HR COMPLIANCE BULLETIN

Affirmative Action in Employment After the Supreme Court's Decision for Higher Education

On June 29, 2023, the U.S. Supreme Court ruled in *Students for Fair Admissions v. President & Fellows of Harvard College* (*SFFA*) that certain "race-conscious" affirmative action programs violate the U.S. Constitution. Although the decision focuses solely on higher education admission policies, the legal principles applied to the two universities involved generally align with existing federal and state prohibitions against race-based selection policies that apply to most private employers.

Because of this, the *SFFA* decision has led to some increased scrutiny of certain employer programs, such as those promoting diversity, equity and inclusion (DEI). However, these programs were already subject to strict prohibitions against employment decisions based on race, sex or national origin, and those particular prohibitions remain unchanged after the *SFFA* decision.

Nevertheless, the *SFFA* decision may ultimately result in various indirect effects on employers. This Compliance Bulletin provides more information about those possible effects and summarizes rules and guidance that still apply to DEI and affirmative action plans in employment.

Action Steps

Employers should continue to follow existing guidance on affirmative action and DEI programs issued by the U.S. Equal Employment Opportunity Commission (EEOC) and other relevant agencies. In general, this means all hiring practices must be free of any race- or sex-based quotas, preferences or set-asides. Employers with DEI programs should also become familiar with the *SFFA* decision and any relevant local discussion of it to assess and prepare for the possibility of investigations or lawsuits.

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Highlights

No Direct Employer Impact

The Court's decision on affirmative action in higher education does not directly affect or change existing prohibitions against race-based selection practices by private employers.

Enduring Prohibitions

The use of affirmative action in employment remains unlawful, except under highly specific circumstances where an employer has identified a racial imbalance through a reasonable self-analysis, and the action is narrowly tailored to remedy that imbalance.

Important Date

June 29, 2023

The U.S. Supreme Court ruled that university policies using race as a "plus factor" for admission violates the Equal Protection Clause of the U.S. Constitution. For employers, other laws already explicitly prohibited using race as a consideration in hiring decisions.

SFFA's Impact on Employer DEI Programs

The decision in *SFFA* essentially made the rules for university admission practices more closely resemble certain legal principles that already applied to most employers since Title VII of the Civil Rights Act (Title VII) was enacted in 1964. However, it has also prompted new concerns related to employer efforts to enhance diversity, equity and inclusion.

Overview

Title VII, which is enforced by the EEOC, prohibits employers with 15 or more employees from engaging in employment discrimination based on race, color, national origin, sex or religion. It also prohibits affirmative action in employment for any purpose other than to remedy a specific racial or gender-based imbalance in a particular workforce. If an employer does take affirmative action to remedy an imbalance, Title VII prohibits those actions from involving any "plus factors," preferences or quotas based on race, sex or national origin. Most states have enacted similar laws that apply to smaller employers, and courts often look to Title VII when interpreting those laws.

For certain federal contractors, Executive Order 11246 and regulations issued by the Office of Federal Contract Compliance Program (OFCCP) may also apply. These require some contractors to take affirmative action to ensure they provide equal opportunity in all aspects of employment. Like Title VII, however, the rules for these mandatory affirmative action efforts explicitly prohibit the use of plus factors, preferences or quotas based on race, sex or national origin as a means of achieving their equal opportunity goals.

Universities, on the other hand, are **not** subject to Title VII or the federal contractor rules in their admission processes. Instead, universities may be subject to anti-discrimination mandates under a different provision of the Civil Rights Act, Title VI, or under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution (or both). This generally depends on whether a university is operated by a governmental entity or receives federal funds.

Either way, most universities were granted a narrow exception to applicable anti-discrimination mandates via Supreme Court decisions issued in 1978 and 2003. In those cases, the Court held that a university's interest in advancing student diversity was sufficient to justify using race as a plus factor in its admission processes. This generally meant that universities could consider an applicant's race in admission decisions, but only as one factor among many, which would all be included in a larger review of that applicant's overall qualifications.

SFFA Decision

In *SFFA*, the Supreme Court reversed its earlier decisions and held that two universities' use of race as a plus factor in admission decisions was not permissible under the Equal Protection Clause. According to the Court, the programs at issue in *SFFA* could not justify using race as a plus factor because they:

- Lacked a sufficient connection between the asserted benefits of diversity and the means used to achieve them;
- Made "race as a plus factor" into a negative factor for certain nonminorities due to the "zero-sum" nature of university admissions (whereby each admission that is based on race as a plus factor means one less spot available to nonminority students);
- Relied on offensive stereotypes about minority perspectives; and
- Had no logical end point or measurable benchmarks.

As a result, race is no longer a permissible factor in a university's admission process. Nevertheless, the Court also ruled that universities could still achieve a diverse student body by considering an applicant's discussion of the effects of race on the individual's life, "be it through discrimination, inspiration, or otherwise."

Governmental Responses

Shortly after the Court released its decision in *SFFA*, the chair of the EEOC, which enforces Title VII and other federal anti-discrimination laws that apply to employers, issued a statement noting that the ruling "does not address employer efforts to foster diverse and inclusive workforces." The EEOC chair also stated that "it remains lawful for employers to implement diversity, equity, inclusion [DEI] and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

Other governmental officials took a different approach. For example, on July 13, 2023, the attorneys general (AGs) of 13 states issued a letter warning employers that they "will face serious legal consequences" if they engage in unlawful race-based discrimination "whether under the label of 'diversity, equity, and inclusion' or otherwise." The AGs who signed onto that letter include those from Alabama, Arkansas, Iowa, Indiana, Kansas, Kentucky, Montana, Missouri, Mississippi, Nebraska, South Carolina, Tennessee and West Virginia. In addition, a senator from Arkansas issued a similar letter on July 17, 2023. This one stated that every employer with a DEI program "should take care to preserve relevant documents in anticipation of investigations and litigation."

While such letters have no immediate or direct legal effect, employers should be aware of and become familiar with them in order to help gauge their risk of increased claims, investigations or lawsuits. In particular, these letters seem to suggest that an increase in claims of "reverse discrimination" and race-based challenges to employer DEI programs could be on the horizon.

Thus, employers should review and adjust their hiring policies and practices as necessary to prepare for these possibilities. Employers should also continue closely observing all applicable laws and existing guidance on affirmative action from the EEOC, OFCCP and any other relevant agencies while also monitoring their websites for any updates.

EEOC Guidance on Affirmative Action for Employers

In 1979, the EEOC issued guidelines for private employers implementing a Title VII-compliant voluntary affirmative action program. Additional EEOC guidance was released in 1981. These documents establish that an employer's race-conscious affirmative action program may be permissible only if:

- ☑ The employer first engages in a reasonable self-analysis and identifies specific practices that have resulted in adverse effects on "previously excluded groups" or groups whose opportunities have been "artificially limited";
- ☑ The actions taken to remedy the adverse effects are reasonable in relation to the problems identified by the self-analysis; and
- ☑ The use of race is closely tailored to achieving the stated interest within a reasonable time and without unduly harming the interests of nonminorities.

Courts have upheld affirmative action plans under Title VII only when they serve a remedial purpose and struck down affirmative action efforts under Title VII when premised on a nonremedial purpose, such as achieving or maintaining a diverse workforce.

Reverse Discrimination and DEI Programs

Reverse discrimination occurs when individuals in groups not historically disadvantaged are discriminated against based on a protected characteristic. For example, if an employer refuses to hire an applicant because that individual is white, this would likely be reverse discrimination. Under Title VII, reverse discrimination is just as unlawful as discrimination against members of minority and historically disadvantaged groups.

Some courts have taken the position that an individual who relies on circumstantial evidence to establish a reverse discrimination claim must meet a heightened standard of proof (by showing that the employer was of the "unusual" kind that "discriminates against the majority"). However, the EEOC generally applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used.

In addition, Title VII allows—and the EEOC encourages—employers to make general efforts to advance inclusivity, create equal opportunity for people of all backgrounds and mitigate bias in the workplace. Examples in the guidance include establishing affinity groups, adopting structured interview processes to ensure more equitable evaluation of candidates for roles, and making general efforts to ensure a more diverse pool of candidates for any given position. Generally known as DEI programs, these efforts may take a variety of forms and are different from affirmative action in various ways.

Employer Compliance Tips

Without a temporary and remedial justification, affirmative action in employment violates Title VII for many of the same reasons the two universities' admission processes violated the Equal Protection Clause in *SFFA*. Therefore, employers should never implement any affirmative action efforts without first identifying a specific remedial purpose, becoming familiar with the EEOC's guidelines for affirmative action programs, and obtaining individualized legal advice.

In addition, to help reduce the risk of claims and liability related to a workplace DEI program, employers should observe the following and other general best practices noted in the EEOC guidance:

- ☑ Develop clear policies outlining a commitment to equal opportunity and anti-discrimination practices;
- ☑ Do not use race, gender, national origin or similar characteristics as factors in selection processes;
- ☑ Provide regular training on DEI principles, including awareness of unconscious bias, to ensure all employees are educated on and sensitive to diversity-related issues;
- ☑ Ensure all job advertisements, hiring processes and applicant evaluations are fair, inclusive and based solely on qualifications and merits;
- ☑ Regularly review pay structures to eliminate gender, racial or other discriminatory pay disparities and ensure equal pay for equal work;
- ☑ Encourage an inclusive workplace culture that appreciates diverse perspectives, provides equal opportunities for career advancement and promotes respectful communication;
- ☑ Establish a robust system for reporting and addressing discrimination, harassment or retaliation complaints promptly, thoroughly and impartially;
- ☑ Provide reasonable accommodations for employees' religious practice unless it causes undue hardship;
- ☑ Prohibit retaliation against employees who raise concerns or participate in DEI initiatives, and establish procedures to address and remediate any instances of retaliation; and
- ☑ Regularly assess the program's effectiveness, review all applicable laws and make adjustments as necessary.