LEGAL UPDATES

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Impact of U.S. Supreme Court's Affirmative Action Decision on Private Employer DEI Programs and Recommendations for Employers

Services

Labor & Employment

Workplace Diversity, Equity, & Inclusion

Professionals

ERIK K. EISENMANN
MILWAUKEE:
414.978.5371
ERIK.EISENMANN@HUSCHBLACKWELL.COM

TYLER M. PAETKAU
OAKLAND:
510.768.0650
TYLER.PAETKAU@HUSCHBLACKWELL.COM

CATARINA A. COLÓN
MILWAUKEE:
414.978.5534
CATARINA.COLON@HUSCHBLACKWELL.COM

By now, most private employers are familiar with the recent U.S. Supreme Court decision on affirmative action, *Students for Fair Admissions v. Harvard (SFFA)*, which arises in the context of college admissions. The Court held that universities may not use race by itself as a "plus factor" in college admissions. The majority effectively overruled its 2003 decision in *Grutter v. Bollinger*, in which the Court upheld a university's consideration of race "as one factor among many, in an effort to assemble a student body that is diverse in ways broader than just race." In justifying this decision, the Court opined that the use of race in admissions is unconstitutional because the goals of such programs (*i.e.*, student diversity) are, in the Court's view, too "amorphous" and unmeasurable to determine whether they are necessary to achieve a compelling interest.

In prior cases, the Court provided some deference to universities in deciding for themselves how best to achieve their educational goals. That deference was always in some tension with the idea that the explicit use of race warranted "strict scrutiny." The *SFFA* decision has now resolved that tension, concluding that it is for the Court to decide whether a university's admissions goals are compelling and whether they are achieved. Chief Justice Roberts, who authored the Court's majority opinion, offered two additional reasons for the ruling: (1) given the "zero sum" nature of university admissions, it is impossible for race to be a "plus factor" for some applicants without, at the same time, functioning as a negative for others; and (2) using race as a plus factor inevitably involves impermissible racial stereotyping.

Notably, the Court did not foreclose all race-related considerations in college admissions, explicitly stating that the opinion should not 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." Even more notably for non-higher education employers, *SFFA* itself does not specifically govern diversity, equity, and inclusion (DEI) programs outside of the college admissions process. In this article, we explore the current DEI environment in the wake of S*FFA*, and we provide recommendations on how employers can navigate a post-*SFFA* world.

Overview of State Attorneys General letter

Following closely on the heels of the Supreme Court's decision in *SFFA*, State Attorneys General in thirteen states sent a letter to Fortune 100 companies explaining their interpretation of the decision and its application to private employers. The AG Letter asserts that "odious discrimination is of the distant past" and threatens imminent "serious legal consequences" for companies that engage in a laundry list of activities that these Attorneys General have deemed violative of the constitutional framework set forth in *SFFA*. The AG Letter explicitly calls into question DEI programs operated by private employers. Unlike the impact of *SFFA* on college admissions, the AG Letter does not have the force of law and private employers maintaining DEI programs can consider the following perspectives.

First, the actions deemed "discriminatory" in the AG Letter are almost certainly not present in the vast majority of employer DEI programs. For instance, the letter indicates that "racial quotas" and "preferences in hiring, recruiting, retention, promotion, and advancement" are unconstitutional, along with "preferential treatment to customers." Most DEI programs do not include any such components and are instead focused on increasing overall workplace cohesion, belonging, and equity. Typical DEI policies and programs do not consider race alone in making employment decisions. Equal Employment Opportunity Commission Chair Charlotte Burrows noted this distinction in the Commission's press release on the same day of the *SFFA* decision:

> "[This decision] does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

Second, while history (and Justice Gorsuch's concurring opinion) suggests that the *SFFA* decision will inevitably influence in some way how private employers structure their DEI practices and policies, the decision itself focuses on factors that are distinctively unique to the university admissions context, particularly with respect to the "zero-sum" nature of admissions to higher education institutions.[1] Moreover, the majority in *SFFA* expressly leaves room for the types of considerations typically promoted by proper DEI programs: "*[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."

In addition to the AG Letter, several individual legislators have sent similar letters to private employers. On July 17, 2023, for example, Senator Tom Cotton of Arkansas sent a letter to 51 law firms citing civil rights laws that he believes these firms and their clients may be violating by maintaining DEI programs. Senator Cotton's letter advises law firms to preserve documentation related to those DEI programs in preparation for private lawsuits over alleged unlawful racial discrimination. The letter also asserts that law firms have a duty to advise their clients of the "risks associated with making employment decisions based on race," and warns that "[f]ederal law has long prohibited treating employees differently because of their race."

Like the AG Letter, Senator Cotton's letter does not have the force of law and does not impose any specific legal obligations on private employers—or their law firms. The truism in Senator Cotton's letter that federal law prohibits discrimination in employment should not disrupt existing DEI programs that were crafted with nondiscriminatory principles in mind.

Nevertheless, in light of these examples, businesses should be prepared for increased litigation, particularly with respect to "reverse discrimination" claims. Reverse discrimination occurs when members of a historically advantaged group are discriminated against based on a protected characteristic (*e.g.,* a discrimination claim made by a Caucasian, heterosexual male for discrimination based on his race, sex, or sexual orientation). The *SFFA* decision may embolden members of the majority to bring such claims against employers who have implemented DEI programs in the workplace. While prevailing on these claims is no easy feat (the employer must be the "unusual employer" that discriminates against the majority), defending against these claims, even when unsupported, can cost significant time and money.

Recommendations for employers

To summarize, even following the Supreme Court's decision in *SFFA*, and despite the AG letter and similar actions by individual legislators, employers can continue to increase diversity in their workforces and set aspirational goals with respect to diversity, equity, and inclusion without running afoul of federal, state, and local anti-discrimination laws. Title VII has always prohibited employers from making employment decisions based on any protected characteristic, including race. This has not changed. Any diversity, equity, inclusion, and accessibility initiatives in the workplace should continue to avoid making any employment and hiring decisions based on the applicant or employee's protected characteristics.

The following recommendations will help employers achieve compliance with anti-discrimination laws while mitigating the risk that employers will be targeted for reverse discrimination claims or audits based on their DEI policies and practices:

Quotas. Do not use quotas or set-asides when setting hiring and advancement goals. Instead, focus on aiming to increase the diversity of your workforce more generally.

Diversity defined. Ensure you are defining diversity broadly. Diversity constitutes much more than just race, ethnicity, sex, and other protected characteristics under federal and state law. For example, diversity can include parental status, education, languages spoken, geographic location, work experience, and recreational habits. At its core, diversity includes any characteristic that makes an individual unique.

Hiring process. Focus on removing barriers in the hiring process, such as expanding your geographic reach and reviewing your job descriptions for accessibility. Ensure you are asking the same questions of all applicants, regardless of their identities.

Employee engagement and support. Create mentorship and pipeline programs open to all employees. Employers can also support Employee Resource Groups but should ensure they are created and maintained in compliance with federal law, including the National Labor Relations Act and Title VII.

Workplace trainings. Employers should continue to provide trainings on anti-discrimination and anti-harassment. Employers may also provide other diversity, equity, and inclusion-related trainings on topics such as cultural competency and implicit bias in accordance with state and local laws.

Internal and external messaging. Continue to carefully review internal and external communications related to DEI.

Complaints. Take seriously complaints of discrimination, including reverse discrimination, and consider involving your legal professional in the investigation process.

Legal updates. Although typical DEI initiatives are likely not impacted in the short term, employers should stay up to date on relevant state and federal law developments and administrative guidance related to diversity, equity, and inclusion in the workplace.

Contact us

For assistance with DEI programs and initiatives in light of the Court's recent decision, please contact Erik Eisenmann, Tyler Paetkau, Catarina Colón, Sarah George, or your Husch Blackwell attorney.

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[1] While outside the scope of this update, the AG Letter does not mention obligations placed on federal contractors under the Office of Federal Contract Compliance Programs' equal opportunity mandates. The OFCCP, under Executive Order 11426, requires certain employers to maintain affirmative action programs for women and minorities, individuals with disabilities, and protected veterans.