

## Defending Reverse Discrimination Claims

1. Reverse discrimination claims are real and should be taken seriously. Many employers look at policies and practices that may negatively affect majority demographic employees as not being problematic, but the discrimination laws protect all members of a protected class equally and we are beginning to see more reverse discrimination claims.
2. There is currently a circuit split regarding the elements of *prima facie* case. Some circuit courts have added an additional element called “background circumstances” to the *prima facie* case when adjudicating reverse discrimination claims. Others have declined to add this element. The Supreme Court is set to resolve this split in the circuits in 2025.
3. These cases can result in huge punitive damage awards. Recent verdicts for successful plaintiffs in reverse discrimination claims have been significant. This may reflect the idea that juries may well seek to punish employers who disfavor one group within a protected class over another.
4. True affirmative action programs (AAPs) do not increase the chance of successful reverse discrimination claims. While some commentators have opined that affirmative action plans and DEI programs may increase the likelihood of a plaintiff’s verdict in reverse discrimination claims, this is unlikely to be true for AAPs required of government contractors and carefully prepared DEI plans.
5. Apply rules and procedures fairly, regardless of demographic. Employers who apply their rules and initiatives without regard to protected classes have little to fear and their employees are generally happier for it.

## 5 FOR THE ROAD

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