3 Ways the Affirmative Action SCOTUS Ruling May Have Ripple Effects on Employers + 6 Steps to Boost Your DEI Program

Insights
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While employers may not be directly impacted by today's SCOTUS decision blocking affirmative action in education admissions, the new standard will likely have big ripple effects on the world of workplace law before long — and the time is now to prepare for the oncoming chain of events. What do employers need to know about the ruling and its possible impact on the workplace? Here are three ways the decision may have ripple effects on your organization and the six key steps you can take now to bolster your DEI efforts while maintaining compliance with anti-discrimination laws.

Here's What Just Happened
The Supreme Court just severely limited higher educational institution's use of race-conscious admission processes ending a decade's long admission process used by schools across the country. You can read a full summary from our Education Team here.

Prior to today's ruling, higher educational institutions were permitted to consider race as part of a holistic review of applicants in an effort to create a diverse student body. This practice, sometimes known as "affirmative action," had been a permissible approach since 1978. But an advocacy group challenged this policy in court, arguing that race-conscious admissions actually discriminate against applicants.

The Supreme Court agreed with the challengers and today ruled that the admissions programs in question violated the Equal Protection Clause of the Constitution. In a majority opinion authored by Chief Justice Roberts, SCOTUS said there were three main problems with using affirmative action in admissions:

- **They Go Too Far:** First, the Court said that the process doesn't pass the "strict scrutiny" test that needs to be applied whenever one person is favored over another because of their race. SCOTUS noted that "college admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter."
- **They Stereotype:** When a university admits students on the basis of race, SCOTUS says it engages in the "offensive and demeaning" assumption that students of a particular race think alike because of their race. This stereotyping is contrary to the core purpose of the Equal Protection Clause, the Court said.

- **They Have No Expiration Date:** When SCOTUS issued a key affirmative action decision in 2003, it said that race-based admissions programs must one day end. Permanent racial preferences would offend the Constitution, it said, and expected that the use of racial preferences would no longer be necessary "in 25 years." Fast-forward two decades and both Harvard and UNC had no end to the race-conscious admissions programs. Thus, with no meaningful end points, the race-conscious admissions process was unconstitutional.

SCOTUS Keeps Some Affirmative Action in Admissions Alive – But Just Barely

All that said, the Supreme Court didn't kill affirmative action in admissions altogether. It said that nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life during the admissions process. This includes stories of courage and determination, how heritage or culture motivated them to assume a leadership role or attain some other goal, challenges they overcame, skills they built, or lessons learned.

However, the majority opinion takes great pains to say that such a discussion must be directly tied to that applicant, and not just a general discussion on race. The discussion must be concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university.

3 Potential Impacts on the Workplace

Note that this decision focuses specifically on race-conscious admissions decisions in higher education, not employer diversity, equity, and inclusion (DEI) programs. Although the legality of your company's DEI program is not directly affected by the ruling, there are several ways your workplace could feel the ripple effect, including the following examples:

1. **Less diversity in applicant pools.** Now that higher education institutions are generally unable to consider race as an admissions factor, a likely decline in enrollment diversity may lead to less diversity in your job applicant pools. Specifically, you may see a dip in applications from historically underrepresented racial and ethnic groups — which could mean that fewer workers from underrepresented groups will fill vacancies and advance to leadership roles. If you'd like to be proactive and boost the diversity in your organization, you should consider exploring new creative and compliant ways to attract, retain, and promote workers from historically underrepresented groups.
2. **More legal challenges.** As a result of the SCOTUS ruling, we expect to see an increase in cases challenging private employer DEI programs under workplace anti-discrimination laws, such as Title VII of the Civil Rights Act. Title VII bars discrimination against job applicants and employees based on race, color, religion, national origin, and sex. Notably, the law protects workers from discrimination if they are in a protected category as defined in Title VII. So, along the same lines as the education cases, we may see workers from majority groups claim that diversity efforts result in discriminatory outcomes for them. While such challenges might not ultimately be

successful, you should prepare for a potential surge in so-called "reverse discrimination" claims and watch for rulings and guidance in this area.

3. **More focus on robust DEI programs.** The SCOTUS ruling will likely prompt many employers to review their DEI programs to confirm compliance with Title VII's requirements. If you have a strong commitment to DEI, you'll want to focus now on building and maintain a compliant and robust program in order to maintain your diversity goals in the future.

You should note that the SCOTUS ruling doesn't impact federal contractor obligations or overall practices. For example, federal contractors and subcontractors still must develop an affirmative action program if they have at least 50 employees and a contract of $50,000 or more. You can learn more about our Affirmative Action and Federal Contract Compliance Practice Group here.

6 Steps Employers Should Consider Taking Now

While employers can choose whether or not to make DEI efforts a priority in the workplace, many are opting to boost such efforts in order to improve productivity, enhance thought leadership, and better serve clients from a variety of backgrounds. Moreover, the majority of workers (56%) have a favorable view of workplace DEI programs – and that percentage is even higher (68%) for workers under age 30, according to a recent study by Pew Research Center. What six steps should you consider taking if you want to boost your DEI efforts while staying in compliance with anti-discrimination laws?

1. **Develop a strong message from your leadership team**. Employers that embrace workforce diversity and publicly commit to supporting and advancing diverse group in the workplace are more likely to attract and retain a diverse team. You may also want to revise or develop a mission statement addressing diversity or inclusivity goals – and perhaps publicize it in the wake of today's ruling.
2. **Expand your applicant pool.** You can attain a more diverse applicant pool by reconsidering where you invest your recruiting resources. Consider partnering with local community organizations that support underrepresented communities or develop relationships with diverse industry groups. You can evaluate areas that include traditionally underrepresented communities to see your applicant pool become more diverse in all sorts of ways.
3. **Focus on fairness.** Creating DEI workplace initiatives can boost morale and work output for an increase in your bottom line. To recruit and retain the best talent, your policies must be fundamentally fair, and your workplace should be as inclusive and engaging as feasible. Be sure to help your hiring managers understand the do's and don'ts of lawful DEI efforts.
4. **Review for compliance.** Now is a good time to work with your attorney to review your current DEI programs for compliance. Be sure your policies and programs don't unintentionally run afoul of anti-discrimination laws and recognize that quotas and preferences – as well as perceived unfairness – can create legal problems. You should also review your employee

handbook and other written policies to ensure they are up to date, aligned with your goals, and legally sound.

5. **Account for state and local nuances.** Be aware of any state and local laws that could impact your DEI program. For example, Florida's Individual Freedom Act, also dubbed the "Stop WOKE" Act, sets parameters on workplace diversity training programs discussing race, gender, and discrimination. Thus, Florida employers should thoroughly review mandatory employee trainings – particularly those with an emphasis on diversity, equity, and inclusion or discrimination and unconscious bias. In all locations, it's a good idea to work with counsel to develop a compliant program that is properly tailored to the unique aspects of your workplace culture.
6. **Train your staff.** Finally, consider providing appropriate/compliant cultural competency and implicit bias trainings for your existing staff, along with revamped anti-discrimination, anti-harassment, and anti-retaliation trainings, in order to foster a more inclusive and welcoming work environment. Note that training and awareness programs on diversity and ethics should be targeted to meet your specific business needs in light of the particular industry, employee expectations, and community standards.

Conclusion

We will continue to monitor economic developments that impact the workplace. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact the authors of this Insight or your Fisher Phillips attorney.

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