Lawyer Insights

Recent affirmative action ruling may impact private sector DEI initiatives

By Emily Burkhardt Vicente and James La Rocca
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Earlier this summer, the Supreme Court of the United States decided in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College that the race-based admissions programs at Harvard College and the University of North Carolina (the "Schools") violated the Equal Protection Clause of the Fourteenth Amendment. It remains an open question whether, and how, the Court's decision will impact diversity, equity, and inclusion (DEI) programs for private employers.

Overview of Students for Fair Admissions

The Fourteenth Amendment states, in relevant part, that no State shall "deny to any person ... the equal protection of the laws." Among other things, the clause protects people regardless of their race. A limited exception that permits race-based action by the government is permissible if such action can survive a rigorous standard known as "strict scrutiny." Under that standard, race-based conduct is permissible only if the government can establish a "compelling government interest" and the race-based action is "narrowly tailored" to achieve that established interest.

The Supreme Court concluded that the Schools' race-based admissions programs failed strict scrutiny. In support of their race-based admissions programs, the Schools asserted a number of educational goals as their compelling interests. These included:

● Training future leaders in the public and private sectors/preparing engaged and productive citizens and leaders.

● Preparing graduates to adapt to an increasingly pluralistic society/broadening and refining understanding.

● Better educating students through diversity/enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes/promoting the robust exchange of ideas.

● Producing new knowledge stemming from diverse outlooks/fostering innovation and problem solving.

● Preparing engaged and productive citizens and leaders.

The Court noted that although these goals were laudable, they were too amorphous to pass muster under the strict scrutiny standard. The Court recognized that a court would have no way to know whether leaders have been adequately trained, whether the exchange of ideas is sufficiently robust, or whether,

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and in what quantity, racial diversity leads to the development of new knowledge. In other words, the Court took issue with the fact that the asserted interests could not be measured in any meaningful, quantifiable way.

In addition, the Court found there was no meaningful connection between the Schools' use of race in the admissions process and the claimed benefits. For example, the Court noted that while diversity may further the asserted interests, the Schools failed to establish that racial diversity would. The Court took particular issue with what it viewed as the overbroad and arbitrary nature of the Schools' race considerations as they were underinclusive (for example, failing to distinguish between South Asians or East Asians, define what Hispanic means, or account at all for Middle Eastern applicants). The Court reasoned that the overbroad, arbitrary, and underinclusive racial distinctions employed by the Schools undermined the Schools' asserted interests - essentially noting that the Schools' race-based admissions programs sought to "check the diversity box" rather than obtain a truly diverse student body.

The Court also recognized that the Schools' race-based admissions processes promoted stereotyping, negatively impacted nonminority applicants, and, contrary to Court precedent, did not have a durational limit or any cognizable way in which to adopt a durational limit. The Court noted that the Schools' arguments to overcome the lack of a definite end point were, essentially, "trust us, we'll know when we're there." Yet such arguments, the Court held, were insufficiently persuasive to offset the pernicious nature of racial classifications.

The Court further took issue with the logical necessity that, in any instance when a limited number of positions are available, a race-based "plus factor" for applicants of a certain race is a negative for applicants who do not belong to the favored race: "How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?" In this, the Court recognized that equal protection is not achieved through the imposition of inequalities.

Impact on private employers

As an initial matter, the Court's decision has no direct legal impact on private employers. The decision was based on the Fourteenth Amendment's Equal Protection Clause, applicable to the Schools under Title VI of the Civil Rights Act, which does not intrinsically apply to private companies. It is Title VII of the Civil Rights Act and analogous state and local laws that apply to private employers and prohibit them from discriminating against employees and applicants on the basis of race (and other protected characteristics).

In employment, the law has always prohibited any consideration of race in decision-making, such as who to hire or who to promote, except in extremely narrow and limited situations. Generally a private employer's affirmative action plan is permissible under Title VII in two scenarios: (1) if the plan is needed to remedy an employer's past discrimination; and (2) if the plan is needed to prevent an employer from being found liable under Title VII's disparate impact prohibitions (which operate to prohibit facially neutral policies that nevertheless disproportionately disadvantage certain groups). There are numerous court decisions that pre-date the Court's recent ruling that have struck down employer affirmative action programs.

Nonetheless, it is highly likely that the Court's decision will spawn new challenges to private employer DEI programs and the Court's rationale in its recent decision will be referenced as an indicator of how the

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Court will view such programs under Title VII. Indeed, in a concurring opinion, Justice Gorsuch pointed to similarities in Title VI's and Title VII's language.

Practical tips for employers

There are countless ways for private employers to design and implement lawful DEI programs. In light of the increased attention the Court's recent decision may draw to such programs, employers should consider the following:

● Revisiting the appropriate legal standard to make sure their initiatives are legally compliant: employment decisions should not be based on protected characteristics.

● Carefully crafting a reason for DEI initiatives that emphasize employment decisions will be made regardless of protected characteristics.

● Training management on communicating about DEI programs.

● Implementing recruiting programs to diversify talent pools.

● Incentivizing employees to refer diverse candidates to be considered for openings.

● Supporting employee resource groups.

● Educating managers on unconscious bias.

● Encouraging diversity in business partners, such as vendors.

● Tying DEI efforts (not results) to managerial performance evaluations.

● Under the privilege of working with counsel, monitor changes in workforce demographics and conduct pay audits.

● Setting the goal of DEI programs to seek diversity based on broader characteristics, such as experiences, economic background, or worldview.

Conclusion

Because the decision in Students for Fair Admissions will almost certainly spawn increased legal challenges to DEI programs in the workplace, employers would do well to review such programs in light of the Court's decision and existing precedent.

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