THE IMPACT OF THE SUPREME COURT’S AFFIRMATIVE ACTION DECISION ON EMPLOYER DEI PROGRAMS

July 24, 2023
Agenda

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2. The Legal Landscape in Employment
3. Best Practices for DEI Initiatives At Risk
4. DEI Backlash and the Risks of Abandoning DEI Initiatives
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6. Employer Takeaways
Students for Fair Admissions (SFFA) sued to end Harvard and UNC’s use of race as a plus factor in student admissions decisions under Title VI and the Equal Protection Clause (EPC)

• Prior decisions established that diversity was a compelling interest permitting consideration of race as one of many factors in admissions decisions

The Court held Harvard and UNC’s policies failed “strict scrutiny” and violated the EPC

• Their goals and justifications for using race-conscious admissions were not compelling
• Their programs were not sufficiently narrow
  • College admissions are “zero sum.” Using race as a “plus” factor will “unavoidably employ race in a negative manner”

The Court did not entirely foreclose race considerations in admissions

• “[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.”
Some Practical Impacts for Employers

• The pipeline of candidates for jobs that require college or post-graduate degrees may become less diverse over time, a concern already raised by 82 corporations and business groups who signed three amicus briefs filed in urging the Court to retain affirmative action in higher education, including a brief by Orrick on behalf of leading technology companies.

• SFFA does not explicitly address employment, but Justice Gorsuch’s concurrence foreshadows the risk of increased litigation: Title VI and Title VII are “neighboring provisions of the same statute—enacted at the same time by the same Congress” and have “materially identical language.”
The Legal Landscape in Employment

• Title VII prohibits discrimination
  – Cannot use race or gender as a factor in employment decision making

• EEOC Guidelines on Affirmative Action, 29 C.F.R. Part 1608

• Office of Federal Contract Compliance Programs (“OFCCP”), 41 C.F.R. § 60-2.16
  – Goal setting based on underutilization
  – Good faith efforts vs. race/gender conscious selection decisions
  – Quotas are prohibited
Best Practices for DEI Initiatives at Risk

- DEI-based compensation incentives
- Vendor diversity programs
- Mentor and sponsorship programs
- ERGs
- Internships and fellowships
- Interns and sponsorships programs
- Scholarships
- Diverse slates
- Goals
  - Hiring
  - Promotion
  - Representation

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Where Will The Backlash to DEI Come From After SFFA?

• Individual lawsuits alleging reverse discrimination

• Activist shareholder and other organizations funded by Conservative Groups demanding retraction of DEI initiatives and reverse discrimination impact audits and bringing litigation when rejected

• Requests to the EEOC to open investigations and issue Commissioner Charges into DEI practices that are forms of reverse discrimination

• EEOC Commissioner Charges

• Petitions to CEO’s

• “Red States” Attorneys General investigations and demands for information

• Politicians and legislators attack on the “Woke Mob”

• State Treasurers as investors of state funds not investing and contracting with companies who are not exclusively focused on maximizing returns and not ESG/DEI
Are Individual Reverse Discrimination Charges More Theoretical than Real?

• *Duvall v. Novant Health* (W.D.N.C.) Executive claimed he was fired in a restructuring to further Novant’s stated goals with respect to diversity. Evidence included bonuses were paid to executives that achieved certain DEI metrics, the committee in charge of the DEI program had set targets for the workforce to mirror the community and that Duvall was told when he was fired the company was “moving in a different direction”.

• Jury verdict for Duvall (including $10 million in punitive damages vacated on posttrial motions) backpay, front pay and attorneys’ fees in excess of $4 million awarded.
The Risks of Abandoning DEI Efforts in Light of SFFA

1) Failure to achieve DEI Commitments Made by Public Companies
   - May lead to “Greenwashing” allegations that companies misled investors about their commitment to diversity, equity, and inclusion. Increased SEC and DOJ oversight of ESG promises made but not fulfilled.

2) Shareholder Derivative Suits Abound
   - According to Bloomberg research, almost 40 suits have been filed against companies in the last 3 years alleging misleading or false statements about DEI commitments.

3) Could be cited in discrimination cases as evidence that a company is not committed to EEO
What about Federal Contractors?

- Placement Goals
- Good faith efforts
- Affirmative action generally
- Gorsuch’s view of EEO categories
- Adverse impact analyses
Takeaways for Employers

• Conduct robust and privileged audits of DEI programs, initiatives and documentation.

• Review DEI training materials for clarity and legal compliance and ensure employees responsible for carrying out DEI programs have received appropriate training and understand the legal landscape.

• Review diverse slate protocols to ensure legal compliance and mitigate potential legal risk.

• Focus on establishing diverse pipelines of well-qualified applicants by casting a wide net to reach individuals from a variety of backgrounds.

• Consider voluntary affirmative action plans for historically underrepresented minorities. While permissible only in specific circumstances, voluntary, temporary, and remedial affirmative action plans allow employers to consider race as a factor in employment decisions.

• Consider partnering with non-profit or educational organizations dedicated to relevant early-career support for students with diverse backgrounds to better develop talent for the future, particularly in specialized fields.
Thank you for attending!

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