



August 24, 2022

The Honorable Henry J. Kerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street NW, Suite 218
Washington, DC 20036-4505

Investigation Request/U.S. Department of Transportation’s Illegal Race-based Hiring and Promotion Practices

Dear Special Counsel Kerner:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to protect the rule of law, due process, and equal protection for all Americans. AFL has obtained internal Department of Transportation documents¹ demonstrating that President Biden’s executive orders on “equity”² are being implemented through unlawful “racial balancing” policies, practices, and quotas in employment training, hiring, and promotion. Therefore, we write to request that the Office of Special Counsel open an investigation into the Department for engaging in unlawful employment practices in violation of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302.³

The Department’s publicly available “Equity Action Plan” demonstrates that race is being unlawfully infused into the Department’s hiring and promotion decisions.⁴ It purports to achieve “desired [racial] outcomes beyond federal regulations” that prohibit the government from playing favorites based on immutable characteristics.⁵ To that end, the Department carried out its “Quantitative Workforce Benchmarking,” a

¹ See U.S. Dep’t of Transp., Office of the Secretary, *Diversity, Equity, Inclusion, and Accessibility (DEIA) Assessment Insights Brief: Quantitative Workforce Benchmarking* (Aug. 4, 2022), available at <https://bit.ly/3dNaVg4>.

² Exec. Order No. 13,895, 86 Fed. Reg. 7,009 (Jan. 27, 2021); Exec. Order No. 14,035, 86 Fed. Reg. 34,593 (June 25, 2021).

³ Although under 5 C.F.R. § 1810.1, the Special Counsel will normally avoid duplicating the procedures for investigating discrimination already established in the agencies and the Equal Employment Opportunity Commission, the Special Counsel may, at his discretion, investigate discrimination complaints, particularly where allegations include discrimination as well as other PPPs. U.S. Off. of Special Couns., FAQs (last visited Aug. 23, 2022), <https://osc.gov/FAQ#tabGroup01>. Here, the allegations include denial of training opportunities, which constitutes a PPP, but not an adverse employment action under 42 U.S.C. § 2000e-2.

⁴ U.S. Dep’t of Transp., EQUITY ACTION PLAN at 6 (Jan. 2022), available at <https://bit.ly/3dGY6Uk>.

⁵ *Id.* at 4.

taxpayer-funded exercise in racial “bean counting” to support illegal race-based hiring and promotion practices. Critically, one of its “ultimate desired outcomes” is “equitable opportunities (sic) to advance in public service at DOT.”⁶

With respect to federal employment, “equitable opportunities” is a term without fixed or discernable legal meaning. In this case, however, the evidence is that the Department is using the term as a proxy for unlawful racial quotas in the service of arbitrary and capricious racial balancing. “Equality means each individual or group of people is given the same resources or opportunities. Equity recognizes that each person has different circumstances and allocates the exact resources and opportunities needed to reach an equal outcome.”⁷ Our laws mandate equality of opportunity. They forbid “allocating the exact resources and opportunities needed to reach an equal outcome.”

Additionally, the evidence is that the Department is setting “specific short-term and long-term targets for diverse representation (sic) in alignment with DOT strategic planning” and creating “SES leadership training for currently underrepresented groups” of federal workers.⁸ Again, although the term “diverse representation” lacks fixed or discernable legal meaning, the evidence is clear that the Department equates “diversity” with a federal worker’s immutable characteristics or, under some circumstances perhaps, his or her sexual behavior. Regardless, the Civil Service Reform Act absolutely prohibits federal hiring and promotions based on “equitable opportunities” or “diverse representation” and clearly forbids “leadership training” for some workers but not others, based solely on their race or sex.

For example, 5 U.S.C. § 2301(b) provides in relevant part that:

Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and *advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.*

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management *without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.*

⁶ See *supra* note 1 at 4.

⁷ Milken Institute School of Pub. Health, The George Washington University, *Equity v. Equality: What’s the Difference?* (Nov. 5, 2020) (last accessed Aug. 22, 2022), <https://bit.ly/3R04vbJ>.

⁸ See *supra* note 1 at 31.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided *for excellence in performance*.

(Emphasis added.)

Also, 5 U.S.C. § 2302(b)(1) provides in relevant part that:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, *shall not...discriminate for or against any employee or applicant for employment* - (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16); (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a); (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)); (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation....

(Emphasis added.)

Consequently, if the Department implements the recommendations made in its office's "Quantitative Workforce Benchmarking" power point, then it will violate the Civil Service Reform Act and other federal anti-discrimination laws.

Discrimination based on immutable characteristics such as race, color, national origin, or sex "generates a feeling of inferiority" in its victims "that may affect their hearts and minds in a way unlikely to ever be undone."⁹ More broadly, the discrimination the Department has promised necessarily foments contention and resentment. It is "odious and destructive."¹⁰ The highlighted measures recommended in the "Quantitative Workforce Benchmarking" are facially illegal, and any actions implementing them will necessarily violate the Civil Service Reform Act. Similarly, the "Equity Action Plan" is highly problematic, and many of the measures suggested there too are egregiously wrong and patently unlawful.

The Department's racist virtue signaling, so redolent of Jim Crow, is illegal and immoral. It truly "is a sordid business, this divvying us up" by race, color, national origin, or sex.¹¹ Always has been, always will be.

Please feel free to contact us if you have any questions.

⁹ *Brown v. Bd. Of Education*, 347 U.S. 484, 494 (1954).

¹⁰ *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

¹¹ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

Sincerely yours,

/s/
Reed D. Rubinstein
America First Legal Foundation