Legal Update Article

How the U.S. Supreme Court's Affirmative Action in Student Admissions Decision Affects Employers

By Tanya A. Bovée, John M. Bryson, Matthew J. Camardella, Michael R. Hatcher, Monica H. Khetarpal, Samia M. Kirmani, Laura A. Mitchell, Michael D. Thomas & Carol R. Ashley

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Meet the Authors

Tanya A. Bovée
(She/Her)
Principal
(860) 522-0404
Tanya.Bovee@jacksonlewis.com

John M. Bryson
Principal
(703) 483-8318
John.Bryson@jacksonlewis.com

The U.S. Supreme Court held that the use of race in university and college admissions is unconstitutional. ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College***, No. 20-1199, together with *Students for Fair Admissions, Inc. v. Univ. of North Carolina,* No. 21-707 (June 29, 2023). The Court's ruling**directly addresses only the admissions decisions of educational institutions** that accept "federal financial assistance" based on an analysis under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The decision also may have implications for employers.

Applicable to private employers are Title VII of the Civil Rights Act of 1964 and other federal and state laws that prohibit discrimination based on a variety of protected characteristics, such as race, color, religion, sex, national origin, disability, age, and other factors.

In addition, Executive Order (EO) 11246 applies to covered federal contractors and subcontractors and prohibits discrimination against employees or applicants for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. EO 11246 requires covered federal contractors and subcontractors to engage in "affirmative action." It is a common misperception that the affirmative action in the EO 11246 contractor context requires or allows covered employers to apply preferences in favor of women and minorities over men and non-minorities in employment, including in hiring and promotion decisions. It does not. In fact, similar to Title VII, EO 11246 prohibits discrimination against applicants and employees on the basis of *all* races (including White) and the other characteristics covered by the EO. This prohibition remains unchanged.

Although the Court's ruling does not change the law regarding employment discrimination, employers should expect those looking to challenge employer diversity, equity, and inclusion (DEI) initiatives are likely to seek to apply the Court's reasoning in the employer context (including those who do not receive federal financial assistance). Employers should anticipate a continuing uptick in "reverse discrimination" claims that allege DEI measures are evidence of discrimination against White or male applicants and employees; stakeholder-led initiatives claiming that DEI measures with the purpose of advancing opportunities for the under-represented negatively affect majority groups and vice versa; and state legislation designed to challenge, weaken, or eliminate DEI initiatives.

Against this backdrop, all employers should consider the following:

1. Focus on lawful, good faith efforts to expand diversity of qualified candidates for hiring, promotions, and other workplace functions.

Matthew J. Camardella
Principal
(631) 247-4639
Matthew.Camardella@jacksonlewis.com

Michael R. Hatcher
Principal
(703) 483-8328
Michael.Hatcher@jacksonlewis.com

Monica H. Khetarpal
Principal
(312) 803-2529
Monica.Khetarpal@jacksonlewis.com

Samia M. Kirmani
Principal
(617) 367-0025
Samia.Kirmani@jacksonlewis.com

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It remains lawful for employers to analyze and seek to eliminate potential structural barriers to entry and advancement. Conducting meaningful review of policies and practices for biases and reviewing and revising job descriptions and announcements for requirements that limit applicant pools, for example, remain lawful. Likewise, employers may continue to make concerted efforts to expand outreach, invest in leadership and mentorship programs, and otherwise institute programming to expand access and ensure equal employment opportunities.

2. Review DEI Communications.

Review DEI-related communications, internal and public-facing, to avoid statements that may be characterized as violations of law. Carefully consider communications about the Supreme Court decision and DEI programs to ensure they could not be misinterpreted to suggest noncompliance with law. Be clear that the company is committed to inclusion *for all,* regardless of race, gender, or another protected characteristic.

3. Take Stock of Existing DEI Measures and Processes for Implementing New Ones.

DEI initiatives remain lawful, but they must be carefully designed, documented, and implemented to comply with applicable law. Pay particular attention to DEI measures focused on the recruitment and advancement of particular groups (*e.g.,* use of the NFL "Rooney Rule").

4. Focus on Lawful Decision-Making, Messaging, and Training.

As has been the case, employers should make decisions — and train their managers to make decisions — based on legitimate business reasons, as opposed to protected characteristics like race, and their decision-makers understand that DEI measures, in and of themselves, do not constitute, mandate, instruct, or otherwise sanction decision-making based on protected characteristics.

5. Stay Alert to State Law Requirements.

States and localities have enacted their own anti-discrimination laws, many of which prohibit discrimination based on characteristics such as family status, caregiver status, and socioeconomic status not covered by federal law. More recently, some states have enacted "anti-DEI" statutes, such as Florida's "Stop Woke Act" (House Bill 7), which prohibits teaching about certain concepts related to race, color, national origin, or sex. Such measures are themselves the subject of litigation. As of this writing, implementation of the Stop Woke Act has been enjoined by the U.S. District Court for the Northern District of Florida *(Pernell v. Fla. Bd. of Governors of the State Univ. Sys.,* 2022 U.S. Dist. LEXIS 208374) and the Preliminary Injunction has been left in place by the U.S. Court of Appeals for the Eleventh Circuit *(Pernell v. Florida Bd. of Governors of the State Univ.,* 2023 U.S. App. LEXIS 6591).

6. Focus on Inclusion, Psychological Safety, and Wellness.

Cultivate an inclusive workplace culture with inclusive leadership and relevant training. Many states have enacted laws intended to push DEI forward (*e.g.,* CROWN Act laws, pay transparency laws, and data privacy and collection) and employers should continue to focus on compliance. Furthermore, ensure Human Resources

Government Contract Compliance
Corporate Diversity Counseling
Employment Litigation
Environmental, Social and Governance (ESG)
Higher Education
National Compliance and Multi-State Solutions
Trials and Appeals

personnel are prepared and trained to investigate and address all DEI-related concerns. Finally, ensure employees are aware of resources available to support self-care, trauma, and wellness.

The Jackson Lewis Corporate Diversity Counseling and Environmental, Social, and Governance (ESG) Groups are monitoring developments that affect employers as a result of the Court's decision. The team is prepared to assist employers to evaluate and mitigate legal risks associated with corporate DEI programs, while strengthening their effectiveness. Please contact a Jackson Lewis attorney with any questions.