PRACTICAL TAKEAWAYS FOR EMPLOYERS FROM THE SUPREME COURT AFFIRMATIVE ACTION DECISION

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US Labor, Employment, and Workplace Safety Alert

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On 29 June 2023, the US Supreme Court issued its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[1] and reversed the longstanding rule that race can be considered as a plus factor among many factors when making higher education admissions decisions. Through this ruling, the court effectively ended affirmative action in college and university admissions.

The decision does not directly address affirmative action in employment, which already prohibits the use of plus factors. Thus, the immediate impact on employers will likely be limited. Nevertheless, the ripple effects of the court's decision may create added risks for employers and ultimately impact affirmative action and diversity initiatives in the long run.

THE DECISION

The 6-3 majority opinion in *Students for Fair Admissions* addressed affirmative action in admissions at Harvard and the University of North Carolina, and determined that their use of race as a plus factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment. In the higher education context, “affirmative action” generally means considering a student's race as one factor within a holistic review of the student's application. The majority determined that while promoting pluralism, diversity, and other values in education are commendable goals, they were not “sufficiently coherent” to survive strict scrutiny in the context of providing racial preferences in admissions for an indefinite period of time. While race, in and of itself, can no longer be an admissions factor, the ruling acknowledges that colleges and universities can still consider an applicant's explanation of how race influenced the student in relation to the individual student's leadership and character advocacy as it relates to specific admissions-related criteria. There were six total opinions from the Justices (majority, three concurring, and two dissents), with the dissents strongly criticizing the majority and advancing the argument that the Fourteenth Amendment allows for race conscious decisions to address historic discrimination and promote diversity.

MANDATORY AND VOLUNTARY AFFIRMATIVE ACTION IN EMPLOYMENT SHOULD NOT BE IMPACTED…FOR NOW

In the employment arena, there are two forms of affirmative action—mandatory and voluntary. Put simply, mandatory affirmative action is required by applicable law, while voluntary affirmative action is not. As described

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in more detail below, mandatory affirmative action includes legal mandates applicable to covered federal contractors and subcontractors (covered contractors); voluntary affirmative action includes diversity-focused initiatives by companies that are not covered contractors. In addition, affirmative action in the employment context may target other underrepresented protected classes in addition to race.

Mandatory affirmative action based on race and gender applies to covered contractors under Executive Order 11246 and Office of Federal Contract Compliance Program (OFCCP) regulations.[2] These regulations require contractors to assess underrepresentation in their workforce and remedy through good faith efforts such as outreach, recruitment, and training. These regulations also require covered contractors to proactively assess compensation, hiring, and promotions systems to identify disparities based on race or gender that could be indicative of disparate treatment or disparate impact discrimination.[3] OFCCP prohibits the use of plus factors, preferences, or quotas in mandatory affirmative action programs. Indeed, OFCCP even states on its website that affirmative action in employment is legally distinct from affirmative action in higher education admissions because the former prohibits preferences, quotas, and set-asides.[4]

Given OFCCP's positive view of affirmative action in employment and its prohibition against using plus factors, the agency will likely take the position that mandatory affirmative action is not impacted by the *Students for Fair Admissions* decision. OFCCP can also point to a number of federal circuit court cases upholding Executive Order 11246 and employment affirmative action, none of which were addressed in the court's ruling.[5] While these circuit cases may one day be subject to challenge, they reflect the current state of the law. Therefore, as long as covered contractors follow applicable regulations and any updated OFCCP guidance that might be issued as a result of the *Students for Fair Admissions* decision, the court's ruling should not materially impact covered contractors.

Similarly, voluntary affirmative action programs should not be immediately affected by the court's ruling. Voluntary affirmative action programs can be established by employers under Title VII of the Civil Rights Act of 1964 (Title VII) and related Equal Employment Opportunity Commission (EEOC) guidance. For a voluntary affirmative action program to be lawful, an employer must demonstrate a manifest imbalance in the workforce based on race or gender when comparing representation to availability. The voluntary program must seek to remedy this imbalance through broader outreach, recruitment, and training. Plus-factors, preferences, and quotas are *strictly prohibited*, just as they are in mandatory programs. There is also less legal risk where the program is seeking to directly remedy past discrimination as part of its justification (e.g., an employer receives an internal complaint of discrimination, investigates the complaint, determines it to be substantiated, and proactively takes action to address its findings). The Supreme Court has confirmed the permissibility of these programs where there is a manifest imbalance based on race or gender in the workforce.[6] Though permissible, multiple circuit court cases have determined that there is a limit to how far voluntary affirmative action can go, invalidating programs that do not sufficiently relate to Title VII's purpose of remedying and eliminating employment discrimination.[7]

THE EEOC'S STATEMENT

Within hours of the decision being published, EEOC Chair Charlotte Burrows released a statement that the *Students for Fair Admissions* decision

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> "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."

Although the EEOC statement is not binding on courts, it indicates how the EEOC will approach complaints or challenges to employment affirmative action and diversity-focused initiatives and further demonstrates that employer affirmative action programs and diversity initiatives that comply with the foregoing requirements are likely safe for the time being, but with added risks and legal considerations.

SUPREME COURT DECISION MAY LEAD TO CHANGES IN EMPLOYMENT AFFIRMATIVE ACTION

Notwithstanding its limited immediate impact on the employment sector, the *Students for Fair Admissions* decision may trigger changes in employment affirmative action as a result of agency-driven action and legal challenges to employer programs.

For example, in the *Students for Fair Admissions decision*, the Supreme Court questioned whether the standard race/ethnicity categories (e.g., White, Black/African American, Hispanic/Latino, Asian, Pacific Islander, Native American), were specific enough to be good measures of underrepresentation in the admissions context, and noted that the current categories are very broad and include many different ethnicities and national origins. This could lead the EEOC and OFCCP to disaggregate these categories into more specific categories, such as East Asian and South Asian as noted by the court, for use in the employment context.

Likewise, covered contractors have been challenged by the recent sharp drop in the number of census occupation codes, which are the primary data source used by covered contractors in their diversity analytics. The most recent US census data includes only 237 occupation codes (down from 488 in the prior census). The substantial reduction in occupation code data is making it more difficult for covered contractors to determine labor-market diversity availability data for some job titles. With the likely increased focus on the use of diversity analytics to show a manifest imbalance, anything that makes this more difficult may pose added legal risk and require more agency guidance to help contractors construct compliant programs.

The Supreme Court's ruling could also serve as a blueprint for future challenges to employers' mandatory and voluntary affirmative action programs, with employees adopting some of the court's reasoning to justify their own claims.

PRACTICAL TAKEAWAYS

- Diversity-focused initiatives are likely not to be impacted in the near term, but employers should focus these initiatives more on non-discrimination in employment (through proactive trainings, OFCCP-style self-audits, and inclusive work environments) and ensuring equal employment opportunity (EEO) in hiring and advancement (through outreach, recruitment, and elimination of barriers). It is critically important that

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employers have affirmative action and diversity programs reviewed by counsel to ensure compliance with existing law and future developments.

- More formal mandatory or voluntary affirmative action programs are likely not to be impacted, although employers should strictly follow the applicable OFCCP regulations and EEOC guidance. Any race-conscious initiative (such as a diverse slate policy) should be reviewed by counsel and must be based on diversity analytics where the employer has identified a manifest imbalance in its workforce (a significant underrepresentation of a particular group) and should be narrowly focused on remedying that manifest imbalance. Employment decisions must not consider race or other protected characteristics as part of the decision.
- To avoid potential lawsuits or complaints, as well as confusion relating to the applicability of the Students for Fair Admissions decision, it may be better to move away from the term affirmative action and use terms such as EEO and diversity-focused initiatives.
- Employees may be confused about the Supreme Court's decision, so covered contractors should consider proactive messages and trainings for their workforces regarding their covered contractor status and continuing obligations to comply. Employers may nevertheless see more discrimination cases where it is perceived that affirmative action played a role in a hiring or promotion outcome.
- If a complaint regarding an affirmative action or diversity initiative is filed with the EEOC or OFCCP, employers should be prepared to show that there is no plus factor, preference, or quota, being used.

CONCLUSION

There are likely to be many more developments in the coming days. The K&L Gates Labor, Employment, and Workplace Safety practice can assist with all aspects of preparing and reviewing affirmative action and diversity initiatives. Stay tuned for more information regarding an upcoming webinar on this topic.

FOOTNOTES

[1] 600 U.S. ____ (2023).

[2] Executive Order 11246 applies to businesses with federal contracts and federally assisted construction contracts totaling more than US$10,000. As a condition of these contracts, businesses agree to not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin, and to take affirmative actions to ensure equal employment opportunity. Additionally, these federal contractors agree not to take adverse employment actions against applicants and employees who, under certain circumstances, ask about, discuss, or share information about their pay or the pay of their co-workers. If a company has at least 50 employees and a single contract of US$50,000 or more, then it must also develop an affirmative action program under Executive Order 11246, as described at 41 C.F.R. § 60-2. OFCCP also enforces Section 503 of the Rehabilitation Act of 1973, related to affirmative action and non-discrimination based on disability, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, related to affirmative action and non-discrimination as to protected veterans.

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[3] *See* OFCCP Directive 2022-01 Revision 1, available at https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1 ("As part of their affirmative action obligations, supply and service contractors are required to perform an in-depth analysis of their total employment processes, including their compensation systems, to determine whether and where impediments to equal employment opportunity exist.")

[4] *See* OFCCP Affirmative Action Frequently Asked Questions, available at Affirmative Action Frequently Asked Questions | U.S. Department of Labor (dol.gov) ("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 C.F.R. §§ 60-1.4(a), 60-300.5(a), and 60-741.5(a).")

[5] *See*, *e.g.*, *Illinois Tool Works, Inc. v. Marshall*, 601 F.2d 943, 945 (7th Cir. 1979) ("As a government contractor, ITW must comply with the terms of Executive Order 11246. This Order … requires affirmative action by government contractors to ensure equal employment opportunities.") and *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1325 (9th Cir. 1979) ("As a condition of doing business with the federal government, larger federal contractors are required to develop "written affirmative action compliance programs" designed to further equal employment opportunity.")

[6] *See*, *e.g.*, *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 632 (1987) ("[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans."; upholding state transportation affirmative action plan because it "represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.")

[7] *See*, *e.g.*, Taxman v. Bd. of Educ. of Twp. of Piscataway, 91 F.3d 1547, 1557 (3d Cir. 1996) (holding that the Board of Education's affirmative action program was invalid for failing to have a remedial purpose consistent with addressing past discrimination under Title VII); *see also Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 497–98 (3d Cir. 1999) (invalidating casino's affirmative action plan under *Taxman* and Title VII because the "plan itself and the regulations which mandate the plan were not based on any finding of historical or then-current discrimination in the casino industry or in the technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation.").

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