How Employers Can Take A Measured Approach To DEI

By **Erin Connell and Alexandria Elliott** (September 28, 2023)

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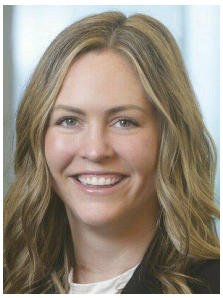

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On June 29, the U.S. Supreme Court struck down race-conscious admissions programs at Harvard University and the University of North Carolina at Chapel Hill with its ruling in Students for Fair Admissions v. President & Fellows of Harvard and Students for Fair Admissions v. University of North Carolina.

In the three months since then, corporate diversity, equity and inclusion, or DEI, programs have come under attack, including through reverse discrimination lawsuits, shareholder demands and open letters from elected officials.

But companies committed to recruiting and retaining diverse talent need not abandon their programs altogether; in fact, doing so can increase legal risk and invite more claims and scrutiny. Instead, now is the time to carefully review DEI programs — both on paper and in practice — to ensure they are legally compliant while still advancing the goals of diversity, equity, and inclusion within America's workforce.

A Primer: SFFA v. Harvard and UNC

By now, most private employers are familiar with the SFFA decision, yet they are uncertain about its reach. In a 6-3 decision split along party lines, the court held that Harvard's and UNC's affirmative action policies violate the 14th Amendment's equal protection clause.

Despite prior Supreme Court precedent holding that diversity in higher education is a compelling interest that justifies affirmative action in college admissions, the court concluded that Harvard and UNC's policies — which overtly considered race as a factor in deciding who to admit — do not survive strict scrutiny. Reasoning that college admissions are a "zero-sum" game, the court held Harvard's and UNC's programs are unlawful because they necessarily operate to benefit some races to the detriment of others.

While the opinion has no direct legal impact on corporate diversity initiatives, it already is having a significant indirect impact. Indeed, in a concurring opinion, Justice Neil Gorsuch expressly recognizes the decision's application to the employment context.

He wrote separately to emphasize that — in addition to violating the 14th Amendment — race-conscious admissions policies also violate Title VI of the Civil Rights Act, which he underscores contains the same relevant language as Title VII. He also notes that "'[b]oth Title VI and Title VII' codify a categorical rule of 'individual equality, without regard to race.'"[1]

It is no surprise, then, that corporate DEI programs are now in the spotlight.

Recent Backlash Against DEI Programs

The SFAA decision has sparked a flurry of activity aimed at corporate diversity initiatives.

For example, on the same day the Supreme Court's decision was released, U.S. Equal Employment Opportunity Commission Commissioner Andrea Lucas published an op-ed urging companies to take a hard look at their diversity programs, and explaining the court's decision "could implicate a host of increasingly popular race-conscious corporate initiatives."[2]

She reminded corporate America that a "general interest in diversity or 'equity' is not sufficient to allow race- or sex-motivated employment actions," and that companies cannot take "race-motivated actions to maintain a demographically 'balanced' workforce."

Shortly thereafter, on July 17, 13 Republican attorneys general wrote to Fortune 100 CEOs and delivered a similar message. They not only condemned "discriminatory practices includ[ing] ... explicit racial quotas and preferences in ... recruiting," but made very clear that companies would be held accountable for such practices through investigations and litigation.

Additionally, reverse discrimination lawsuits — which already were on the rise — are becoming increasingly common. Ed Blum, the conservative activist who initiated the lawsuits leading to the SFFA decision, has apparently set his sights on corporate America.

On Aug. 22, through the conservative activist group that he leads, American Alliance for Equal Rights, Blum has filed lawsuits against two prominent law firms alleging their fellowship programs for minority law students amount to racial discrimination in violation of Section 1981 of the Civil Rights Act.

On Aug. 2, the same group filed a separate suit against Fearless Fund Management LLC, a venture capital firm, alleging their grant program — which provides $20,000 grants to Black women — also constitutes racial discrimination under Section 1981.

Similarly, on Sept. 5, a worker represented by the conservative activist group America First Legal Foundation filed suit against a Big Tech company, alleging claims under Title VII and Sections 1981 and 1985 of the Civil Rights Act. The suit alleges that the company's diversity program called Double the Line intentionally discriminates against White employees by steering jobs and contract opportunities to Black, Indigenous and people of color.

Lawsuits aimed at particular employment decisions are also on the rise, including at least one class action filed by five current and former Gannett Co. employees under Section 1981. There, the plaintiffs allege that they were fired or passed over for promotions in favor of less-qualified minorities.

Conservative activists are not the only voices in the room, however. In response to the Republican attorneys general letter to Fortune 100 companies, Democratic attorneys general from seven states promised to support and defend companies whose DEI initiatives face challenge by Republican officials. And the Rev. Al Sharpton, President and Founder of the National Action Network, issued a statement warning that any company that withdraws from its diversity commitments will face "Blacklash" when consumers withdraw their dollars.[3]

Additionally, activist shareholders on the other side of the political aisle, institutional investors, government agencies, and the plaintiffs bar — including class action attorneys — continue to hold companies' feet to the fire, not only with respect to promoting diverse and equitable workplaces, but also living up to DEI commitments.

Best Practices for a Measured Approach to DEI

In the face of increasingly polarized positions and intense scrutiny, now is not the time to overreact. Instead, savvy employers committed to DEI, but interested in mitigating legal risk, are taking a measured approach that does not involve abandoning DEI all together, but instead includes taking a closer look and making adjustments when needed.

Taking inventory of existing DEI programs is a critical first step. This includes not only reviewing external diversity reports, environmental, social and governance statements, websites, shareholder materials, and corporate filings that address DEI, but also internal program documentation, guidelines, training materials and presentations.

It also can include reviewing contracts with third parties such as diversity consultants, vendors, and nonprofit organizations or academic institutions with whom employers partner on DEI initiatives or programs. This document review is important not only for identifying programs already in place, but also for helping to identify areas of potential risk.

For example, DEI programs that state they are exclusively for employees, or potential employees, of some races but not others — or that exclude men — pose more legal risk than those that do not, as do programs that appear to consider race or gender in a zero-sum way, like the college admissions scenario addressed in SFFA.

Data analytics also play a key role. Employers whose DEI programs already are backed by analytics should review them to ensure they are relevant and defensible. And for employers whose DEI programs lack sufficient analytic support, now is the time to invest in meaningful analyses.

For example, employers who have implemented aspirational hiring goals should ensure they are based on a reasonable assessment of the qualified labor force for the particular jobs at issue, as opposed to being randomly set or based on metrics untethered to the relevant workforce. Similarly, aspirational representation goals — as opposed to hiring goals — should also account for promotions and retention of diverse talent, in addition to hiring opportunities.

In addition to reviewing documents and data, it is important to ensure DEI programs are lawful in practice as well as on paper. This means talking to people; namely, the individuals responsible for carrying out DEI programs and initiatives.

It includes interviews with employees working in human resources and recruiting, as well as managers responsible for making hiring, promotion and other employee selection decisions. It also can include conversations with third parties, as well as reviewing relevant written communications. It might also include giving recent employment decisions a second look with the SFFA decision in mind.

A final step is to develop an action plan.

If warranted, this includes making substantive changes to the way DEI programs are structured and operating to mitigate legal risk and ensure legal compliance. It might also include contract revisions with vendors, academic institutions, and other third parties — for example, to make clear that race and gender are not being considered in an unlawful way. It also can include changes to both internal and external documentation describing DEI programs, both for accuracy and to ensure it does not describe DEI activities in a way that

could invite legal claims or scrutiny.

And finally, in almost all cases, it includes more and better training when it comes to DEI. If employees responsible for implementing DEI programs do not understand the rules of the road, they can easily engage in conduct that increases legal risk — perhaps even unknowingly.

For example, recruiters and hiring managers must understand that, even if an employer has articulated aspirational hiring goals and/or implemented a diverse slate protocol, all hiring decisions still must be based on job-related factors other than race or gender. If this is not clear, the goals can devolve into unlawful quotas and the diverse slate protocol can lead to race- or gender-based hiring decisions, both of which are unlawful.

Taking these steps — reviewing relevant DEI documentation, investigating DEI programs, making changes if appropriate, and ensuring the right people are trained — will allow companies that are committed to promoting diversity and inclusion to retain their DEI programs in a legally compliant way without catapulting them all together.

While SFFA did not change the law when it comes to DEI, it did increase the importance of getting it right.

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[1] Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2209 (2023) (Gorsuch, J., concurring).

[2] http://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

[3] https://nationalactionnetwork.net/newnews/rev-al-sharpton-nan-tell-corporate-america-to-expect-blacklash-if-they-back-out-of-dei-commitments-after-affirmative-action-ruling/.