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DEI after SCOTUS University Admissions Decision

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Introduction

With the Supreme Court's recent consolidated opinion on the affirmative action programs at Harvard and the University of North Carolina (UNC) in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, there is growing concern regarding the status of "affirmative action." However, it is important to be clear about the meaning of "affirmative action" and the specific setting involved, as the Supreme Court's opinions in the *Harvard* and *UNC* cases do not directly translate to a rebuke of voluntary DEI efforts or affirmative action requirements for certain federal contractors in the employment context, even if the Supreme Court's decision may result in a less diverse pool of students from which employers can find diverse talent in the future.

In particular, while the *Harvard* and *UNC* cases addressed policies allowing university admissions officers to consider race as one potentially determinative factor (a "plus factor") in the higher education setting, the Court's opinion does not reach affirmative action required of contractors by Executive Order 11246 and the rules of the Office of Federal Contract Compliance Programs (OFCCP) or voluntarily adopted diversity and inclusion efforts under a DEI program. In fact, employer DEI programs are usually quite different from the UNC/Harvard admissions programs. Each will be discussed in turn.

Affirmative Action Required by Certain Federal Contractors

OFCCP affirmative action programs require proactive "affirmative action" to ensure that applicants and employees are treated *without regard* to protected traits such as race (as opposed to being a determinative factor). OFCCP's FAQ page explains the difference as follows:

> [Q.] Are the affirmative action obligations OFCCP enforces similar to the affirmative action steps taken by some educational institutions to increase the racial diversity of their student bodies?
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> [A.] No. While OFCCP seeks to increase the diversity of the federal contractor workforce through the variety of affirmative action obligations described above, the obligations it enforces are wholly distinct from the concept of affirmative action as implemented by some post-secondary educational institutions in their admissions processes. In contrast to the affirmative action implemented by many post-secondary institutions, OFCCP does not permit the use of race to be weighed as one factor among many in an individual's application

> when rendering hiring, employment, or personnel decisions, as racial preferences of any kind are prohibited under the authorities administered by OFCCP. *See* 41 CFR 60-1.4(a), 60-300.5(a) and 60-741.5(a). OFCCP, therefore, does not permit the use of race as a factor in contractors' employment practices to achieve diversity in the workforce, either by using race as one factor among many to achieve a "critical mass" of representation for underrepresented minorities or through direct numerical quotas or set-asides. *See, e.g., Fisher v. University of Texas*, 136 S. Ct. 2198, 2214-15 (2016); *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003); *Regents of University of California v. Bakke*, 438 U.S. 265, 324 (1978). OFCCP's affirmative action regulations expressly forbid the use of quotas or set asides, provide no legal justification for a contractor to extend preferences on the basis of a protected status, and do not supersede merit selection principles. *See* 41 CFR 2.16(e).[1]

Voluntary DEI Efforts

As for voluntarily adopted DEI programs, many of them are based on OFCCP guidelines, and thus do not permit quotas or preferential determinations of the kind which met with disfavor from the Supreme Court in the *Harvard/UNC* decision.

In addition, under current Supreme Court precedent, employers may implement certain race-conscious initiatives. Voluntary race-conscious initiatives, to be lawful under Title VII, must necessarily serve a remedial purpose consistent with Title VII's goals. Thus, where an employer seeks to address a "manifest imbalance" in the workforce concerning historically underrepresented groups, an employer is permitted to implement narrowly tailored measures, which do not "unnecessarily trammel" the rights of other groups[2] for as long as necessary to rectify the imbalance.[3] An employer can consider a protected trait to remedy its own past discriminatory practices if the employer sets goals as opposed to quotas, does not set aside specific positions but instead allows all eligible employees to apply, and considers the protected trait as one of other factors.[4] Note that the Third Circuit has held that race-conscious DEI programs that do not serve a remedial purpose, even with the "laudable purpose" of preventing discrimination, are unlawful under Title VII.[5]

Current Status and Potential Future Impacts of the *Student for Fair Admissions* case

With respect to the *Harvard/UNC* decision's impact beyond higher education, Equal Employment Opportunity Commission Chair Charlotte Burrows stated that:

> the decision . . . does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.[6]

In fact, one of the aims of OFCCP programs (and well-designed DEI/voluntary affirmative action programs) is to protect employers from disparate impact violations, where the focus is not on individualized decisions but the aggregate result of decisions on a protected group.[7]

However, the Court's conservative majority clearly expressed in the *Harvard/UNC* opinion that they do not believe diversity, for its own sake, is a sufficient rationale for race conscious affirmative action (in the higher education setting, at least). The majority seems to believe that a 'race-neutral' policy will lead to an end to discrimination in society. Consequently, it remains to be seen how far the Court will take this rationale, and whether it will be applied in the context of other civil rights laws, including Title VII.[8]

At present, however, employers who are covered contractors of the federal government remain subject to various affirmative action requirements. In addition, employers may voluntarily pursue DEI programs, provided the programs are tailored in such a way that they are not discriminatory,[9] but instead appropriately geared toward affirmative, proactive measures to avoid or remediate discrimination.

Recommended Actions for Employers

Employers may find it helpful to prepare to explain and communicate the limitations of the *Harvard/UNC* decision to those who may question employer's compliance with subcontractor obligations and/or pursuit of voluntary DEI programs. Namely, the *Harvard/UNC* decision focused on policies that expressly relied on race as a determinative factor while OFCCP programs are (and voluntary DEI programs should be) structured to achieve exactly the opposite: to ensure that race or other protected traits are *not* used as a determinative factor in an effort to prevent unlawful discrimination.

Employers may also wish to consider more broadly what is meant by “diversity,” to potentially include protected-category neutral affinity groups, such as first-generation college graduates, people who were not raised in two-parent homes, groups for people who were raised in homes under the median average income, and groups for adopted/adopting employees. Consideration of diversity as it relates to various elements of societal privilege will likely lead to diversity as it relates to protected categories, as well.

Additionally, employers may want to focus on retention programs to ensure they don't lose ground on the diversity that may already exist in their workplaces.

Although the *Harvard/UNC* decision has no direct or immediate impact on employer's voluntary DEI and/or affirmative action policies, employers nonetheless should assess their affirmative action and DEI efforts to ensure compliance with law and to avoid risks of reverse discrimination and/or disparate impact claims. An audit of current employment practices, in light of existing law, may also maximize the availability of good faith defenses to discrimination claims, including any claims challenging

voluntary affirmative action/DEI program.

Footnotes:

[1] *See* https://www.dol.gov/agencies/ofccp/faqs/AAFAQs
[2] In reaching the conclusion that the plan did not "unnecessarily trammel" the rights of other workers, the Court observed that the plan did "not require the discharge of white workers and their replacement with new black hires," that the plan did not "create an absolute bar to the advancement of white employees," that "the plan [was a] temporary measure," and that the plan was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *See Weber*, 443 U.S. 193 at 197.
[3] *See United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).
[4] *Johnson v. Transp. Agency, Santa Clara Cnty*, 480 U.S. 616 (1987). This remedial justification for affirmative action was left undisturbed by the *Harvard/UNC* cases, since both institutions declined to rely on a remedial justification for their programs.
[5] *See Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1558 (3d Cir. 1996) ("there is no congressional recognition of diversity as a Title VII objective requiring accommodation."); *but see id.* at 1576 (Sloviter, C.J., dissenting) ("I cannot say that faculty diversity is not a permissible purpose to support the race conscious decision made here" and opining that "the Board's action was not overly intrusive on Taxman's rights").
[6] *See* https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action
[7] The focus of the majority opinion in the *Harvard/UNC* cases on individualized decisions does not help higher education universities with avoiding discrimination on an aggregate basis. Hence, it is unsurprising that a complaint before the U.S. Department of Education Office for Civil Rights has been filed against Harvard for the alleged discriminatory impact of its legacy admissions policies.
[8] Justice Gorsuch, in his concurrence, in fact specifically notes the similarities between Title VI (under which the *Harvard* case was brought) and Title VII. Thus, the Court might, for example, address Justice Scalia's questions in *Ricci v. DeStefano*, wherein he suggested that disparate impact theories of discrimination under Title VII offend the equal protection requirements of the Constitution.
[9] *See e.g., Duvall v. Novant Health Inc.*, No. 3:19-CV-00624-DSC, 2022 U.S. Dist. LEXIS 143209 (W.D.N.C. Aug. 11, 2022); *see also Thompson v. City of Lansing,* 410 F. App'x 922 (6th Cir. 2011).
