Podcast

2023 Mid-Year Report: SCOTUS Decision on Affirmative Action

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Transcript

Alitia Faccone:

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2023 does not look to be an exception. What follows is one of a collection of concise programs, as We Get Work™ the podcast provides the accompanying voice of the Jackson Lewis 2023 Mid-Year Report. Bringing you up-to-date legislative, regulatory, and litigation insights that have shaped the year thus far and will continue to do so. We invite you and others at your organization to experience the report in full on JacksonLewis.com, or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining us.

Samia Kirmani:

Hi, everyone. On Thursday, June 29th, which made for a very long and busy weekend for DEI practitioners, the United States Supreme Court issued its decision in SFFA v. Harvard and UNC, in which the court held that the use of race in student admissions violates the Equal Protection Clause of our Constitution. Not terribly surprising, but decidedly impactful. The talk leading up to the Supreme Court's decision on the workplace front was and remains about the fate of employer DEI programs and initiatives. We're going to talk about that specifically. Spoiler alert, Monica and Michael and I are going to tell you nothing in employment discrimination law has changed, except maybe employer risk analysis.

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So I'm here with my partners, Monica Khetarpal, who co-leads our higher ed group and focuses her practice on ESG and DEI initiatives, advice and counsel relating to them, climate studies, audits, investigations and litigation, and Michael Thomas, a partner and key member of our corporate diversity practice group, DEI advisor and counselor, trainer, and class action litigator. I'm Samia Kirmani, also focused on DEI related advice, counseling program development and training, and a member of our corporate diversity practice group, our investigations group, and I co-lead our training group.

So our colleague Carol Ashley, who wrote an amicus brief on the decision, just concluded a three-part webinar series on the decision's impact on higher ed admissions. So today, again, our focus is what, if any, impact does the decision have on employers and the laws that apply to them relating to employment discrimination, Title VII state anti-discrimination laws, and Executive Order 11246, which applies to federal contractors. So while it remains the case that employers are having their DEI initiatives challenged by those saying, "You're not doing enough." And by those saying, "You're going too far." It also remains the case that intentional and thoughtful implementation and operations are the key. You can undertake DEI measures and do so lawfully.

So Monica and Michael, why don't you kick us off and talk about what the decision said, and maybe what it didn't say, and then let's talk about what we're going to do about it.

Monica Khetarpal:

Thanks, Samia, I'll go through the decision a little bit first, and yes, definitely we can still do DEI, but there's some nuance to it. So the case is decided under the Equal Protection Clause, which is the Fourteenth Amendment of the Constitution. The Equal Protection Clause says that, "All the laws of the United States must apply equally to all individuals, without respect to race." That implicates UNC because it's a state university, but what about Harvard?

So the Supreme Court dropped a footnote that said that, "Discrimination that violates the Equal Protection Clause of the Fourteenth Amendment that's committed by an institution that accepts federal funds also violates Title VI of the Civil Rights Act of 1964." That's how they looped in Harvard. That's nothing new, that's from the Grutter decision back in 2003. So the court said that they accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause.

Both schools admissions' programs do consider race as a factor, or did consider race as a factor in their analysis decided who they should admit into their universities. So that means to be lawful under the Equal Protection Clause and Title VI it has to pass what is called strict scrutiny. That means it has to be justified by a compelling government interest, among other things. The schools argued that the compelling interests here were a couple of things. First, training future leaders in public service and in private sectors. Second, preparing graduates to adapt to an increasingly pluralistic society. Third, better educating students through diversity. Fourth, producing new knowledge stemming from diverse outlooks. And fifth, fostering innovation and problem solving, among others.

But the court didn't buy it. They decided that this did not pass that strict scrutiny test. One of the things that they used to describe these justifications was that it was insufficiently coherent. It also talked about how these factors, in their mind, were not sufficiently measurable and trackable. So what they held, and this is a quote, "The university programs must comply with strict scrutiny, they must never use race as a stereotype or negative. At some point, they must end. Respondent submission systems, however well-intentioned and implemented in good faith, fail each of these criteria. As a result, they violate the Equal Protection Clause of the Fourteenth Amendment."

There was some discussion about when you measure these deliverables and you say, "Okay, we've met them, now the program can end." That was one of the other factors that went into the analysis. So we talked about Title VI, and Title VI is triggered when entities receive federal financial assistance. So what does that mean for private employers even? The short answer is that it's complicated. So you should really just be looking at do you accept federal financial assistance in any way, shape or form? If you do, look at it carefully with advice of council. Because we think that may be an area where it's going to be challenged in the future, and there may be an argument that if you receive one nickel of federal financial assistance, there you go, this decision now applies to you. That's probably not the case, almost certainly not the case, but it's definitely worth a look.

The other thing is Executive Order 11246, which Samia mentioned, that applies to federal contractors and subcontractors. It prohibits discrimination against employees or applicants for employment based on race, color, religion, sex, sexual orientation, gender identity, or national origin. It requires federal contractors and subcontractors to engage in what's called Affirmative Action. So we're getting this question, does that mean that federal contractor and subcontractor Affirmative Action is dead? The answer is definitely no. It's actually common misperception that Executive Order 11246 requires or allows covered employers to apply preferences either in favor of women and minorities, and that's just not true. It doesn't. So in fact, it prohibits discrimination against applicants and employees on the basis of all races, including White, and the other characteristics covered by the Executive Order, and that remains unchanged. So Michael, what should employers who don't receive federal financial funding be thinking about?

Michael Thomas:

Well, thank you, Samia and Monica, and yes, this is a very exciting decision and a lot to think about in some ways, but don't panic. So the fact still remains that Title VII and state similar laws have really not changed. Some things have changed, but the law's essentially the same. So the things that have changed is that there are now some additional things that employers in the private sector context, that either have a DEI initiative or are considering having a DEI initiative, should consider in assessing risk.

So first, employers can expect more claims, both internal claims and lawsuits, arguing that a DEI initiative provides unlawful preferential treatment to minority applicants or employees to the detriment of the majority. That complaint or claim

may then be followed by a lawsuit arguing that the employer maintains a policy or practice that's neutral on its face, but in the application favors White applicants and men to the detriment of minorities. So what do I really mean by that?

The Supreme Court in the SFFA decision held that the use of race in university college admissions is unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. So Harvard arguably had a practice that gave preferential treatment to minorities, the court also noted that elimination racial discrimination means eliminating all of it. So while one could argue that the reason race was consciously considered in the admission process is because Harvard maintained a race neutral practice that in the application favored White applicants to the detriment of qualified minority applicants.

Which leads us to the lawsuit filed on July 3rd by the Chica Project, the African Community Economic Development of New England, and the Greater Boston Latino Network. So on July 3rd of this year, so less than a week after the Harvard decision, these organizations filed a federal civil rights complaint with the US Department of Education Office for Civil Rights against Harvard alleging that its practice of giving preferential treatment in the admission process to applicants with family ties to wealthy donors and alumni for your legacy applicants resulted in systemic preferential treatment of White applicants. So the complaint identified that most of the students that received this preferential treatment, based on familial ties, are overwhelmingly White.

So the point is employers may start seeing this somewhat boomerang pattern of having a disparate treatment claim that favors minorities to the detriment of the majority, followed by a claim of disparate impact that favors the majority to the detriment of the minority. Employers may see that pattern. The second thing important to keep in mind is this concept of organizational standing. So the Supreme Court quickly discussed organizational standing in somewhat of a conclusionary way in just a couple of pages, the First Circuit in the underlined Harvard decision actually has a more lengthy conversation of organizational standing.

So what is organizational standing and why is it important? So organizational standing is where the organization non-individual claims to have suffered a harm. So to invoke organizational standing an organization must show three things, one, its members would otherwise have standing to sue on their own right, two, the interests it seeks to protect are germane to the organization's purpose, and then three, and this is the important part, neither of the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. So Students for Fair Admissions in the Harvard case did not have to identify an individual who was actually injured to bring the lawsuit. The organizations that filed a civil rights complaint against Harvard last week did not have to identify an individual who was actually injured to bring the lawsuit.

So arguably an employer could be sued by one of these organizations on Monday for disparate treatment, and then sued by a different organization on Tuesday for a disparate impact, without actually having to identify an actual employee who was injured. So that becomes important to keep in mind moving forward. A third

area that employers might need to think about is that we've seen an uptick in so-called reverse discrimination cases, and those are alleging discrimination against White employees or males, and this trend will I think continue. Again, this is not really new, but it's becoming probably more important because we've seen more of these cases, but they've been around for a while and nothing's unique about them, with the exception that now these cases are relying on the DEI initiative as evidence of discrimination, disparate treatment or disparate impact.

So we expect to see more of these cases, but they typically turn on really the traditional litigation approach, so circumstantial evidence of discrimination, discriminatory comments, events of inconsistent treatment of some individuals, things like that. But the fact is that Title VII and states' similar laws have not really changed. What has changed is there will likely be more scrutiny of DEI practices, so there might be more risk for employers. So as always, it still remains paramount to make sure decisions are made for legitimate nondiscriminatory reasons, and that you evaluate your DEI practice as written, and also as applied. So the other question that comes up is really what should employers be doing? So Monica, I'll turn this back to you, what should employers be doing?

Monica Khetarpal:

Yeah. Thanks, Michael. That's the question, right? Again, if you have any federal financial funding consult council as to how that may implicate any of this. The biggest thing employers should be doing right now is really just take stack of your DEI measures. What are you doing? What are your policies and practices? What data are you collecting? What are you analyzing? How is all of that being operationalized? Also, how are you communicating about all of that? That's often a really big piece of this. Samia, do you want to talk a little bit about that?

Samia Kirmani:

I think it comes down to the same advice we've been giving before this decision, and we continue. So first, we want to make sure that we're reviewing our DEI related communications, internal and public facing, so that we're avoiding statements that can be construed as violations of the law. So think about what those communications are that we're saying about the decisions so that they can't be misinterpreted to suggest noncompliance, and be clear that the company is committed for inclusion for all.

Then, as always has been the case, we want to make sure that we're making decisions and that we're training our managers to make decisions based on legitimate business reasons. So what we want when we talk, when our leaders in particular talk about our DEI initiatives, and when HR or DEI offices speak about our DEI measures, we don't want those listening to walk away with an impression that they've just been told that because we're implementing this measure that it's okay to make employment related decisions based on race or gender or any of the other protected characteristics. So it remains the case that we want to make sure that we are highlighting that just because you're undertaking a DEI initiative does not mean that you are making decisions that are based on protected characteristics.

I guess the last thing I'll say is that be mindful of state law requirements. What we're seeing, and what Monica and Michael have just been talking about, is we're seeing a very real push forward of DEI initiatives, and then headwinds pushing back the other way. So keep in mind that states and localities have enacted their own anti-discrimination laws, many of which prohibit discrimination based on characteristics that aren't covered by the federal laws, but they're also passing and considering passing laws that challenge DEI practices as discriminatory. The example everyone's always talking about is the Florida Stop WOKE Act which prohibits teaching about certain concepts relating to race, color, national origin, et cetera.

As of today, that implementation of the Florida HB 7, House Bill 7 or Stop WOKE Act has been enjoined by the US District Court and that's been maintained by the Eleventh Circuit, so it's in litigation, but really reflective of what's out there. So as Monica was saying, as you're evaluating and taking stock of your measures, really the key is to say, "Hang on a second, what are we doing? Let's understand what we're doing and let's understand what the potential challenges of all of the different initiatives we have, whether it's just evaluating our workforce, doing an analysis of data, collecting data, or whether we have particular hiring and promotion measures, et cetera, in place, how are we thinking about them on that sliding scale?"

I guess the last thing that we want to cover, and Michael, why don't you take this, focusing on inclusion and psychological safety and wellness remains paramount as it was before.

Michael Thomas:

Yeah, that's absolutely right, Samia. So focus on inclusion, so the challenge employers often have in this space where there's pushback is that as some groups seek greater recognition and acceptance in the workplace, it is often perceived by others as taking something away from them, which is why belonging and inclusion become important. So belonging and inclusion sends that message that there is space for everyone. So setting that really starts at the top in the C-suite, which is why things like inclusive leadership and relevant training are critical.

The other part that focuses on inclusion and psychological safety is also making sure that you're complying with recent state laws that actually encourage DEI, so things like the CROWN Act, pay transparency laws, and even some data privacy and collection laws really encourage that openness and creation of belonging and DEI within the workplace. Again, these are structures that are intended to make everyone feel welcome, more invited in the workplace regardless of who they are, and finally ensuring that employees are aware of resources available to support self-care, trauma and wellness. Again, these are all things that are not really new, but really are an important part of the employer's obligation to create a safe workplace that includes everyone. So Monica, I'll turn it back to you to maybe conclude and say what the bottom line is.

Monica Khetarpal:

Yeah. Thanks, Michael. Thank you for that last piece, it's absolutely critical, so

important. I think the bottom line is chances are most of what you're doing is likely okay, true lawyer speak with all of the little caveats. But it really is about the communication that you're using, the guardrails you're putting around things, and ensuring that everyone involved understands what the DEI measures are and how to operationalize those within the bounds of the law. DEI is not dead, it is still alive and well, and what organizations should be doing.

Samia Kirmani:

I think times up for us, although, Michael and Monica and I spend all of our time discussing with each other all of these issues. It's always a treat. I also wanted to mention that we have a series of webinars on this decision and others, so you can check out our website for information on them. So webinars on the impact of the decision on higher ed and admissions, and a webinar on potential implications of the decision on employers. Thank you all for listening.

Alitia Faccone:

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