The Supreme Court's Upcoming Affirmative Action Decision: Potential Implications for Private-Sector Employers

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The Supreme Court of the United States is expected to issue a widely anticipated decision next month concerning the permissibility of race-conscious affirmative action in higher education in the *Harvard College* and *University of North Carolina* cases.[1] Although these cases arise in the context of education, not employment, and do not formally concern laws governing private-sector employment, we expect that the decision may have far-reaching implications for how courts, lawmakers, employers, and employees address efforts to promote diversity in private-sector workplaces. In particular, the decision may have an impact on how employers navigate the line between permissible efforts to promote workplace diversity and avoiding so-called "reverse discrimination" lawsuits brought by employees who may claim that they are disadvantaged by such efforts.

There already appears to be an increasing trend of lawsuits and other legal actions being commenced to challenge employers' diversity initiatives as constituting unlawful discrimination against non-diverse employees and applicants. If the Supreme Court overturns its prior precedents permitting race-conscious affirmative action in higher education and holding that the interest in promoting diversity is a compelling justification for such practices, we expect that such a decision could supercharge the trend of challenges to employer diversity policies and practices. Charting the path between permissible and potentially impermissible diversity initiatives, which is already nuanced, may become more so after the Supreme Court rules.

The 2023 Affirmative Action Cases and Supreme Court Precedent

In 2014, Students for Fair Admissions ("SFFA") sued both Harvard College and the University of North Carolina ("UNC"), arguing that their admissions programs, which consider race as one of a number of factors in admissions decisions, violate federal law.

[1] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, No. 20-1199 (U.S. argued Oct. 31, 2022); Students for Fair Admissions, Inc. v. University of North Carolina, No. 21-707 (U.S. argued Oct. 31, 2022).

More specifically, SFFA takes the position that Harvard's race-conscious admissions program discriminates against Asian American applicants, in violation of Title VI of the Civil Rights Act of 1964, and that, as a public university, UNC's admissions program discriminates against white and Asian American applicants in violation of both the Civil Rights Act and the Equal Protection Clause of the 14th Amendment.

After about five hours of oral argument in these cases in the fall of 2022, the country now awaits the Court's decision, which many commentators expect may overrule the Court's past precedent permitting race-conscious admissions programs aimed at achieving a diverse student body in colleges and universities.

The Court's jurisprudence addressing race-conscious initiatives in admissions practices at universities begins with *University of California v. Bakke*[2] in 1978. The Court's plurality opinion in Bakke established that although universities are not allowed to set racial quotas in admissions practices, they can use race as one of several permissible admissions criteria. In 2003, the Court, in its landmark decision in *Grutter v. Bollinger*, upheld the University of Michigan Law School's affirmative action program, in which the school considered race as one factor in a holistic review of applicants.[3] The Court found that, unlike quotas, such narrowly tailored consideration of race in university admissions was justified by a "compelling interest in obtaining the educational benefits that flow from a diverse student body."[4] The Court's 2016 decision in *Fisher v. University of Texas* at Austin reaffirmed this justification for race-conscious affirmative action in college admissions.[5]

The concept that promoting a diverse student body is a compelling interest—the "diversity rationale"—has been at the core of the Court's jurisprudence permitting race-conscious affirmative action in higher education. Many commentators expect that the upcoming decision in the *Harvard* and *UNC* cases may reverse course and hold either that the diversity rationale is not a sufficiently compelling interest to justify race-conscious action or that the law requires more narrowly tailored means to advance that interest.

Although the Court's precedents in this area do not formally address laws governing private-sector employment, they have drawn an explicit link between the educational and employment contexts, noting repeatedly that the benefits of promoting diversity in a student body extend to the workplaces that students will enter after graduation. In *Grutter*, for example, the Court noted that major corporations submitted amicus briefs

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2 438 U.S. 265 (1978).

3 539 U.S. 306 (2003).

4 *Id.* at 343.

5 579 U.S. 365 (2016).

which "made clear that skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[6] Likewise, in Fisher, the Court determined that the University of Texas at Austin used race-conscious admissions practices to prepare its student body "for an increasingly diverse workforce and society," and the "cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry."[7]

Affirmative Action, Diversity Initiatives, and Employment Law

The diversity rationale has not been held to be sufficient to justify race-conscious affirmative action in private-sector employment, but it does underlie more general "diversity policies" that are ubiquitous in American workplaces. More specifically, in the context of private-sector employment, the law (1) permits race-conscious affirmative action only in narrow circumstances where exacting criteria are satisfied, but (2) generally permits employers to adopt policies and practices to promote diversity, provided that such policies and practices do not adversely impact non-diverse employees in the terms and conditions of employment. (Different considerations and guidelines apply to public-sector employment and to federal contractors, neither of which is the focus of this Alert.)

Race-conscious affirmative action policies in private-sector employment are permissible only if such programs are aimed at remedying a manifest imbalance in a traditionally segregated job category, are temporary, and do not "unnecessarily trammel" the rights of those who would not benefit from the program.[8] Unlike in the college admissions context, the diversity rationale alone has never been held to be sufficient to justify race-conscious affirmative action.[9]

But, while race-conscious affirmative action programs are relatively rare in private-sector employment and permissible only subject to strict requirements, most employers today have diversity policies that are, explicitly or implicitly, premised on the diversity rationale. Many employers today perceive a business imperative to promote diversity in

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6 539 U.S. at 330 (citing briefs for 3M and General Motors Corp. as *Amici Curiae*).

7 579 U.S. at 382 (internal quotations and citations omitted).

8 United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208–09 (1979); *accord* Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 631–40 (1987). These voluntary affirmative action plans are legally distinct from affirmative action plans that federal contractors may be required to implement under Executive Order No. 11246. *See* Exec. Order No. 11246, 3 C.F.R. (1964–1965 Comp., p. 339), *reprinted as amended* in 41 C.F.R. 60 (2023). Federal contractor affirmative action plans pursuant to this federal regulation are not expected to be impacted by the Court's decisions in the 2023 affirmative action cases.

9 *See, e.g.*, Taxman v. Board of Education, 91 F.3d 1547, 1557 (3d Cir. 1996); *see also* Shea v. Kerry, 796 F.3d 42, 57 (D.C. Cir. 2015).

their organizations and have adopted diversity policies and practices to that end. Unlike a voluntary affirmative action program, a general effort to promote diversity cannot take protected characteristics into account in any decisions about terms and conditions of employment, such as hiring, firing, compensation, or promotion. For example, initiatives to hire from or attract a more diverse applicant pool, to conduct programming or training aimed at promoting a workplace culture that respects difference, or funding employee affinity groups are all generally recognized as permissible activities. But certain more assertive policies—such as setting specific diversity representation targets; compensation programs that hold managers accountable for achieving such targets; or internships, scholarships, or other benefits made available only to diverse applicants or employees—have been challenged as "reverse discrimination" for allegedly having an adverse effect on non-diverse employees.

The Rise in "Reverse Discrimination" Legal Actions Against Employers

Lawsuits and other legal actions commenced in the last few years reflect what some have identified as a growing backlash—particularly in certain circles—against workplace diversity initiatives. For example:

- In April 2023, America First Legal, a conservative legal advocacy group, filed civil rights complaints with the U.S. Equal Employment Opportunity Commission against Anheuser-Busch, Blackrock, and Mars, Inc., alleging that those companies' diversity policies, practices, and programs discriminate against non-diverse employees.[10]

- In March 2023, a white, male former BlackRock employee filed a lawsuit against the company and its CEO, Larry Fink, alleging that he received a reduced bonus and was eventually fired as a result of the company's efforts to promote diversity and

[10] EEOC Investigation Request re: AB InBev (Anheuser-Busch), submitted by America First Legal to U.S. Equal Employment Opportunity Commission ("EEOC") St. Louis District Office (Apr. 17, 2023), https://aflegal.nyc3.digitaloceanspaces.com/wp-content/uploads/2023/04/09040909/EEOC-Complaint_Anheuser-Busch-AB-InBev-Corporation-Final-Letter.pdf; EEOC Investigation Request re: BlackRock, Inc., submitted by America First Legal to EEOC New York District Office (Apr. 18, 2023), https://aflegal.nyc3.digitaloceanspaces.com/wp-content/uploads/2023/04/09040908/EEOC-Blackrock-04182023.pdf; EEOC Investigation Request re: Mars, Inc., submitted by America First Legal to EEOC Washington Field Office (Apr. 26, 2023), https://aflegal.nyc3.digitaloceanspaces.com/wp-content/uploads/2023/04/09040901/Mars-04262023.pdf.

following an alleged statement from Mr. Fink that there were too many white males in leadership positions at the company.[11]

- In August 2022, a Starbucks shareholder represented by The National Center for Public Policy Research, a conservative legal advocacy group, filed a complaint in Washington state court, alleging that Starbucks inappropriately set hiring goals for people of color and tied executive compensation decisions to achieving such goals. The case was removed to federal court, Starbuck's motion to transfer venue was denied, and discovery is proceeding.[12]

- In November 2021, a white, male former executive in AT&T's property tax group filed a lawsuit in federal court in Georgia alleging that he had been terminated as part of the company's efforts to diversify its finance department. AT&T's motion to dismiss was denied and the case has been stayed until July 7, 2023, to allow for mediation. Should the parties fail to reach a settlement, discovery will resume.[13]

- In October 2021, a North Carolina jury awarded $10 million (later reduced to $3.7 million) in favor of a white, male former executive who claimed that he had been terminated by Novant Health in order to help the company achieve goals under a diversity and inclusion initiative.[14]

- In September 2020, following public statements made by senior executives at Wells Fargo and Microsoft committing to boost Black representation in management positions, the U.S. Department of Labor commenced inquiries with both companies concerning whether their respective efforts to promote diversity resulted in unlawful discrimination against non-diverse employees and applicants.[15]

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[11] Dzibela v. BlackRock, Inc., MON-L-000797-23 (N.J. Super. Ct. Law Div. filed Mar. 15, 2023), No. 3:23-cv-02093 (D.N.J. filed Apr. 13, 2023).

[12] National Center for Public Policy Research v. Howard Schultz, No. 22-2-02945-32 (Spokane Cnty Super. Ct. filed Aug. 30, 2022), No. 2:22-cv-00267-SAB (E.D. Wash. filed Nov. 7, 2022).

[13] DiBenedetto v. AT&T Services, Inc., No. 1:21-cv-04527-MHC-RDC (N.D. Ga. filed Nov. 2, 2021).

[14] Duvall v. Novant Health, Inc., No. 3:19-cv-00624-DSC (W.D.N.C. Aug. 11, 2022), *amended on reconsideration in part*, No. 3:19-cv-00624-DSC (W.D.N.C. Oct. 19, 2022), *appeal docketed*, No. 22-2142 (4th Cir. Nov. 7, 2022).

[15] Letter from Craig Leen, Director of U.S. Dep't. of Labor Office of Federal Contract Compliance Programs to Michelle Duncan and Jackson Lewis, ERCA Counsel for Wells Fargo (Sept. 29, 2020); Letter from Craig Leen, Director of U.S. Dep't of Labor Office of Federal Contract Compliance Programs to Kris Meade, ERCA Counsel for Microsoft Corporation (Sept. 29, 2020).

Conclusion and Recommendations

As the examples above illustrate, the line between permissible activity to promote diversity and actions that generate exposure to reverse discrimination claims is becoming increasingly nuanced. We expect that if the Supreme Court ruling in the *Harvard College* and *University of North Carolina* cases casts doubt on the legitimacy of the diversity rationale, albeit in the context of education rather than employment, that may impact how courts, lawmakers, employers, and employees think about the dividing line between permissible and impermissible practices in the private-sector employment context as well.

Employers who perceive and act upon a business imperative to promote diversity within their organizations (as we and many of our clients do), therefore, have a significant interest in understanding how to navigate potential ramifications that may flow from a decision to overrule the Court's precedent and its prior holdings about the compelling nature of the diversity rationale. Especially after the Supreme Court rules, and taking into consideration any possible implications of that decision, we recommend that clients consider the following:

- Consult with counsel when designing and implementing policies, practices, and initiatives aimed at promoting diversity to ensure compliance with federal, state, and local employment laws and minimize legal risk.
- Assess the extent to which existing policies and practices aimed at promoting diversity may be subject to legal challenge.
- Assess whether company communications and marketing material touching on diversity-related topics describe the company's policies and practices thoughtfully and accurately.
- Document employee performance thoroughly and ensure that the reasoning for any adverse employment decision is supported by such documentation.
- Stay abreast of legislative and regulatory developments, as well as legal rulings coming out of the growing number of court cases on this topic.

We regularly advise clients in assessing and enhancing their initiatives to promote diversity, while also carefully mitigating legal risk. To learn more, please contact any one of the members of our team below.

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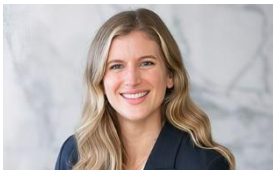
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