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Workplace Diversity Efforts Remain Legal But Face Increased Scrutiny in Wake of Supreme Court's Affirmative Action Decision

Human Resources & Employment

In the wake of the U.S. Supreme Court's momentous ruling this summer on the use of affirmative action in college admissions, many companies may wonder what it means for their affirmative action and Diversity, Equity and Inclusion (DEI) programs. At the moment, from a purely legal perspective, the answer is nothing directly.

The Decision and Its Impact

On June 29, 2023, the U.S. Supreme Court held in [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#) that affirmative action programs that consider race as a "plus factor" in college admissions are unconstitutional under the Equal Protection Clause. The court stated that universities may still consider how race has affected an individual applicant's life insofar as the discussion is tied to a "quality of character or unique ability that the particular applicant can contribute to the university." But admissions offices may no longer consider race by itself as a factor impacting college admission.

Notably, the Equal Protection Clause generally only applies to government entities. The court, however, allowed the case to proceed against Harvard, a private institution, under Title VI of the Civil Rights Act of 1964, which states "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Because "discrimination that violates the Equal Protection Clause... committed by an institution that accepts federal funds also constitutes a violation of Title VI," the court "evaluate[d] Harvard's admissions programs under the standards of the Equal Protection Clause."

Therefore, companies that receive federal funds should examine their equal employment opportunity policies and consult with counsel in light of this ruling. Further, even for companies who do not accept such funds, this case may have a significant societal impact and could result in legal challenges to affirmative action and DEI policies.

Affirmative Action in the Workplace

Companies use affirmative action programs to provide underrepresented minorities equal or expanded access to opportunity. The Equal Employment Opportunity Commission's [guidelines on voluntary affirmative action](#) encourage companies to "correct the effects of past discrimination and to prevent present and future discrimination" by taking actions such as growing their applicant pools to diversify the workplace.

But affirmative action programs do not only correct and prevent discrimination. Rather, diversity in background and experience also sparks diversity of thought, which supporters argue fosters better, more complete ideas, and thus, often, a more successful workplace.

While the decision in *Students for Fair Admissions* has no immediate legal impact on workplace affirmative action programs, it is possible the Supreme Court takes up a case regarding such programs in the future. Further, the court's noted hostility to race-

conscious decision-making may encourage employees who oppose affirmative action to raise internal complaints or challenge such programs in court.

Until legal authority weighs in on affirmative action in the workplace, though, companies may continue with their current programs as long as they comply with federal, state and local laws.

Diversity, Equity and Inclusion

After the decision in *Students for Fair Admissions*, companies may also be second-guessing their DEI efforts, which often take the form of company trainings, educational messages and events that are intended to create greater understanding of unique and diverse cultures and perspectives.

Like affirmative action programs, the court ruling does not directly affect the legality of DEI programs. However, the ruling may embolden people of certain protected classes to criticize company DEI efforts and threaten reverse discrimination suits (claims by non-minority protected classes, such as white and/or male employees, that they face discrimination based on their non-minority status).

When considering adding, removing or altering DEI activities, it is important for companies to remember the general goals of DEI programs and the needs of their own workforce. Generally, DEI programs can help employees feel heard and respected, educate employees who otherwise would not know about certain populations or may be afraid to ask questions, foster greater collaboration among diverse employees, attract top talent, and increase workplace morale by creating space for recreational events and festivities to enjoy unique cultures. Companies may also consider programs specific to their needs.

DEI efforts are not, however, without their critics. In Texas, for example, Gov. Greg Abbott signed a bill prohibiting DEI offices in public colleges and universities. The [legislation stated](#) that such offices promote “differential treatment of or provid[e] special benefits to people on the basis of race, color, or ethnicity.” Critics also claim that a focus on equity ignores merit and qualifications.

While companies may fear blowback to their DEI programs, there may also be legal risk to not participating in DEI. Federal, state and local employment discrimination laws prohibit workplace discrimination based on protected class. DEI policies and training programs may reduce decision-maker bias and reduce policies that could create a disparate impact in the workplace among protected classes.

Therefore, companies should focus their attention on building allyship, fostering respect and eliminating bias. To do so, it may be beneficial to emphasize that everyone has both conscious and unconscious biases, and that such attitudes are not exclusive to majority populations. Companies wary of complaints from employees who believe that efforts to achieve workplace diversity and equity are “taking something away from them” may mitigate such concerns by emphasizing belonging among all employees.

If you have any questions about your company’s affirmative action or DEI programs, please contact a member of Gould & Ratner’s [Human Resources and Employment Law Practice](#).