely offensive to establish an objectively hostile environment through its severity alone.[17] In addition, such training typically does not occur frequently enough to satisfy the pervasiveness standard for a hostile work environment.[18]

Many trainings that employers provide are not only consistent with Title VII, but are essential for the employer to show it has taken reasonable steps to prevent discrimination and harassment in the workplace.[19]

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[15] As an alternative, the DOJ Memo recommends a "Faculty Student Success Network" interested in promoting student success as the sole alternative solution. DOJ Memo at page 6.

[16] For a description of the high standard necessary to establish a "hostile work environment, and relevant cases, see EEO Leaders on Employer DEI Efforts, page 3.

[17] For example, in *Hartman v. Pena*, 914 F. Supp. 225, 230 (N.D. Ill. 1995), a court found that a "cultural diversity" training may have created a sufficiently severe environment to support the plaintiff's sexual harassment claim where the male plaintiff was required to participate in a "role reversal" exercise that involved walking between two rows of female colleagues who touched his genitalia and other parts of his body and subjected him to derisive comments.

[18] Young v. Colorado Department of Corrections (10th Cir. 2024). This case involved a prison employee who claimed that the state corrections department's mandatory diversity training created a hostile environment. The district court dismissed his claims, and the Tenth Circuit affirmed, finding that the plaintiff had not alleged a sufficiently pervasive hostile environment to support a harassment claim when he did not allege that the training he challenged had occurred more than once. The court contrasted this to a situation where the employer discusses race "with a constant drumbeat of essentialist, deterministic, and negative language" and where the effects of that training spilled out into other workplace interactions to infect them with racial animus.

[19] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). For more information on training, see EEO Leaders on Employer DEI Efforts, pages 2-3. The EEOC Select Task Force on Harassment Report, issued in 2016, describes various forms of effective training.

Employee Resource Groups. The DOJ Memo does not address employee resource groups directly because it focuses most of its examples on educational institutions. In that context, the DOJ Memo posits a college that "designates a 'BIPOC-only study lounge' facially discouraging access by students of other races." The Memo then says that "[e]ven if access is technically open to all, the identity-based focus creates a perception of segregation and may foster a hostile environment."

This "perception" of a hostile environment might make some employers wary of establishing employee resource groups that are intended to support employees based on characteristics such as race, sex, LGBTQ+ status, or other protected characteristics. In fact, there is no legal prohibition on setting up voluntary employee groups that address common experiences and provide a supportive environment, as long as such groups are open to all employees. For example, an employer may establish a group dedicated to supporting women in the workplace, but all employees – regardless of gender – should be permitted to join the group on the same terms.[20]

The underlying problem with the DOJ's analysis is that it posits two extremes that an institution or an employer might take - mandated and complete segregation based on race or sex on the one hand, or completely erasing race and other components of identity on the other.

This framing wrongly implies that eliminating any mention of identity is the only appropriate course of action to guard against "segregation." Of course employers should not mandate separation based on a protected characteristic. But neither is it necessary to remove all references to identity from the workplace, as the Memo seems to suggest.

There is a third alternative, which is to recognize and value the experiences of employees of all backgrounds in the workplace, and allow voluntary and inclusive organizing framed by race, gender, disability, LGBTQ+ status, and other identities. This voluntary and inclusive alternative can have significant benefits for workplace culture and engagement. And while it may also be appropriate and reasonable to organize around universal objectives, such as career development, Title VII does not mandate erasure of any discussion or engagement related to race, gender, or other protected traits. The Memo does not cite a single legal opinion to support its position or engage with any of the case law that clearly permits this third alternative.

D. Treatment of Transgender Employees

While the DOJ Memo seeks to cast many legitimate actions as "unlawful segregation," it doubles down on the importance of strictly maintaining "facilities that are single-sex based on biological sex to protect privacy or safety, such as restrooms, showers, locker rooms, or lodging." DOJ Memo at page 6. The Memo states that institutions "that allow males, including

[20] *See Diemert v. City of Seattle*, No. 2:22-CV-1640, 2025 WL 446753, at *17 (W.D. Wash. Feb. 10, 2025) ("When properly structured, [ERGs] are voluntary and open to all who share the group's goals, and can foster a sense of belonging and respect that advances equity in the workplace and improves the bottom-line.") (citing *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 539-542 (7th Cir. 2005) (approving of guidelines stating that membership in affinity groups was "voluntary and must be open to all current, salaried, full-time employees who share a group's goals.")).For more information on affinity groups, see EEO Leaders on Employer DEI Efforts, page 4.

those self-identifying as 'women,' to access single-sex spaces designed for females – such as bathrooms, showers, locker rooms, or dormitories – undermine the privacy, safety, and equal opportunity of women and girls." DOJ Memo at page 6. The Memo notes that "[t]hese policies risk creating a hostile environment under Title VII, particularly where they compromise women's privacy, safety, or professional standing." DOJ Memo at page 6.[21]

These statements mislead the reader into thinking that current law prohibits an employer from allowing transgender women to use the women's bathroom. This is simply incorrect.

To the extent that courts have addressed the rights of transgender individuals to use the restroom consistent with their gender identity, courts have largely ruled in favor of such individuals. Most of the cases have arisen in the educational context and have upheld the rights of transgender students to use the restroom consistent with their gender identity.[22] Although the caselaw is evolving and may change,[23] the current case law in the educational setting is favorable to transgender students.

There are two published cases dealing with the right of transgender employees to use the restroom consistent with their gender identity. In a 2021 case, *Hobby Lobby v. Sommerville*, an Illinois state appellate court ruled that preventing a transgender employee from using the women's restroom was unlawful under Illinois' civil rights law. In a 2001 case, *Goins v. West Group*, the Minnesota Supreme Court ruled that Minnesota's civil rights law did not require an employer to permit a transgender woman to use the women's restroom.[24]

But there is *no* judicial ruling of any kind, on the federal level or the state level, that *prohibits* an employer from *voluntarily* allowing transgender employees to use the restrooms consistent with

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[21] Presumably, DOJ must also believe that a transgender man using the men's bathroom "undermine[s] the privacy, safety, and equal opportunity" of men. The Memo, however, does not make that claim.

[22] The first court to rule that transgender students had the right to use bathrooms consistent with their gender identity was the Maine Supreme Court, finding that right under Maine's civil rights law. Doe v. Clenchy (2014). The Seventh Circuit ruled twice in favor of transgender students, finding that Title IX, the federal law prohibiting sex discrimination in education, and the Equal Protection Clause gave those students the right to use the bathrooms consistent with their gender identity. *Whitaker v. Kenosha Unified School District No. 1 Board of Education* (2017); *A.C. v. Metropolitan School District of Martinsville* (2023).

In the most recent case of *Doe v. South Carolina*, the Fourth Circuit Court of Appeals issued an injunction in August 2025 blocking a state law that prevented transgender students from using the bathrooms consistent with their gender identity. In September 2025, the Supreme Court declined to lift the injunction, keeping the state law from going into effect. The Fourth Circuit was following its precedent from a 2020 case, *Grimm v. Gloucester County School Board*, in which it ruled that a school's policy restricting a transgender boy from using the boys' restroom was a violation of Title IX and the Equal Protection Clause.

[23] For example, the Seventh Circuit recently vacated a June 2025 ruling in favor of a transgender student in *D.P. v. Mukwonago Area School District*, and ordered a rehearing to consider whether it should overrule its holdings in *Whitaker* and *A.C.* in light of the Supreme Court's decision in *United States v. Skrmetti*, 605 U.S. 495 (2025).

[24] The EEOC has also weighed in on this issue. The EEOC ruled in *Lusardi v. McHugh, Dept of the Army* that Title VII requires an employer to permit a transgender person to use the restroom consistent with their gender identity. That ruling remains in effect until the EEOC overturns it. The EEOC has also shaded out (and will presumably soon remove) the section of its harassment guidance that states the same rule. See EEO Leaders Statement on EEOC's Harassment Guidance. But under *Loper Bright Enterprises v. Raimondo*, EEOC's guidance is relevant to a court only to the extent that it is a persuasive interpretation of Title VII.

their gender identity. The argument that such a policy would be a violation of other female employees' "privacy, safety, and equal opportunity" has never been accepted by any court.

Although this is an evolving area of law, to the extent that employers wish to reduce their legal risk, it is more prudent to allow transgender employees to use the restrooms consistent with their gender identity than to prohibit them from doing so.

E. Limiting Retaliation Standards

Title VII and many other civil rights laws forbid retaliation against employees who participate in procedures to vindicate their right to be free from discrimination, or who oppose discriminatory conduct.[25] This means it is illegal to fire, refuse to hire, or take any other adverse employment action against an employee for making a complaint of discrimination or challenging discrimination in the workplace. The prohibition against retaliation is a fundamental component of the law's purpose to ensure workplaces will be free from bias. If employees believe they will be punished for making complaints, they will not bring illegal conduct to the attention of their employer, and the employer will have no opportunity to address the harm or keep it from recurring.

The Memo counsels employers to be on the lookout for illegal retaliation related to a single type of conduct: "adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws" and observes that "[i]ndividuals who object to or refuse to participate in discriminatory programs, trainings, or policies are protected from adverse actions like termination or exclusion based on that individual's opposition to those practices." DOJ Memo at Page 2. While this scenario could in theory give rise to a valid retaliation claim, employers should also refrain from taking adverse actions against employees who express concern that removing an existing DEI program has resulted in discrimination against them or others, or who take any other type of action opposing discrimination. By focusing only on retaliation against conduct that ideologically aligns with the government's view, the DOJ Memo fails to advise employers about the full range of legal requirements that apply to them with regard to retaliation.

IV. Best Practices from EEO Leaders

Our best practices are set forth below:

- Engage in broad outreach and recruitment strategies to promote equal opportunity, which can advance an employer's talent objectives and business success.
- Engage in merit-based hiring based on the full range of skills and competencies that are relevant to the workplace and the job.
- Actively evaluate applicant pools, interview panels, candidate slates, and other aspects of the hiring process, to ensure they reflect a commitment to equal opportunity for all.
- Support employee resource groups that are open to participation by all employees.

[25] 42 U.S.C. §2000e–3(a); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U. S. 53 (2006).

- Provide training on non-discrimination that addresses racial, gender-based, and other forms of bias, through promoting respectful conduct and inclusive culture.
- Provide all employees the freedom to use facilities consistent with their gender identity.
- Establish strong anti-retaliation protections that ensure employees can voice concerns and identify potential discrimination on any basis protected under the law.

V. Conclusion

The DOJ Memo opens with this statement: “One of our Nation's bedrock principles is that all Americans must be treated equally. Not only is discrimination based on protected characteristics illegal under federal law, but it is also dangerous, demeaning, and immoral.” DOJ Memo, page 1.

We could not agree more. Yet the Memo itself is demeaning to employees and employers who engage in legal equal opportunity efforts; it is destructive to those efforts; and it is contrary to our basic American values of equal opportunity.

Consistent with America’s highest ideals, Title VII of the Civil Rights Act of 1964 and other federal employment laws have expanded employment opportunities for all workers. Clear guidance about the rights and obligations created by these laws helps protect and strengthen our economy and society, so that everyone can thrive.

Federal contractors and grantees now face a particularly challenging environment with pressure on them to abandon proven equal opportunity programs or risk losing federal funding. Private employers face similar pressure, even without government contracts at stake. And yet, capitulating to these misguided views creates significant risks. Employers who dismantle equal opportunity efforts face legal liability under existing civil rights laws and risk losing highly qualified talent that helps drive innovation and growth. In addition, these employers may face significant long term disadvantages when future Administrations return to established legal interpretations.

We urge all employers to carefully assess their options and to stand together in support of the rule of law and America’s promise of fair and equal workplaces.