Professional Perspective

Impact of College Admissions Affirmative Action Cases on Employer DEI Initiatives

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Bloomberg Law

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The US Supreme Court is poised to rule on two cases, *Students for Fair Admissions, Inc.* ("SFFA") v. University of North Carolina ("UNC") and Students for Fair Admissions, Inc. v. Harvard University ("Harvard"), challenging the use of affirmative action in college admissions. Based on the justices' remarks during oral argument in October 2022 and the current composition of the Court, many commentators believe the Supreme Court will likely end or significantly limit the use of affirmative action in college admissions.

Although such a decision will not have direct application to workplace diversity, equity, and inclusion ("DEI") initiatives and affirmative action programs, companies may be indirectly impacted by the decision, including through potential legal challenges to their programs. Employers must also consider a growing trend of states passing or considering initiatives limiting the use of workplace DEI programs.

Background

Under current court precedent, educational institutions can lawfully consider race as a factor in their admission processes to increase diversity in their student populations. This practice is commonly referred to as "affirmative action" in college admissions.

The two cases consolidated before the court were originally brought in 2014 by SFFA, challenging Harvard and UNC's use of race as a factor in their admission programs. SFFA specifically claims that Harvard and UNC's admissions policies violate Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution by, among other things, unlawfully using race to give a preference to underrepresented minority applicants.

In January 2022, the court agreed to hear SFFA's cases against UNC and Harvard. In these cases, SFFA is seeking to have the court overrule its longstanding precedent in Grutter v. Bollinger, 539 U.S. 306 (2003), and other cases permitting the use of race as a factor in college admissions. Given the current composition of the court, statements by the justices at oral arguments, and recent decisions by the court, the court is expected to strike down the use of race as a factor in admissions programs for colleges and universities.

Potential Impact

If the court ends affirmative action for college admissions, the decision will not likely directly apply to workplace DEI or affirmative action programs. Rulings relating to Title VI and the US Constitution in the educational context do not directly apply to workplace-related policies. Instead, employer DEI and affirmative action programs are governed by Title VII and other federal and state employment anti-discrimination laws. Under most employment discrimination laws, using protected classes, such as race, to make employment decisions is generally unlawful, even if intended to increase diversity. Put differently, employers are already prohibited from using race as a factor in employment decisions.

Although the court ending affirmative action for college admissions may not directly apply to workplace DEI programs, the court's decision could encourage challenges to workplace DEI and affirmative action programs. Depending on the court's reasoning, the opinion could undermine the importance of diversity as a compelling interest more broadly and undercut some of the rationales used to support DEI initiatives and affirmative action measures in the workplace. As a result, employers should understand the differences between permissible and potentially unlawful DEI and affirmative action programs.

DEI Programs

Many employers have implemented DEI programs in their workplaces to bolster diversity and inclusion. DEI programs are distinct from affirmative action. DEI programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach to certain underrepresented groups in the workforce, such as women, people of color, LGBTQ+ individuals, and people with disabilities.

DEI programs might include outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent, creating training and mentoring programs aimed at supporting diverse talent within a company, and having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events. Significantly, under current law, unless an employer is legally permitted to adopt a voluntary affirmative action plan, DEI initiatives cannot involve using protected categories, such as race, to make employment decisions or creating set asides or hiring quotas based on a protected class.

Employers can, in certain limited instances, create voluntary affirmative action plans, allowing the employer to engage in certain preferential treatment based on a protected class. However, the employer must meet certain criteria to ensure that these plans are permissible under anti-discrimination laws. Under court precedent, a voluntary affirmative action plan is generally permissible only if:

- It is designed to eliminate a manifest imbalance in traditionally segregated job categories—i.e., it is remedial.
- It does not unnecessarily trammel the interests of non-diverse candidates.
- It is a temporary measure intended to attain, not maintain, a balanced workforce.

Because employers do not typically conduct the analyses required to determine whether there are any workplace diversity imbalances, many employers do not meet the criteria necessary to have voluntary affirmative action programs.

The court's decision in the *SFFA* cases is likely to impact employer diversity initiatives in several ways. It is possible, based on statements at oral argument and the court filings in the case, that a court opinion striking down college admission affirmative action either implies or expressly states that race-conscious decisions aimed at remedying historical imbalances are either no longer necessary—due to the passage of time since the initial implementation of affirmative action—or lead to undesirable outcomes. Any such statement or implication will likely embolden those looking to challenge DEI initiatives in the workplace.

Potential plaintiffs might use the court's reasoning to challenge voluntary workplace affirmative action programs on the basis that such programs are no longer necessary to eliminate a manifest imbalance in a job category. Further, the reasoning can be used to support challenges to common DEI initiatives—like diversity fellowships or internships—on the basis that these programs place too much emphasis on an applicant's or employee's protected class membership. Some of these initiatives have already been subject to court challenges, and the court's decision in the *SFFA* cases may lead to additional lawsuits.

Federal Contractor Affirmative Action Plans

The court's decision will not directly apply to affirmative action requirements for federal contractors because those programs do not raise the same race-conscious concerns that the court is considering in the university context. Under Executive Order 11246 and other affirmative action laws applicable to federal contractors, covered companies are legally required to create affirmative action plans annually.

These affirmative action plans generally require performing various data analyses of workforce demographics. If the analyses indicate that females, minorities, individuals with disabilities, and protected veterans are underrepresented based on those analyses, the contractors must set placement goals to increase representation of those groups. These legal requirements expressly prohibit using protected categories, such as race or gender, as a factor in making employment decisions or having any quotas or set asides based on race, gender, or other protected characteristics.

Instead, these laws require contractors to focus on increasing representation of certain underrepresented groups through various outreach and DEI efforts, including undertaking recruitment practices aimed at creating diverse candidate pools, which, over time and through application of a neutral selection process, should lead to progress on placement goals. Although these DEI efforts should remain viable, contractors—like other employers—will want to ensure their DEI initiatives do not exceed the legal parameters and potentially invite a legal challenge.

Risk from State Legislation

Employers are also increasingly having to navigate the growing trend of state lawmakers passing and considering various legislation and measures aimed at limiting certain DEI policies, trainings, and practices. Although most of these measures relate to DEI efforts at educational institutions and universities, a few states have enacted or proposed initiatives targeting workplace DEI programs:

- **Florida**. In 2022, Florida Governor Ron DeSantis signed into law the Stop W.O.K.E. Act ("SWA"). The SWA, among other things, prohibited employers in Florida from requiring Florida-based workers to attend certain types of DEI trainings, if such trainings could espouse, promote, advance, or compel specified diversity concepts, such as critical race theory. In August 2022, a federal judge in Florida temporarily blocked the SWA provisions relating to workplace DEI efforts on grounds that those provisions violated the First Amendment, a decision that was upheld by a federal appeals court.

  In the meantime, Florida continues to challenge employer DEI policies this legislative session, including introducing the "Reverse Woke Act," which aims to discourage employers from offering insurance to cover gender-affirming care by making employers responsible for the lifetime costs for an employee's detransition care, even if the employee no longer works for the employer.

- **Texas**. In February 2023, Texas Governor Greg Abbott issued a memorandum to state agencies warning them not to use any DEI programs in hiring that are "inconsistent" with Texas law, including setting diversity goals or interview targets for diverse candidates. The memorandum provides that hiring cannot be based on anything "other than merit."

  Although the memorandum is aimed at Texas public employers, it is unclear whether the guidance in this memorandum could also apply to private companies that contract with Texas or whether the Texas governor may take similar action toward private employers in the state.

- **Kansas**. Kansas lawmakers recently passed a budget amendment to Kansas' Behavioral Sciences Regulatory Board, which oversees licensing for various professionals in the state, including psychologists, social workers, addiction specialists, and family therapists. The amendment seeks to prohibit using that Board's budget to require "licensees or permit holders to go through training or education on 'diversity, equity, inclusion . . . or other related topics.'"

Employer Action Items

The potential risk of discrimination claims may be heightened by the outcome of the *SFFA* cases and current trend of laws and social movements seeking to limit DEI programs. There has already been an apparent uptick in the number of such cases challenging diversity programs.

In October 2021, for instance, a jury in a North Carolina federal court awarded a former white senior vice president $10 million in damages based on its finding that the employee was terminated due to his employer's "intentional campaign to promote diversity in its management ranks." The evidence presented to the jury, among other things, showed that shortly after the company formed a special counsel in 2018 to address its failure to meet leadership diversity targets, white men were discharged and women and people of color were promoted in near-uniformity. See Duvall v. Novant Health, Inc., No. 3-19-cv-00624, 2022 BL 374138 (W.D.N.C.).

In addition, in September 2022, a large international employer was sued by a group alleging that its diversity fellowship program—which required applicants to be members of certain underrepresented racial groups—violated antidiscrimination laws. Although the lawsuit was dismissed after a judge determined the group lacked legal standing to sue the company, the employer subsequently modified the qualifications for its program to eliminate the requirement.

Practical Steps to Mitigate Risk

Given these developments, employers should consider reviewing their DEI and affirmative action efforts closely and consider measures to mitigate potential risk. Employers should take the following steps:

- **Review DEI Programs for Vulnerabilities**. Companies should review existing DEI efforts with an eye toward areas of vulnerability. Employers might consider their DEI policies, internship programs, employee resource groups, and other diversity efforts to ensure that these efforts do not create unlawful preferences based on protected characteristics or include quotas or set asides.

  Hires and promotions should be based on business-related criteria and merit. If employers intend to increase diversity by using preferences based on protected characteristics, employers should tread carefully to ensure that those programs comply with court precedent and EEOC guidance for establishing lawful voluntary affirmative action programs and should understand that these actions could be subject to legal challenge.

- **Review Written DEI Materials**. Employers should review their policies, procedures, and promotional materials about their DEI programs for any statements that describe their companies' practices in a manner that could be viewed as unlawful. In some cases, plaintiffs have used statements in DEI policies and literature to support discrimination claims.

- **Justify Efforts for DEI Programs**. In anticipation of the court ruling against affirmative action, employers should be prepared to justify the importance of their existing DEI programs and how those programs are consistent with the law. Such justifications could include tangible evidence to demonstrate how increased diversity can improve the company's bottom line through increased collaboration and better decision-making.

- **Train Managers Not to Use Race or Preferences in Employment Decisions**. Managers are often not aware that they cannot give unlawful preferential treatment when making hiring or promotion decisions. Employers should consider conducting or modifying existing manager and employee training, emphasizing that the company's anti-discrimination policies are aimed at ensuring fair and lawful employment decisions, regardless of race, ethnicity, gender, and other protected characteristics.

  The training should explain that recruiting for diversity is legitimate, but that selection should be based on the most qualified candidate—regardless of their demographics—and not take protected characteristics into account.

- **Review Diversity Trainings for Risk**. Employers should review current diversity trainings, including unconscious bias training, considering recent legislation aimed at limiting DEI programs and trainings that might make it vulnerable to attack. Employers might be able to mitigate risk by making some of their diversity trainings voluntary or including disclaimers, e.g., trainings are provided purely for education and are not intended to compel employees to believe any of the concepts discussed.

- **Monitor State Laws Limiting DEI Programs**. Companies should continue to monitor state laws and regulations aimed at limiting DEI programs and determine whether those laws could affect their diversity training, programs, and strategies.