Proskauer

Cos. Should Plan To Protect DEI Before Supreme Court Ruling

Law360 on **May 22, 2023**

With the U.S. Supreme Court poised to reverse course on affirmative action, companies may soon find their corporate diversity and inclusion programs facing scrutiny.

The court this term is considering whether to overturn the landmark 2003 affirmative action case, Grutter v. Bollinger,[1] which permitted race-conscious admission policies in higher education. After lengthy oral arguments, many expect the court will reject policies that consider race this June.

While the two cases challenging Grutter arise under Title VI of the Civil Rights Act and therefore will have no direct legal impact on employers, a ruling rejecting race-conscious policies could have a domino effect, starting with the immediate elimination of affirmative action programs and then expanding to other policies and programs that consider race, such as corporate diversity, equity and inclusion initiatives, and affinity programs.

Accordingly, while the court has yet to rule, it is not too early for employers to begin planning for a changing landscape.

The Cases

The cases at issue, Students for Fair Admissions Inc. v. President & Fellows of Harvard College[2] and Students for Fair Admissions Inc. v. University of North Carolina[3] were both brought in 2014 when a nonprofit group called Students for Fair Admissions sued the schools. SFFA's mission is to prevent higher education institutions from considering race at all in the college admissions process.

In both cases, SFFA argues that race-conscious admissions policies discriminate against certain applicants on the basis of their race, color or ethnicity in violation of the 14th Amendment and Title VI, and asks the court to reverse Grutter and hold that universities receiving funds under Title VI may not lawfully implement such policies.

In Harvard, SFFA, on behalf of Asian American applicants who were rejected from admission to Harvard College, alleged that Harvard's affirmative action program unlawfully discriminated against Asian American applicants, used unlawful racial balancing, considered race as more than merely a "plus" factor in admissions decisions, and considered race in the place of available and workable race-neutral alternatives.

Similarly, in UNC, SFFA's initial complaint alleged that the University of North Carolina at Chapel Hill "intentionally discriminated against certain of [its] members on the basis of their race, color, or ethnicity in violation of the 14th Amendment and [federal law]" by, inter alia, considering race as factor in admissions.

The lower courts in both Harvard and UNC found in favor of the universities, holding that they each had a compelling interest in diversity and had narrowly tailored their race-conscious admissions policies to achieve results that could not otherwise be achieved through race-neutral means.

Likely Outcomes and Effects

Notwithstanding the lower courts' rulings, during oral argument, the majority of justices appeared skeptical of the affirmative action programs at Harvard and UNC. Several justices asked the parties to discuss the possible effects of an admissions policy that did not allow for consideration of race on the demographics of the universities.

The court also asked the parties to explain the extent to which colleges and universities may lawfully consider an applicant's personal experiences involving race in the context of an admissions essay, suggesting that the justices believe there are likely race-neutral ways to achieve a diverse student body.

Accordingly, many believe the Supreme Court will vote along ideological lines and rule to further restrict or entirely eliminate race-conscious admissions under Title VI.

Thus, while it is possible the court will decline to overturn Grutter, the most likely outcome of this pair of cases is either the implementation of additional restrictions around the consideration of protected categories, or a complete elimination of the lawful consideration of race in college admissions. Either could have a cascading effect on corporate diversity initiatives, which stem from the very issues that call for affirmative action in the first place.

First, because jurisprudence in the Title VI and Title VII contexts tend to be persuasive on one another, successful challenges to educational policies tend to result in challenges to similar policies in the corporate sphere. While SFFA's mission is limited to higher education, there are several similar groups challenging diversity initiatives in the corporate sphere.

In this case, employers will likely see increased litigation from both sides: Those who seek to maintain or expand existing DEI and affirmative action commitments, and those claiming that the existing DEI and affirmative action commitments are discriminatory.

Second, a decision prohibiting consideration of race may create tension with the growing number of legal obligations and societal pressures with respect to corporate diversity.

From a legal perspective, both the U.S. Securities and Exchange Commission and Washington state require covered employers to either achieve numeric diversity representation goals or publicly disclose if they do not.[4]

Similar laws are under consideration in other jurisdictions, including California, which enacted two board diversity statutes in 2018 that are currently enjoined from enforcement, and Hawaii.[5] In New York, Illinois[6] and Maryland, employers have annual reporting requirements with respect to diversity.

Law firm clients have also entered the mix, with many refusing to work with firms that do not meet their diversity requirements.

In the long run, employers may also face increased challenges in finding and recruiting candidates from underrepresented groups, as restrictions on affirmative action programs could reduce the diversity of candidates who graduate from top-tier universities.

Takeaways for Employers

Given the uncertain fate of these policies and their potential for widespread effects — including competing litigation risks — employers should begin engaging their key stakeholders to thoughtfully evaluate and decide how to approach their DEI programs going forward.

Some employers may decide their organizational mission and values require them to prioritize their diversity initiatives, or even to increase the scope or number of those initiatives in protest, as many employers did with reproductive health care benefits in the wake of the Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health Organization.[7]

For these employers, a careful review and evaluation of already established DEI initiatives is important to ensure existing policies and messaging align with the organization's goals and comply with existing laws.

For employers whose stakeholders are more risk averse, there are several steps that can be taken to safeguard diversity initiatives against legal challenges.

Be Inclusive

Employee development programs and affinity groups, while designed to eliminate barriers and increase belonging, can be viewed as exclusionary.

To reduce risk, employers should make clear to employees that participation in an affinity group or advancement program, while intended for a certain group, is open to anyone.

Consider Race-Neutral Diversity Factors

With race-conscious programs in the spotlight, employers can seek to improve diversity through initiatives focused on criteria that, while race neutral, nonetheless tend to increase racial diversity in the workplace.

Such factors may include socioeconomic status, first generation professionals, unique personal circumstances or geographic diversity.

Look for Race-Neutral Partnerships

Many employers support DEI through financial investment in charitable organizations and partnerships with various nonprofits.

To reduce risk, employers should inventory their roster of donations and partnerships and include among them race-neutral organizations that support underserved communities.

Review Public Facing DEI Documents

Programs that are otherwise neutral can become a target for potential plaintiffs if described the wrong way in a public posting.

As the legal landscape begins to shift, it will become increasingly important for employers to regularly review their public-facing documents and revise the language, as needed.

Evaluate Supplier Diversity Programs

As with public facing documents, it is important for employers to pay careful attention to the language in their supplier diversity programs.

How is diverse supplier defined? What are the program's goals, and what metrics are being used? Criteria other than race should be used, where possible, without undermining the program's results.

While the full reach of the Supreme Court's upcoming decisions is unknown, by taking these steps, employers can best position themselves to protect their existing initiatives and maintain their commitment to diversity in the face of tightening restrictions.

[1] Grutter v. Bollinger , 539 U.S. 306 (2003).

[2] Students for Fair Admissions Inc. v. President & Fellows of Harvard College , Dkt. No. 20-1199.

[3] Students for Fair Admissions Inc. v. University of North Carolina , Dkt. No. 21-707.

[4] Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service; Washington State Women on Corporate Boards Act (RCW 23B.08.120).

[5] Crest v. Padilla I , No. 20 STCV 37513, 2022 WL 1073294 (Cal. Super. Apr. 1, 2022); Crest v. Padilla II , No. 19STCV27561, 2022 WL 1565613 (Cal. Super. May 13, 2022); Hawaii House Bill No. 1191.

[6] Illinois Public Act 101-0589.

[7] Dobbs v. Jackson Women's Health Organization , No. 19-1392, 597 U.S.___ (2022).

Keisha-Ann G. Gray is a partner and co-chair of the workplace investigations practice group at Proskauer Rose LLP.

Proskauer associates Melissa Overbeck and Arielle Kobetz, and law clerk Olympia Karageorgiou, contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Reproduced with permission. Originally published May 2023, "Cos. Should Plan To Protect DEI Before Supreme Court Ruling," Law360.

Related Professionals

- **Keisha-Ann G. Gray**
  Partner
- **Arielle E. Kobetz**
  Associate
- **Melissa Arangio Overbeck**
  Associate