What Impact Will Supreme Court's "Affirmative Action" Decision Have on Federal Contractor Employers? An 8-Step Plan

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The Supreme Court recently cracked down on the use of "race-conscious" admissions for academic institutions, mostly blocking them from considering race as part of a holistic evaluation of prospective students. What does this so-called "affirmative action" decision mean for employers who are federal contractors? Here is a brief analysis and an eight-step plan to ensure you meet your regulatory obligations.

Overview of SCOTUS Decision

For those that want an in-depth analysis of the SCOTUS decision:

- Our Education team provided an immediate summary of the decision and the impact it will have on schools across the country, which you can read here.
- For an in-depth analysis on what the decision means for employers, please see the companion Insight article published in the aftermath.

Affirmative Action in the Employment Context

Employers who are federal contractors are required to engage in affirmative action, per Executive Order 11246. In this context, "affirmative action" means that federal contractors must analyze their workforce data to determine whether goals for women and/or minorities should be set.

This is accomplished by comparing their current workforce to the availability of women and minorities externally (using local and/or national data) and internally (based on employees eligible for promotion). Where goals are established, federal contractors are required to make good faith efforts to cast a wide net to diversify the applicant pool – which, in turn, provides the best opportunity for diversifying the workplace.

Outreach is Crucial

Of course, covered federal contractors are also required to engage in affirmative action outreach efforts for protected veterans and individuals with disabilities, based on two additional laws enforced by the US Department of Labor's Office of Federal Contract Compliance Programs

(OFCCP). Consequently, federal contractors must be mindful of these protected characteristics as well. Outreach efforts – not preferences or set-asides – are required for compliance.

Clearing Up Misunderstandings

Thus, affirmative action, in the employment context, does **not** allow employers to make employment decisions based on protected characteristics, such as race and gender. In fact, federal contractors, and employers in general, are prohibited from taking race (as well as gender, color, national origin, and other protected characteristics) into account when making decisions related to hiring, promotions, terminations, and other terms and conditions of employment.

However, because this recent Supreme Court case and other cases on the same topic have been dubbed "affirmative action" cases, many federal contractors have questions regarding how their affirmative action obligations are impacted.

Does the SCOTUS Decision Mean Affirmative Action by Employers is Banned?

No. "Affirmative action" in employment, particularly as it relates to federal contractors, is **not** directly impacted by the recent Supreme Court decision. Employers who are federal contractors should not discontinue efforts to comply with federal affirmative action obligations.

However, there are a few considerations to keep in mind – especially in the areas of effective outreach and remedying potential problem areas. In the wake of the SCOTUS decision and the heightened interest this topic will surely receive, federal contractors will need to consider options for achieving their regulatory obligations and their diversity goals.

What Can Federal Contractors Do to Meet Their Regulatory Requirements? An 8-Step Plan

1. Expand your applicant pool. Engage in outreach to diverse industry groups, Historically Black Colleges and Universities (HBCUs), and other sources of diverse applicants.
2. Consider the impact on your pipeline. Partner with local community organizations that support underrepresented communities and consider establishing mentorship programs for youth.
3. Review discrimination policies to ensure they adhere to local and national legislation (including EO 11246). Work with your attorney to ensure that your policies, programs, and employee handbooks don't unintentionally violate anti-discrimination laws and regulations.
4. Foster a diverse and inclusive workforce by implementing (or continuing) diversity, equity, inclusion, and accessibility programs. Effective initiatives can boost morale and improve profitability. Ensure your DEI programs encourage participation by all interested employees and recognize the value of allies.
5. Provide training, including "unconscious bias" training (if not prohibited by local jurisdiction). Ensure your hiring managers understand the parameters of lawful DEI efforts.

6. Be creative about your outreach efforts. Consider new and different outreach avenues. Merely posting jobs on diverse job boards may no longer be enough.
7. Consider your "action-oriented programs" – do they need to be reviewed or revised to ensure you are not running afoul of the law?
8. Stay tuned to new developments from the EEOC and OFCCP on regulatory changes and potential reporting changes. The SCOTUS decision raised a question regarding the effectiveness of the race and ethnicity categories that are seen in EEO-1 reporting, which could signal to the agencies that a change may need to be made in the data collection categories.

Note that some state and local laws (i.e. Florida's Individual Freedom Act) may impact your DEI program. Work with your attorney to ensure that your policies, practices, and procedures are in compliance with your local jurisdiction(s).

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. 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, your Fisher Phillips attorney, or any attorney in our Affirmative Action and Federal Contractor Compliance Practice Group.

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