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Implications of U.S. Supreme Court Decision Overturning Affirmative Action Precedent in Higher Education

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On June 29, 2023, the U.S. Supreme Court ruled in Students for *Fair Admissions, Inc. v. President and Fellows of Harvard College* that race-conscious admissions programs at Harvard College and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment.

The Court held that these universities' use of race in their admissions processes lacked sufficiently measurable objectives and clear durational endpoints, making them unlawful under the strict scrutiny standard. Some Justices dissented, arguing that race-conscious programs are necessary to achieve diversity and equity.

While the Court's ruling on affirmative action did not involve private-sector employment, the decision poses potential implications for policies, programs and practices employers develop to advance their own diversity, equity, and inclusion.

Q&A

1. What are the implications of the Supreme Court's decision on employers?

At first blush, there is an argument that the ruling does not directly impact employers because it arises in the context of Title VI of the Civil Rights Act of 1964 (which applies to educational institutions that receive federal funding) and the Fourteenth Amendment (which applies to government and quasi-government actors). Employers, by contrast, are subject to Title VII of the Civil Rights Act. In support of that argument, following the Court's ruling, EEOC Chair Charlotte Burrows issued a statement indicating that the 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."

But employers still face noteworthy risks, particularly with respect to disparate treatment reverse discrimination claims, in the wake of this ruling. Plaintiffs pursuing such claims are apt to point to and capitalize on two things. First, they may rely upon the Majority's conclusion in the educational context to suggest that reliance upon race in connection with a DEI initiative when making employment decisions—especially where the employment decision involves a zero-sum game—amounts to prohibited discrimination. Second, they can be expected to point to Justice Gorsuch's concurring opinion noting that Title VI and Title VII have "essentially identical terms."

Considered in appropriate context, it is important to recognize that, in the years leading up to the recent U.S. Supreme Court decision, plaintiffs have increasingly pointed to employers' race-conscious diversity programs as evidence of discriminatory intent, and some of these challenges have been quite successful. To illustrate, in *Duvall v. Novant Health* (W.D.N.C. Oct. 26, 2022), a jury issued a sizeable verdict to a plaintiff who alleged he was discharged because of his employer's diversity initiatives; he claimed that a diversity program resulted in white men being targeted for termination in order to be replaced by women and racial minority candidates.

On the other hand, many employers have been facing pressure from stakeholders and litigation seeking to reaffirm their existing DEI commitments. *See, e.g., Kiger v. Mollenkopf*, No. 2023-0444 (Del. Ch., complaint unsealed Apr. 26, 2023) (alleging the employer breached its fiduciary duties to stockholders by misrepresenting the company's compliance with its stated DEI goals); *Lampe v. Delta Air Lines, Inc.*, Docket No. 2:21-cv-00176 (D. Utah Mar. 23, 2021) (claiming the employer "ignored its own policies and procedures" with regard to affirmative action and harassment, resulting in the plaintiff facing harassment and discrimination on the basis of her gender).

In light of these competing risks, it is difficult to say precisely what the implications will be of the U.S. Supreme Court's decision on private sector employers. Yet, it is fair to say that the decision will almost surely lead to greater scrutiny of employer DEI initiatives by those who believe that these initiatives amount to differential, and potentially discriminatory, treatment. Thus, employers should review their programs and initiatives in order to assess (or re-assess) risks associated with those programs in light of the shifting legal landscape.

2. Can employers maintain affirmative action plans or programs (AAPs)?

In the context of private sector employment, the U.S. Supreme Court held in *United Steelworkers v. Weber* (1979) and *Johnson v. Transportation Agency* (1987), that private employers may engage in voluntary affirmative action in extremely narrow circumstances. 443 U.S.193; 480 U.S. 616. Such programs are only permissible if they are established to remedy the: (i) effects of prior discriminatory practices; (ii) effects of historically limited labor pools, or; (iii) "adverse effects," if the employer has conducted an analysis revealing that its practices have resulted in "actual or potential adverse impact." *Weber*, 443 U.S.193 (1979); *Johnson*, 480 U.S. 616 (1987). *See* 29 CFR § 1608.3.

A voluntary AAP under the EEOC's regulations must include three components: (i) a "reasonable self-analysis" of the employer's practices that exclude groups or leave prior discrimination unremedied, (ii) a determination by the employer that there is a reasonable basis for concluding action is appropriate, and (iii) reasonable action taken by the employer in response to issues identified by the employer's self-analysis. *See* 29 CFR § 1608.4.

The Court's recent ruling does not directly impact existing precedent under Title VII concerning voluntary AAPs, though employers should be aware that race-conscious voluntary AAPs are likely to face increased scrutiny following the ruling.

In addition to obligations arising under Title VII, public sector employers are also subject to the Equal Protection Clause of the Fourteenth Amendment. Pursuant to the Court's decisions in *Adarand Constructors, Inc. v. Pena* (1995) and *Wygant v. Jackson Bd. of Educ.* (1986), public sector employers' use of race-based affirmative action must be (i) "justified by a compelling governmental interest;" and, (ii) "narrowly tailored to the achievement of that goal." 515 U.S. 200; 476 U.S. 267. Because the recent U.S.

Supreme Court ruling also arises under the Equal Protection Clause, it is conceivable that plaintiffs may challenge these public sector employer-sponsored programs on the same grounds that *SFFA* challenged colleges and universities' race-conscious admissions programs.

3. Outside of voluntary AAPs, what are the risks associated with corporate DEI-related goals and initiatives?

Aside from formal AAPs, many employers choose to engage in DEI efforts, such as by maintaining employee resource or affinity groups, recruiting diverse prospective job applicants, and providing inclusivity training. The U.S. Supreme Court has not directly addressed employers' use of race- or gender-conscious initiatives for the purpose of enhancing diversity; but employers are generally prohibited from discriminating against individuals "on the basis of" their protected characteristics, including race, gender, age, sexual orientation, and disability.

When implementing and evaluating their DEI goals, employers should consider that challenges may arise both from individuals seeking to enforce these DEI commitments, as well as plaintiffs challenging such programs as being unlawfully discriminatory. To this point, DEI initiatives based on or conscious of protected characteristics may face more scrutiny than race-neutral approaches. Under the Court's existing Title VII precedent, employers' DEI efforts cannot "unnecessarily trammel" the rights of non-diverse employees, such as by limiting participation in job training prerequisites to career advancement to only those employees considered to be diverse. In addition, all applicants should be required to meet the same minimum qualifications for a position. With regard to employee resource groups, an EEOC "best practice" is to have participation open to all, regardless of race.

4. How does the Court's ruling implicate recruitment practices?

As discussed, while the Court's ruling does not involve private sector employment, many employers are carefully reviewing their existing recruitment policies and public-facing and internal DEI materials, and are consulting with counsel as needed, to ensure they reflect current practices and comport with federal and local laws prohibiting discrimination.

In addition, employers who recruit from colleges and universities that maintain affirmative action programs similar to those proscribed by the Court's ruling may find that their recruiting pools have become less diverse in the wake of the ruling.

5. What are hiring "quotas" and are they lawful under federal employment laws?

A hiring quota is a numerical target set by an employer, usually with the purpose of hiring a certain number of employees belonging to a particular protected class. Federal laws generally prohibit employers from using quotas that "trammel" individuals' rights based on their protected characteristics. In the context of voluntary AAPs, the U.S. Supreme Court held in *Weber* that an employer's temporary "preferential selection" for a job training program did not unlawfully impede employees' rights under Title VII because it sought to address a "manifest imbalance" in a "traditionally segregated job category." 443 U.S. 193.

With regard to higher education, the U.S. Supreme Court held in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003), and affirmed in the June 2023 decision, that "outright racial balancing" and "quota system[s]" are "patently unconstitutional" under the Equal Protection Clause. While the recent U.S. Supreme Court ruling does not directly affect private employment, the Court previously held in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) that Title VII prohibits "discrimination ... against, or in favor of, any race." EEOC guidance further states that "affirmative action, when properly designed and implemented, does not allow for the use of quotas." Office of Federal Contract Compliance Programs (OFCCP) regulations similarly prohibit federal contractors and subcontractors from using quotas in their AAPs. *See, e.g.,* 41 CFR §§ § 60-300.45; 60-741.45.

In the context of voluntary AAPs, the Court in *Weber* found that the employer's AAP – which temporarily "reserved" a certain percentage of training openings for qualified minority applicants – fell "on the permissible side of the line." 443 U.S. 193, 195. There, the employer instituted its job training program to address the effects of historical race discrimination in craft industries that had resulted in limited training and employment opportunities for racial minorities. The Court held the employer's AAP was lawful because the training program was a voluntary measure implemented to "eliminate traditional patterns of racial segregation." Moreover, the AAP was upheld as it "did not unnecessarily trammel" employees' interests because it:

1. did not require the discharge of workers and their replacement with new hires based on employees' protected characteristics;
2. did not create "an absolute preference" for minorities or serve as an "absolute bar to" employees' job advancement; and

3. was a “temporary measure, not intended to maintain racial balance, but simply to eliminate manifest racial imbalance” in a historically segregated profession.

Thus, the Court permitted the AAP at issue in *Weber* because it was not a strict quota that required employees to be terminated and replaced based on their protected characteristics, but rather was a temporary reservation for a noncompulsory job training program that was instituted to address effects of historical race discrimination in particular professions.

However, as discussed in response to Question 2 above, employers should be aware that voluntary race-conscious AAPs like the one at issue in *Weber* are likely to receive increased scrutiny following the Court’s recent decision. For example, in the wake of the ruling, 13 state attorneys general issued a joint letter to Fortune 100 companies contending the June 2023 decision “recognized” that federal statutes prohibiting employers “from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination” in higher education admissions. Similarly, Senator Tom Cotton sent a letter to several law firms in July 2023 to “warn” that “race-based hiring quotas and benchmarks” are unlawful, and “Congress will increasingly use its oversight powers ... to scrutinize the proliferation of race-based employment practices.” As such, race-conscious employment policies utilizing similar “preferences” to the *Weber* plan are likely to face more challenges from both plaintiffs and legislators in the wake of the recent Court ruling.

6. What is the effect of the Court’s ruling on federal contractors’ affirmative action obligations?

The Court's ruling does not impact federal contractors' and subcontractors' obligations to annually develop and maintain affirmative action programs ("AAPs"). Pursuant to Executive Order 11246 and regulations issued by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), contractors and subcontractors with at least 50 employees and one federal government contract of $50,000 or more must develop AAPs analyzing the racial and gender makeup of their workforces. Because the regulations governing AAPs make clear that contractors and subcontractors may not employ quotas or otherwise discriminate in their affirmative action efforts, the Court's ruling should not impact, directly or indirectly, government contractor and subcontractor AAP obligations. OFCCP has taken the position the Court's decision is limited to "higher education admissions" and does not impact Executive Order 11246 or its regulations governing affirmative action for federal government contractors and subcontractors.

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