Updates to the Nondiscrimination Clauses in State Contracts

Frequently Asked Questions

What changes have been made to the Nondiscrimination Clause in the standard state contract template and why?

In light of recent developments in civil rights law, including the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023), a modification to the civil rights provision of the State contract and grant templates used by state agencies is appropriate to ensure that all contracts into which the state enters fully comply with Indiana Code § 22-9-1-10, which requires state contractors and grantees to covenant that they will not discriminate on the basis of race or sex, among other protected characteristics, in their employment practices. The revised Clause adds a new subparagraph concerning diversity, equity, and inclusion ("DEI") practices and references to Indiana's False Claims Act in both the current and new subparagraphs of the Clause.

The revised language requires a contractor or grantee to covenant that it does not operate any programs or engage in any practices promoting DEI that violate Indiana or federal civil rights laws by treating a person differently on the basis of race or sex, such as by considering race or sex when making recruitment, hiring, disciplinary, promotion, or employment decisions; requiring employees to participate in trainings or educational programs that employ racial or sex stereotypes, depending on the circumstances under which the trainings or programs are conducted; or attempting to achieve racial or sex balancing in the Contractor's workplace.

Prohibitions on racial discrimination have long been included in all state contracts. The new subparagraph concerning DEI practices simply clarifies and makes explicit the obligations to which all state contractors and grantees are already subject.

What makes DEI programs or practices unlawful?

If a contractor or grantee treats a person differently than it treats another person because of race or sex, the contractor is violating the law. Contractors and grantees are thus prohibited from using race or sex in decisions pertaining to hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, and all other aspects of their workforce operations.

Although some programs and practices may seem neutral as to race and sex, a program or practice is still unlawful if it is based on considerations of race or sex or indirectly takes race or sex into account in employment or other contexts. For example, an employer may

not use job applicants' cover letters, writing samples, or other factors as proxies for determining or predicting an applicant's race and favoring or disfavoring applicants based on such determinations. Relying on non-racial information as a proxy for race, and making decisions based on that information, violates the law.

DEI programs often violate civil rights laws in subtle but significant ways. For instance, many DEI programs operate based on unlawful assumptions that members of a certain race behave or think alike and treat members of that race accordingly. That is a form of racial stereotyping that violates civil rights laws.

Not all DEI programs or practices necessarily violate federal or state civil rights laws. Conversely, just because a contractor's or grantee's program or practice does not use racially charged DEI language does not mean that it is compliant with civil rights laws. Some entities may attempt to veil racially discriminatory policies with terms like "anti-racism," "social-emotional learning" or "culturally responsive" training. Whether a DEI initiative constitutes unlawful discrimination does not turn on whether it is labeled "DEI" or uses terminology such as "diversity," "equity," or "inclusion." An assessment of policies and programs depends on the facts and circumstances of each case.

Relatedly, DEI practices related to sex may not always raise the same legal concerns as racially discriminatory practices in cases where sex is a bona fide occupational qualification.

What are some examples of unlawful DEI programs or practices?

Examples of unlawful DEI programs or practices include:

- Implementing "quotas" or otherwise attempting to "balance" a workforce by race or sex;

- Excluding or dissuading individuals from taking part in training, fellowships, mentoring, or other programs on the basis of their race or sex;

- Selecting candidates for interviews, including placement on candidate slates, based on their race or sex;

- Limiting membership in workplace groups, such as employee resource groups, to members of particular racial groups;

- Making resources or other forms of workplace support available only to employees of a particular race; and

- Separating employees into groups based on race when administering workplace trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources.

What consequences do state contractors and grantees face if they operate unlawful DEI programs?

Contractors and grantees who operate unlawful DEI programs may be subject to penalties under Indiana's False Claims Act, Indiana Code § 5-11-5.5 *et seq*. The new, revised Nondiscrimination Clause makes clear that breach of the Clause will be treated as a material breach of the contract for purposes of the False Claims Act.

The attorney general and inspector general have concurrent jurisdiction to investigate violations of the False Claims Act, and the attorney general may bring a civil action against the contractor or grantee to recover up to three times the amount of damages sustained by the state, plus attorneys' fees and up to $5,000 in penalties. Additionally, the Act authorizes whistleblowers to bring a civil action on behalf of the State to recover these damages.

When is the effective date of the updated Nondiscrimination Clause?

The effective date of the template update was July 1. Any contracts initiated on or after July 1, 2025 must include the updated Nondiscrimination Clause. Contracts initiated after July 1, 2025 without the updated Nondiscrimination Clause may be disapproved by the attorney general. Contracts that have already been signed and submitted for approval before July 1, 2025 do not have to be amended to include the updated Nondiscrimination Clause.

Contracts that are amended after July 1, 2025 must incorporate the updated Nondiscrimination Clause, even if the only changes are term extensions or added funds.