New EEOC Technical Assistance on Anti-Discrimination in the Workplace

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On March 19, 2025, the Equal Employment Opportunity Commission (EEOC) released two new publications on diversity, equity, and inclusion (DEI) in the workplace. Both documents address the scope of protections under Title VII of the Civil Rights Act of 1964[1] (Title VII) as they relate to an employer's DEI policies, programs, and practices. The first document, *What To Do If You Experience Discrimination Related to DEI at Work* (the "flyer"), is a one-page overview jointly issued by the EEOC and Department of Justice.[2] The second document, *What You Should Know About DEI-Related Discrimination at Work* (the "FAQ"), was released solely by the EEOC in question-and-answer format.

As technical assistance documents, both the flyer and FAQ provide helpful insight into the views of the EEOC on DEI in the workplace, but they are not legally binding.[3] At this time, the EEOC cannot vote to issue new rulemaking or legally binding guidance because it lacks a quorum of commissioners. Instead, this technical assistance reflects the EEOC's views on the application of *existing* law, court cases, and guidance to certain factual situations involving DEI. Notably, both the flyer and the FAQ acknowledge that Title VII does not define DEI. Though they lack legal authority, the flyer and FAQ shed light on how the EEOC may investigate and regulate over the next several years.

The FAQ reiterates the established legal principle that Title VII's protections "apply equally to all workers".[4] Both technical assistance documents emphasize the longstanding so-called mixed motive theory that Title VII prohibits discrimination that is based, in whole or in part, on a protected characteristic.[5] This means an employer who terminates an employee for both a discriminatory *and* a legitimate (e.g., performance-related) reason still violates Title VII. Protected characteristics under Title VII include race, color, religion, sex, or national origin.

In addition to traditional employment actions such as hiring, firing, and compensation, the flyer and FAQ provide further examples of employer-sponsored activities that could violate Title VII:

- **Workplace Affinity Groups.** Title VII prohibits employers from depriving individuals of employment opportunities by "limit[ing], segregat[ing], or classify[ing]" them based on protected characteristics.[6] The technical assistance documents state that "unlawful segregation" could include limiting membership in workplace affinity or employee resource groups (e.g., a working parents club) to only members of a protected class. Accordingly, employers should evaluate their workplace-sponsored activities and groups to ensure all employees are given the opportunity to participate, regardless of their protected characteristics.

- **Pre-Employment Data Collection.** Briefly in the FAQ, the EEOC points to existing guidance on how pre-employment questions about a candidate's protected characteristics could suggest that information is being used as a basis to make selection decisions. Unlawful discrimination during the interview process, including placement in or exclusion from a candidate pool based on protected characteristics, can form the basis for a Title VII claim. The EEOC has long suggested that employers' hiring processes anonymously collect and separate any necessary demographic questions from information that will be used to evaluate a candidate's qualifications for the job.[7]
- **Training and Programming.** The EEOC is responsible for enforcing federal anti-discrimination laws, but also provides resources and guidance on preventing employment discrimination. Training for employers and employees is a significant part of ensuring appropriate conduct in the workplace. In some Title VII lawsuits, an employer can even defend itself against a discrimination claim by showing that it attempted to promptly prevent and correct the offending conduct by training its employees.[8] Many states also require employers to conduct trainings on topics such as respectful workplaces or sexual harassment.[9] The FAQ points out two activities with respect to trainings and similar programming that should be avoided:
    - The technical assistance documents provide that, similarly to "unlawful segregation" in employee groups, trainings and other programming that separate workers into groups based on protected characteristics could violate Title VII, even if the separate groups are given the same content or amount of employer resources. Instead, the FAQ states employers should conduct trainings that provide "workers of all backgrounds" the tools needed to perform well.
    - Title VII prohibits conduct that creates a hostile work environment, which is harassment based on a protected characteristic that is so severe or pervasive that it effectively changes the conditions of employment.[10] Both the flyer and FAQ indicate that a DEI-related training could create a hostile work environment if it is discriminatory in "content, application, or context." However, any training would still need to be so severe or pervasive as to meet the existing legal standard for a hostile work environment. Examples of conduct contributing to a hostile work environment in training-related case law include inappropriate touching of employees and the display of graphic images.[11]
- **Protected Activity.** Title VII prohibits employers from retaliating against individuals who engage in a protected activity, such as opposing unlawful discrimination or participating in an EEOC investigation.[12] The flyer and FAQ add that opposing a "DEI training" could constitute a protected activity if the individual "provides a fact-specific basis for his or her belief that the training violates Title VII". This is the same standard that applies when an employee opposes any other type of unlawful conduct.

These technical assistance documents have not changed the legal framework underlying Title VII: discrimination in employment based on an individual's protected characteristics is still prohibited. The courts, which have played an important role in interpreting anti-discrimination statutes over the decades,

are still responsible for hearing cases brought by the EEOC under Title VII. Although these technical assistance documents do not amend the current legal obligations of employers, the content does signal that the EEOC will likely take a particular interest in allegations of discrimination related to DEI activities. It is possible that the number of DEI-related lawsuits brought by the EEOC against employers will increase in the foreseeable future. Finally, once additional commissioners are appointed to the EEOC, the agency may release binding guidance on DEI and related topics that could require employers to make changes in their workplace.

END NOTES

[1] 42 U.S.C. § 2000e et seq.

[2] The EEOC and Department of Justice share jurisdiction over the enforcement of anti-discrimination laws for public sector employers, such as state and local governments.

[3] 29 CFR 1695.2(d)

[4] The Supreme Court is currently considering a case, *Ames v. Ohio Department of Youth Services* (No. 23-1039), regarding whether majority-group plaintiffs must meet an additional evidentiary burden for discrimination claims.

[5] 42 U.S.C. § 2000e–2(m)

[6] 42 U.S.C. § 2000e–2(a)(2)

[7] E.g., EEOC, *Pre-Employment Inquiries and Race* (https://www.eeoc.gov/pre-employment-inquiries-and-race): "If an employer legitimately needs information about its employees' or applicants' race for affirmative action purposes and/or to track applicant flow, it may obtain the necessary information and simultaneously guard against discriminatory selection by using a mechanism, such as "tear-off" sheets. This allows the employer to separate the race-related information from the information used to determine if a person is qualified for the job."

[8] Known as the *Faragher-Ellerth* defense, which is based on the Supreme Court cases *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

[9] Maine, for example, requires employers with 15+ employees to conduct sexual harassment training for all new employees and additional training for supervisory employees. 26 M.R.S.A. § 807.

[10] Established by case law deriving from the Supreme Court case M*eritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[11] *Hartman v. Pena*, 914 F. Supp. 225, 227 (N.D. Ill. 1995) (discussed in Brief of the EEOC as Amicus Curiae in Support of Neither Party, *Vavra v. Honeywell International, Inc.*, No. 23-2823 (7th Cir. Feb. 6, 2024))

[12] 42 U.S.C. § 2000e–3(a)