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4 Employer Takeaways From High Court's Admissions Ruling

By **Vin Gurrieri**

Law360 (June 30, 2023, 9:54 PM EDT) -- The U.S. Supreme Court's blockbuster decision gutting race-based affirmative action in college admissions will prompt employers to revise their diversity, equity and inclusion programs and may spur an uptick in discrimination lawsuits challenging those initiatives, experts say.

In a 6-3 decision, the high court's conservative bloc ruled Thursday that admissions policies used by Harvard University and the University of North Carolina violated the 14th Amendment's equal protection clause.

The ruling marked a win for the group Students for Fair Admissions, which had challenged the schools' admissions policies and urged the justices to overrule a 2003 decision called Grutter v. Bollinger that affirmed a University of Michigan Law School admissions program. The ruling Thursday, experts say, effectively gutted Grutter and related cases that permitted race-conscious admissions.

In the employment context, it's long been unlawful for employers to use race as the basis to make an employment decision, like who to hire, promote or terminate. But just because the high court's ruling involved education rather than employment laws doesn't mean there won't be plenty of indirect effects on companies' approach toward diversity, equity and inclusion programs or the way workplace discrimination cases play out in court.

"From a purely legal perspective, the law in the employment space is not changed by yesterday's decision. It has been and remains the case that with very few exceptions, protected characteristics cannot be taken into account," said Krissy Katzenstein, a partner at Baker & McKenzie LLP. "I think the big takeaway for employers, though, is more practical in terms of how the court's ruling and the perception of the court's ruling may result in further challenges to the [DEI] programs that they have in place."

On top of its impact on higher education, the high court's decision will have far-reaching implications for corporate diversity programs, according to Grace Speights, leader of Morgan Lewis LLP's employment practice.

"The impact will not be immediate, as lower courts will need to grapple with how the Supreme Court's analysis applies in other contexts," Speights said in written comments. "But smart organizations will want to look at their employment, supplier diversity, and charitable giving DEI and ESG strategies so as to maintain forward progress, while navigating potential legal and reputational risks."

Here are four takeaways from the high court's admissions ruling.

DEI Plans May Need Tightening Up

One of the immediate effects of the high court's conclusion that Harvard and UNC's race-based admissions processes don't pass constitutional muster — and the tone the ruling sets — may be to prompt employers to tie up loose ends that may exist in how their DEI programs are structured.

"The reality is if the program was lawful on Wednesday, it's lawful today," Katzenstein said. "But I think what employers should be thinking about is a holistic review of the [DEI] programs that they have in place to understand both what programs exist … and then an assessment of how [they are] being implemented."

To the extent that companies have programs in place that may be focused on particular demographic groups, Katzenstein said that ensuring those types of programs remain open to all "will also be an important consideration going forward."

For employers whose DEI programs are already properly structured, that means making clear their programs were never about making employment decisions rooted in demographics.

"If an employer had been straddling the line [and] potentially going too far in their initiatives, I think even though today's opinion is not directly applicable to them … they would be wise to do what they already should have done and thoroughly evaluate their program … [to] ensure that they're really not crossing the line into making employment-based decisions on the basis of a protected characteristic," said Loren Gesinsky, a partner at Seyfarth Shaw LLP.

Jerry Hunter of Bryan Cave Leighton Paisner LLP, a onetime senior trial attorney for the U.S. Equal Employment Opportunity Commission, also said companies should review whether any current DEI programs or policies could be interpreted as establishing race or gender based quotas.

That includes making sure that things like employer-sponsored affinity groups or training seminars aren't limited to people of, say, a particular ethnicity, gender or other demographic categories and are instead open to all employees, and that affirmative action plan language or DEI-related communications are legally compliant.

"Any lawsuit brought by [a] plaintiff is going to try to point to language that appears to promote a certain race or sex or group, [so] the language should be neutral," Hunter said.

Employee Scrutiny Of DEI Programs May Increase

Given the attention that the high court's decision involving Harvard and UNC has focused on affirmative action generally, it's to be expected that an increasing number of employees will connect the dots and start asking about their own companies' diversity initiatives, attorneys said.

And employers — even those with legally sound DEI programs — need to have consistent answers to make sure their programs aren't misunderstood.

"Employers [that] were already doing things right should not need to change the way they were doing

things," Gesinsky said. "But even they, I think, would benefit from reevaluating messaging to ensure that people understand what their initiatives are about and what they're not about."

Mike Muskat, a management-side attorney at Muskat Devine LLP, said that properly structured DEI programs should focus on expanding opportunities for recruiting and retaining people of diverse backgrounds, and not on imposing those types of quotas. However, some employers, even those with properly structured programs, sometimes aren't careful about how the goals of their programs are perceived.

Some companies, he said, aren't careful enough in how they talk about their DEI programs, leaving the door open for workers or managers to perceive them as imposing race- or sex-based employment quotas.

"Not every employer, but I think that there are some employers who have implemented DEI programs where they are communicating about those programs in a way that is too loose and is probably inadvertently suggesting to hiring managers and other employees in the organization that the DEI program calls for employment decisions to be made on the basis of race or sex," Muskat said. "And what I think [Thursday's] decision is a reminder to people of is that these DEI programs serve a very valuable purpose because they are recruiting and retention tools."

White Men May Lodge More Bias Suits

If more workers do question the viability and legality of their employers' DEI programs, one way that could manifest itself is through a marked increase in lawsuits sometimes referred to colloquially as "reverse discrimination" cases.

"I think [the Supreme Court's ruling] is going to have the effect of encouraging more white and male employees to bring employment discrimination claims involving DEI programs," Muskat said, noting that he has observed an uptick in such cases even before Thursday's ruling.

Besides individual claims, Muskat said the high court's ruling could also embolden third-party advocacy groups "to keep pushing for federal and state investigations and regulations" of corporate DEI programs, and potentially encourage legislatures in more states to themselves consider reining in those corporate diversity initiatives through legislation or regulation.

Andrew Turnbull, a partner at Morrison & Foerster LLP, similarly said the high court siding against Harvard and UNC will spark more legal challenges to workplace DEI and affirmative action plans.

"I think when most everyday people, employees, hear the term 'affirmative action' and they hear the Supreme Court overruled that, in their minds, they may say, 'Well, a company can't do these DEI or affirmative action programs themselves,'" Turnbull said. "If they're inclined to challenge those in the first place … I think you may see people more willing to kind of challenge those types of programs in court."

In the same vein, Turnbull noted that there are interest groups not dissimilar from the group that brought the Harvard and UNC cases that are taking aim at employers' DEI programs and actively looking for test cases to pursue. So it wouldn't be surprising if more of those types of cases are on tap, he said.

"We're all kind of expecting now that there will be an uptick and maybe an onslaught, depending on

how this plays out, in reverse discrimination cases," Turnbull added. "So I think companies need to really think about, 'Do we have vulnerabilities?'"

Federal Contractors' Obligations Could Be Next Legal Fight

Beyond voluntary diversity programs that employers may have in place, companies that contract with the federal government are required to have affirmative action plans on the books aimed at recruiting and advancing qualified minorities, women and other people from underrepresented communities. Such programs can include outreach, recruiting or training programs.

The law for contractors, according to Katzenstein, remains unchanged following the high court's decision.

"It's interesting because there is an obligation to have affirmative action plans, which require analytics into whether there are gaps in things like hiring and promotion," Katzenstein said.

"The law has always been that even where they might identify gaps or shortfalls, they need to put in place programming to help close those but [not] take the protected characteristics into account," she added. "So even for federal contractors, the rules remain the same in that you engage in activities that are aimed at a more diverse workforce, but doing so in a manner that doesn't take protected characteristics into account."

While the U.S. Department of Labor's Office of Federal Contract Compliance Programs, which polices bias among federal contractors, has a regulatory scheme in place that isn't tethered to the body of law at issue in the Harvard and UNC cases, contractors might still want to consider fine-tuning their practices in light of Thursday's ruling, attorneys say.

That's because the success enjoyed by the challengers to UNC and Harvard's affirmative action policies may try to replicate that success against the federal government's requirements for federal contractors. Those legal challenges, according to MoFo's Turnbull, may be lying in the weeds.

"Similar to Title VII, there will be plaintiffs' attorneys or interest groups that will make some very creative arguments and I wouldn't be surprised if we don't see challenges to federal contractor affirmative action," Turnbull said.

--Additional reporting by Chris Villani. Editing by Amy Rowe and Leah Bennett.

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