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We've Come a Long Way, Baby – But There's Still a Way to Go

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Companies strive to have a vital, healthy corporate culture and business reputation. In recent years, many organizations have adopted plans and initiatives to enhance diversity, equity and inclusion in the workplace. These initiatives have a primary goal of increasing recruitment, retention, and representation of historically underrepresented groups like women and racial or ethnic minorities. Now that these initiatives have become more commonplace, companies are learning what has worked, what hasn't and where risks to their organization may arise in the implementation of the plans.

Is the end of affirmative action near?

Currently, the rules governing affirmative action programs arise from *United Steelworkers v. Weber*, when the Supreme Court upheld private-sector affirmative action plans provided (1) they were designed to remedy a "manifest imbalance" in a "traditionally segregated workforce," (2) they did not unnecessarily restrict the rights of non-minorities, and (3) the plans were temporary.[i]

Thereafter, the Supreme Court found in *Grutter v. Bollinger* that diversity was a compelling state interest and upheld a "race-sensitive" university admissions program that considered race as only one factor and gave individual consideration to each applicant.[ii]

Two cases currently before the Supreme Court, however, stand to overturn *Grutter* and effectively eliminate the use of affirmative action in university admissions programs. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard University*, and *Students for Fair Admissions, Inc. v. Univ. of N.C.*, the plaintiffs argued that Harvard and UNC violated Title VI by intentionally discriminating against Asian-American and white applicants by using improper "racial balancing" instead of using race as a mere "plus factor" for decisions and failing to utilize race-neutral alternatives.[iii] Given the current makeup of the Supreme Court, the expectation is that *Grutter* will be overturned.

The Court's decision will not impact the affirmative action requirements that apply to federal contractors under Executive Order 11246. Additionally, while these cases will not directly impact private employers, they reflect a potential trend which would require employers to re-evaluate their voluntary DEI plans and initiatives. The Equal Employment Opportunity Commission's guidance distinguishes affirmative action as "backward looking," i.e., remedying past discrimination, from forward-looking "diversity efforts designed to open up opportunities to everyone," which the EEOC argues is a "business management concept under which employers voluntarily promote an inclusive workplace."[iv] Employers who implement voluntary affirmative action plans must also evaluate whether they have sufficient justification and meet certain criteria to ensure the plans are permissible under anti-discrimination laws.[v] The EEOC has long-standing guidance on when employers can use voluntary affirmative action programs: (1) where an analysis reveals that existing or contemplated employment practices are likely to cause an actual or potential adverse impact; (2) where a comparison between the employer's workforce and the appropriate labor pool reveals that diversity efforts are necessary to correct the effects of prior discriminatory practices; and (3) where a limited labor pool of qualified people of color and women exists due to historical restrictions by employers, labor organizations or others.[vi] Because employers seldom conduct these requisite analyses, they often do not meet the criteria for proper voluntary affirmative action plans.

The Rise of Reverse Discrimination Claims and Public Complaints

As companies have become increasingly vocal in their push for more diversity, equity and inclusion, employees have likewise placed a greater priority on working for companies who value DEI efforts. A 2021 report from CNBC and SurveyMonkey revealed 80% of employees who responded wanted to work for companies who valued diversity, equity, and inclusion.[vii] With these increased DEI efforts, however, some reports of unfairness have been made and more claims of reverse discrimination are arising.

The following case examples reflect that courts are increasingly willing to hold that DEI programs can be evidence of discrimination. In *Powers v. Broken Hill Properties (USA), Inc.*, the Southern District of Texas held that a company's gender-based DEI initiative could be an illegal affirmative action plan and direct evidence of gender bias. The plaintiff, a male former manager, claimed that the employer re-titled his position and gave it to a woman, passing over him for other jobs in favor of less-qualified female candidates.[viii] BHP publicly announced a goal of increasing women in its global workforce by 3% annually and having a gender-balanced global workforce by 2025. He also pointed out that the gender-based DEI initiative was used to help set bonus amounts for company leaders. In denying BHP's motion for summary judgment, the court noted that certain affirmative action plans or DEI initiatives can be legitimate when the address imbalances in traditionally segregated jobs, but can also be direct evidence of discrimination.[ix] The court additionally held that DEI initiatives' goals could be circumstantial evidence of sex bias under the *McDonnell-Douglas* burden-shifting method of proving discrimination.[x]

In *Duvall v. Novant Health, Inc.*, a jury recently awarded a white male former executive $10 million in punitive damages for discrimination relating to the employer's DEI plan.[xi] The plaintiff claimed he was one of at least five other white male executives who were replaced by female and minority candidates around the same time frame as a result of the company's DEI initiatives. He introduced evidence that his employer's DEI plan included (1) the use of a diversity "lens" in decision-making; and (2) the implementation of a long-term incentive plan for senior leadership who could demonstrate they improved DEI in various areas between 2017 and 2019 in order to "meet their underrepresented minority hiring targets."[xii] He also showed that between 2016-2019, there was a 5.9% decrease in white employees at or above the Vice President level, as well as contemporaneous increases in the numbers of women and underrepresented minorities. After two days of deliberations, the jury returned a verdict of $10 million in punitive damages, which was later reduced by the court to $300,000 in accordance with Title VII's cap on punitive damages.[xiii]

Additionally, several states have taken measures targeting employers' DEI initiatives in an effort to limit certain policies, training and practices. In 2022 Florida Governor Ron DeSantis signed the Stop W.O.K.E. Act ("SWA") into law which, among other things, prohibited Florida employers from requiring workers to attend certain types of DEI trainings if the training could espouse, promote, advance, or compel specified diversity concepts, such as critical race theory.[xiv] A federal judge in Florida temporarily blocked the SWA provisions in August 2022 and the U.S. Eleventh Circuit Court of Appeals upheld the ruling on March 16, 2023.[xv]

In February 2023, Texas Governor Abbott issued a memorandum warning state agencies not to use any DEI programs in hiring that are "inconsistent" with Texas law. The memorandum provides that hiring cannot be based on anything "other than merit." While direct to public employers, the guidance in the memorandum may ultimately be applied to private companies that contract with Texas.[xvi]

Employees are also taking note of whether their companies are abiding by their DEI policies and initiatives or simply giving them lip service. In March 2021, an employee sued Delta Airlines claiming that the company ignored its own policies and procedures which resulted in sexism, discrimination, hostility and harassment. More recently, the Delaware Court of Chancery determined that corporate officers are subject to oversight claims and can be held liable for failing to properly oversee investigations of workplace misconduct.[xvii]

Companies are also increasingly worried about "cancel culture" and how to manage risk in an environment where employees, customers, and the general public feel emboldened to speak, post, and act on anything they're feeling in the moment. Companies can minimize the risk of employees engaging in problematic speech in the following ways. They can address known underlying issues between employees before they come to a head. If a company is aware that an employee is upset or is having problems with a co-worker or supervisor, addressing the problem

early can prevent a later incident that may prove to be more serious. Companies must also have clear policies in place that address harassment, discrimination, and employee speech that employees are required to read and sign and should conduct training on these policies to ensure employees understand how they apply.

While not all employee "bad behavior" can be addressed before it happens, if companies keep a pulse on their organization and understand how employees are feeling and what problems they are facing they can often get out in front of potential problems within the workforce. When an incident of negative employee speech arises, the key is to act smartly – whether that requires immediate termination and managing the message to the public, or requires an investigation that takes more time. Developing a plan to deal with speech that damages a company's reputation is money well spent if it protects the company from negative public attention or litigation.

Best Practices

A company will not always be able to prevent every lawsuit, complaint, or potential for being "cancelled." However, there are some general best practices that can curtail risk while also continuing to promote a company's important DEI efforts. A few examples are as follows.

- Review DEI programs for vulnerabilities. Consider whether these efforts do not create unlawful preferences based on protected characteristics. Self-auditing these programs can go a long way toward minimizing risk for the company.
- Employers should hire only the most qualified candidates, while avoiding employment decisions that can be construed as removing qualified workers in favor of creating vacancies for underrepresented groups.
- DEI initiatives should be designed to achieve a balanced workforce – not maintain balance indefinitely.
- Employers should carefully consider what targets they set for hiring and retention so as not to have legitimate goals be seen as discriminatory "quotas" that may eliminate opportunities for a particular group of people.
- Companies must keep in mind that aspirational language can, at times, be seen as discriminatory if it appears that one group of people is being favored over another.
- Management and employees should be trained on the company's DEI efforts and understand that they are meant to move the company forward in a positive way – not to exclude certain groups of people. Management should not be forced to hire based on quotas in order to increase diversity.
- Aside from specific DEI plans or policies, all employees should look for ways to support one another and foster inclusion in a company's culture so that no one person or group feels excluded. Only when a company has the buy in of its employees can it truly move forward with effective DEI initiatives.

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[i] *United Steelworkers v. Weber*, 43 U.S. 193 (1979).
[ii] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[iii] *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard University,* 12 S. Ct. 895, 211 L.Ed.2d 604 (2022) and *Students for Fair Admissions, Inc. v. Univ. of N.C,* 142 S. Ct. 896 (2022).
[iv] DEI Initiatives & Discrimination Litigation, Paul E. Starkman, April 2023.
[v] Are Workplace Diversity Programs in Jeopardy if the Supreme Court Ends Affirmative Action in College Admissions? Michael Schulman, Andrew Turnbull, March 29, 2023.
[vi] *Id.*

[vii] Can DEI policies clash with anti-discrimination laws? Katie Clarey, March 1, 2022.
[viii] *Powers v. Broken Hill Properties (USA), Inc.*, 2022 BL 416951 (S.D. Tex. Nov. 21, 2022).
[ix] *Id.* at *23-24.
[x] *Id.* at *29.
[xi] *Duvall v. Novant Health, Inc.*, Civil Action 3:19-CV-00524 (W.D. N.C. 2022).
[xii] *Id.*
[xiii] *Id.*
[xiv] Are Workplace Diversity Programs in Jeopardy if the Supreme Court Ends Affirmative Action in College Admissions? Michael Schulman, Andrew Turnbull, March 29, 2023.
[xv] *Id.*, *citing Pernell et al v. Lamb et al.*, Civil Action No. 22-13992 (11th Cir. 2023).
[xvi] *Id.*
[xvii] *In Re McDonald's Corp. Stockholder Derivative Litigation*, No. 2021-CV-324(Del. Ch. Jan. 25, 2023).