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Affirmative Action Cases Could Threaten Employer DEI Initiatives

By Andrew Turnbull, Carrie Cohen, and Michael Schulman

Morrison Foerster's Andrew Turnbull, Carrie Cohen, and Michael Schulman review how employers can respond to affirmative action rulings and state legislative efforts that could limit the scope of diversity initiatives.

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The US Supreme Court is poised to rule on two cases challenging the use of affirmative action in college admissions at Harvard University and University of North Carolina. Many believe the rulings will end or limit its use in student selection. Although the decision won't directly apply to workplace diversity, equity, and inclusion initiatives and affirmative action programs, companies may be indirectly impacted by the decision, including through potential legal challenges to their programs.

Potential Impact on Workplace Programs

Rulings on college affirmative action programs don't directly apply to workplace policies. Instead, employer DEI and affirmative action programs are governed by Title VII and other federal and state employment anti-discrimination laws. Under these laws, using protected classes, such as race, to make employment decisions is generally unlawful, even if intended to increase diversity.

However, the court's decision could encourage challenges to workplace DEI and affirmative action programs and undermine some rationales used to support DEI initiatives and affirmative action measures in the workplace. As a result, employers should understand the differences between permissible and potentially unlawful DEI and affirmative action programs.

Unlike affirmative action that uses protected class membership as a factor in decision-making, DEI programs in the employment context are policies and practices designed to ensure equal opportunities and outreach to certain underrepresented groups in the workforce. DEI programs might include diversity-focused recruitment, training, and mentoring programs designed to support diverse talent, and other policies and practices to champion diversity within the workforce.

Employers are only permitted to adopt a voluntary affirmative action plan that considers protected class status if it: is designed to eliminate a manifest imbalance in traditionally segregated job categories (i.e., is remedial), doesn't unnecessarily trammel the interests of non-diverse candidates, and is a temporary measure intended to attain, not maintain, a balanced workforce. Most employers don't meet these criteria.

The court's decision in the college admissions cases is likely to impact employer diversity initiatives in several ways. The court's opinion could indicate that race-conscious decisions aimed at remedying historical imbalances are either no longer necessary—due to the passage of time since the initial implementation of affirmative action—or lead to undesirable outcomes.

Potential plaintiffs might use the court's reasoning to challenge voluntary workplace affirmative action programs on the basis that such programs are no longer necessary to eliminate a manifest imbalance in a job category. Further, the reasoning can be used to support challenges to common DEI initiatives—like diversity fellowships or internships—on the basis that these programs place too much emphasis on protected class membership.

Employer Action Items

Employers must also navigate increased state efforts to limit certain DEI policies, trainings, and practices. A few states, including Florida, Texas, and Kansas, have enacted or proposed initiatives that target workplace DEI programs.

Given these developments, employers should consider reviewing their DEI and affirmative action efforts closely and consider measures to mitigate potential risk. Employers should take the following steps.

Review DEI Programs for Vulnerabilities. Companies should review existing DEI efforts with an eye toward areas of vulnerability and confirm the initiatives don't create unlawful preferences based on protected characteristics or include quotas or set asides.

Review Written DEI Materials. Employers should review their DEI program materials for any statements that describe their companies' practices in a manner that could be viewed as unlawful.

Justify Efforts for DEI Programs. Employers should be prepared to justify the importance of their existing DEI programs and how those programs are consistent with the law.

Train Managers Not to Use Race or Preferences in Employment Decisions. Managers are often not aware that they can't give preferential treatment to underrepresented groups when making hiring or promotion decisions. Employers should train managers to engage in lawful employment decisions, regardless of race, ethnicity, gender, and other protected characteristics.

Review Diversity Trainings for Risk. Employers should review current diversity trainings, including unconscious bias training, considering recent legislation aimed at limiting DEI programs and trainings that might make it vulnerable to attack.

Monitor State Laws Limiting DEI Programs. Companies should continue to monitor state laws and regulations aimed at limiting DEI programs.

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