



The Future of Employer-Sponsored Voluntary DEI Programs After Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

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07.28.2023

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, et al*, the U.S. Supreme Court ruled that the admissions practices used by Harvard University and the University of North Carolina, which considered race as a factor in their selective college admissions processes, violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, as well as Title VI of the Civil Rights Act of 1964. The decision first reinforced the strict scrutiny standard that has long been applicable to race-based classifications, demanding that such educational diversity programs serve compelling governmental interests and be narrowly tailored. The Court concluded that the schools' admissions systems failed to serve that compelling interest and found that the interests cited by the universities were either overbroad, arbitrary, or undefined. Further, the court commanded that the schools were impermissibly using race as a negative factor in that race benefits some students, but at the expense of others.

While *Students for Fair Admissions* analyzed diversity programs in federally funded higher education institutions, its principles might be extended to employer-driven voluntary diversity, equity and inclusion (DEI) programs. In their concurring opinions, Justices Gorsuch and Thomas analogized Title VI of the Civil Rights Act to Title VII, which prohibits discrimination in employment, and noted that both statutes seek to provide "equal" opportunities and seek to achieve race neutrality. By analogizing the statutes, the Court left open the question as to whether, just like educators, employers also would be prohibited from using racial diversity as a "plus" factor in their hiring and career advancement processes. The decision highlights the importance of establishing race-neutral and measurable objectives in admissions or employment practices. While promoting diversity and inclusion remains a compelling interest, employers may be required to demonstrate tangible and measurable goals linked to individual skills, unique abilities, and character rather than relying solely on racial classifications.

Employers also should be cautioned by a letter issued by a group of Republican U.S. state Attorneys

General to some of the nation's largest public companies concerning their DEI policies and programs. Citing the U.S. Supreme Court's decision as a basis for their concern, the Attorneys General stressed that any employment policy treating individuals differently based on race, even if implemented with good intentions, could be deemed illegal by virtue of the Supreme Court's decision. The letters urged companies to refrain from using "race-based quotas or preferences" in hiring, promotion, and contracting. Justice Gorsuch's concurring opinion noting the similarities between the federal law on race bias in federally funded programs and the law prohibiting workplace discrimination will likely be used in legal challenges to corporate diversity initiatives considering race. Indeed, these Attorneys General warned that failure to comply may result in serious legal consequences, and they threatened legal action "sooner rather than later."

It is crucial to acknowledge that the *Students for Fair Admissions* decision does not impact federally mandated Affirmative Action Programs (AAP) for federal contractors and subcontractors, which programs have been established by Executive Order and federal regulations, which to date, have not been rescinded. Federal contractors must continue to adhere to AAP obligations as mandated by federal law.

This case highlights the need for clear guidance on using race in employment practices. Employers are likely to consider taking proactive steps to review their DEI programs and align them with the Court's emphasis on race-neutral goals and measurable criteria. This approach may help prevent potential legal challenges and ensure compliance with equal protection laws. Employers can expect challenges to voluntary DEI initiatives and possible claims of "reverse discrimination" or negative impact on majority groups. To navigate these complexities, many employers will prioritize lawful efforts to promote diversity and equal employment opportunities, review DEI communications for clarity, and comply with state law requirements. For example, in decision-making, employers may focus on legitimate business reasons rather than protected characteristics like race while actively cultivating an inclusive workplace culture.

Students for Fair Admissions reminds employers to be thoughtful when using any race-based considerations in their hiring and employment practices. Developing transparent and measurable DEI programs may be useful for maintaining compliance with equal protection laws and fostering a diverse and inclusive workforce. Given the evolving nature of the legal treatment of voluntary DEI initiatives, employers can work with legal counsel to ensure that their DEI programs align with applicable laws and regulations, reducing non-compliance risk.

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