

The Future of DEI and Reverse Discrimination Suits

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December 11, 2023

The Legal Landscape

As we reviewed in earlier posts, the Supreme Court's June 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)* promised to be a game changer not just in education but in the employment context as well. While the SFFA decision did not directly apply to private employers, its strong language criticizing affirmative action has had the effect many argued the Court wanted it to have: it caused universities and employers to reevaluate their DEI programs. The decision further prompted potential plaintiffs and members of the plaintiff's bar to challenge employment decisions allegedly made on the basis of a lack of membership in a group viewed as diverse and inclusive.

Now, nearly six months after the Court's decision, we are finally starting to see the ramifications of this holding in the private sector and are better able to predict how the burgeoning legal landscape may continue to take shape.

By way of review, the SFFA decision struck down the race-conscious admissions programs of Harvard University and the University of North Carolina at Chapel Hill. The Court found that the universities violated both the Equal Protection Clause and Title VI of the Civil Rights Act by utilizing race as a stand-alone "plus" factor in admissions evaluations. Ultimately, the majority opinion concluded that the programs "lack sufficiently focused and measurable objections warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."

While a significant development in the field, the decision remains—at least technically—restricted to the field of higher education. However, in the months since the decision, aggressive organizations and plaintiffs have been actively attacking diversity programs beyond the realm of higher education.

DEI Under Attack

In the aftermath of the SFFA decision, DEI programs have been under attack, both in the court of public opinion and actual court system.

Federal courts are beginning to see a small uptick in claims that seek to challenge DEI initiatives. Critically, there appear to be two different cohorts of potential plaintiffs emerging in these litigation efforts: (1) organized, well-funded, and committed activist/political advocacy groups pursuing injunctions and non-monetary resolutions; and (2) traditional single- or multi-plaintiff efforts seeking to recover more traditional damages.

At this point in time, the first group is more actively litigious. Indeed, within just months of the SFFA

decision, the American Alliance for Equal Rights—the same organization that brought suit against Harvard and the University of North Carolina in the SFFA decision—began to aggressively challenge diversity initiatives at private employers, which they argued are illegal and discriminatory. Unsurprisingly, large firms and companies with public-facing and prominently displayed DEI initiatives proved to be primarily targeted by these initial efforts. Worth noting is that these groups tend to first engage with the employer prior to filing suit, although these efforts are often accompanied by publicly-released media statements.

Interestingly, the American Alliance first targeted the legal industry and law schools, both writing to and then suing several multinational law firms. They also challenged DEI programs at large companies. The group filed lawsuits that resulted in those institutions having their scholarship and recruitment efforts publicly scrutinized via the filing of three prominent complaints. The group's efforts seek to challenge companies that fund award programs, diversity scholarships, and grants to minority-led employees, applicants, or businesses.

The American Alliance may argue that these efforts have been largely successful. In response to the charges and lawsuits, several defendants have already opted—publicly or privately—to revise their internal policies in an effort to avoid active or threatened litigation. Many of these programs have been revised to no longer outwardly identify race as a factor in the selection of applicants for DEI fellowships and other internal programs. Indeed, in recent public comments the American Alliance has declared a brief pause in the group's planned activities, citing the belief that many organizations revised policies that the group viewed as objectionable. For example, a recent stipulation of dismissal in one of the lawsuits identified the removal of the phrase “membership in a disadvantaged and/or historically underrepresented group in the legal profession” from the targeted DEI program.

The effect of the SFFA decision is also still being felt in the realm of higher education. In October, SFFA filed suit against both the U.S. Naval Academy in Annapolis and West Point Academy, arguing that affirmative action in its admissions processes violates the Fifth Amendment. No. 1:23-cv-02699-ABA (D. Md. Oct. 5, 2023); No. 7:23-cv-08262 (S.D.N.Y. Sept. 19, 2023). Beyond the question of admission, other institutions have been sued by aggrieved students for allegedly using race, sex, or gender preferences in selecting members for particularly prestigious organizations within the University. *Doe v. New York University*, No. 1:23-cv-09187 (S.D.N.Y. 2023).

In addition to the above, individual employees are pursuing legal challenges to adverse decisions that the employee believes were motivated by the employer's desire to advance internal diversity and inclusion targets. *Meyersburg v. Morgan Stanley & Co. LLC*, No. 1:23-cv-07638 (S.D.N.Y. Aug. 29, 2023). Such claims are likely continuing to work their way through enforcement agencies such as the EEOC before appearing on public dockets.

What is the Future of DEI Initiatives?

Recognizing this trend is important for several reasons:

1. First, DEI programs are still lawful. As it stands, employers are more likely to receive pressure from advocacy groups to revise and remove DEI programs such groups perceive as unfair. The best way to circumvent similar challenges is for employers to proactively review existing DEI initiatives and programs to make sure they are compliant with the law. It is critical that the review is conducted through a litigation lens, but important to recognize that such challenges are unlike traditional plaintiffs seeking to bring causes of action for violations of Title VII, hostile

work environment, or retaliation. There are comparatively minimal efforts needed to create and maintain policies that will not draw the ire of the first class of plaintiffs; and

2. Second, more traditional “reverse discrimination” claims—i.e., an individual plaintiff seeking to recover monetary damages—are incredibly fact specific and at this time more uncommon. In fact, proper preemptive measures may well prevent the second group of plaintiffs from establishing a “legal foothold” at all. Absent additional developments to the case law on a federal level, there may not be an opening of the proverbial floodgates via a one-size-fits-all formula for plaintiffs seeking to recover monetary damages.

While a true “explosion” of DEI-centric litigation has not yet occurred, the current trend unmistakably indicates that companies need to be aware of their litigation risks going forward. Firms that wish to continue adopting a best-practices approach should review internal and public-facing DEI communications and avoid statements that explicitly mention protected characteristics as “plus” factors for employment decisions. In line with these recommendations, executives and other high-ranking officers should exercise care in making statements that indicate any sort of racial or ethnic preference. This is not to say that diversity programs must be abandoned—indeed, the opposite remains true—however, it is important for businesses to remain educated about the realities imposed by the current DEI climate and properly protect themselves.

In the interim, employers will continue to grapple with the potential exposure that DEI programs may create and the public relations implications that accompany litigation. Through what is likely a combination of tightening economic conditions and the specter of potential litigation, there has been a growing dearth in DEI practitioners at the management level. When DEI programs are not directly targeted for budgetary concerns, certain industries—particularly information and technology—have experienced significant turnover in DEI team leaders and other officer roles. In addition, job postings for DEI positions fell 19% in 2022, a trend that appears to have continued into 2023. In fact, since 2018, the average tenure of a DEI role within an S&P 500 company has been less than two years.

What Should Employers be Doing?

Ultimately, if and until the Supreme Court weighs in on the legality of DEI programs within the private sector, the controlling advice has not changed—employers who value diversity need not immediately abandon their initiatives. However, employers should be prepared and even expect that their programs may come under public scrutiny or even be challenged in court.

Here are some points to consider:

- At the very least, employers must ensure that any programs and initiatives they wish to maintain are compliant with the law and do not facially promote favorable treatment of one group over another.
- There should never be a mandate or directive that “favors” or “targets” certain groups for hiring or promotion within an organization.
- Employers should avoid or eliminate all direct numerical targets or incentives, as such initiatives are likely to come under the most scrutiny going forward.
- Look closely at any program or opportunity that provides a direct “prize” or “reward”, like scholarship or training programs. Those should be open to all, or membership should be chosen from applicants of all backgrounds.

- While employers may still set goals for diversity, they should avoid any link between meeting those goals and financial compensation.

While such statistics are disconcerting, the SFFA decision should not ultimately be a cause for panic for private sector employers. Simple, easily replicable steps will likely allow for the majority of entities to avoid potential litigation.

If you have questions concerning your company's DEI program, please contact a member of [Kelley Drye's Labor and Employment team](#).