

Insights, News & Events

# DID WORKPLACE DEI PROGRAMS DIE FOLLOWING THE SUPREME COURT'S AFFIRMATIVE ACTION DECISION? 6 STEPS YOU SHOULD TAKE TO ENSURE COMPLIANCE

Insights  
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It's been over three months since the Supreme Court struck down affirmative action in college admissions – and many employers are still wondering whether their workplace Diversity, Equity & Inclusion programs are still legal in the wake of the groundbreaking ruling. While the dust is still settling, the answer to this question is starting to come into focus. Here's a review of how the SCOTUS decision impacted workplace DEI programs and six steps you can take to ensure compliance.

## Did Supreme Court Ruling Impact Corporate DEI Programs?

On June 29, the Supreme Court ruled that UNC's and Harvard's [use of race in their college admission decisions violated the Equal Protection Clause of the Fourteenth Amendment](#). The Court held that while student body diversity is a commendable goal, the schools' approach – which had no ability to determine when student body diversity reached acceptable levels – amounted to stereotyping. Employer Diversity, Equity & Inclusion (DEI) programs and federal contractor affirmative action practices were not directly addressed by the Court's decision. Still, many employers and interest groups have been focused on what the SCOTUS decision means for employers and their DEI programs.

## *EEOC Chair Says No*

## Related People



**Sheila M. Abron**

Partner

803.740.7676



**Raymond W. Perez**

Of Counsel

Immediately following the ruling, EEOC Commission Chair Burrows issued a press release addressing private employer DEI programs. She emphasized that the decision “does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background.”

She went one step further by saying: *“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.”*

### **Others Send Warnings to Employers**

In contrast, EEOC Commissioner Lucas authored an article that same day in which she stated that, “Poorly structured voluntary diversity programs pose both legal and practical risks for companies. Those risks existed before the Supreme Court decision today. Now they may be even higher.”

Echoing the sentiments of Commissioner Lucas, the Attorneys General of 13 states sent letters to the CEOs of Fortune 100 companies reminding them of their:

obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of “diversity, equity, and inclusion” or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

In light of these challenges and risks, employers may be questioning whether to retain their DEI programs. The short answer to that question is yes. Properly implemented DEI programs remain a tremendous asset for employers.

While the challenges to DEI programs may start increasing, the underlying benefits of such programs remain. Studies continue to find that companies with effective DEI programs continue to outperform financially those companies that do not have formal such programs.

In addition, employees often state that they prefer and are more committed to companies that value diversity and inclusion. This becomes increasingly important as newer

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generations are entering the workforce and playing critical roles in modern organizations. Employers considering terminating compliant DEI programs may face the loss of talent and the remaining workforce may be disgruntled and disengaged.

## 6 Action Steps for Employers with DEI Programs

The balance of competing interests likely justifies the continuation of effective, legal DEI programs. You'll need to review your entire program to ensure that it meets the legal requirements – as well as the business imperatives that warrant the continued operation of your DEI initiatives.

Here are six topics and action steps you should consider when evaluating your existing DEI programs.

- **Review Your Recruiting:** Efforts to expand the applicant pool should remain acceptable. You should continue outreach to diverse sources for applicants including high schools in diverse communities, HBCUs, and organizations that promote women, minorities, veterans, disabled individuals, and other underrepresented groups. Consider including socioeconomic and geographic diversity as other potential factors in employment decision making.
- **Avoid Improper (and Illegal) Considerations When Hiring and Promoting:** Just as before the Supreme Court's decision, private employers are prohibited from using race (and other protected characteristics) when making employment decisions such as hiring and promotions. Avoid doing so now just as then.
- **Reconsider Race-Based Goals:** Quotas have always been unlawful for private employers under Title VII. It is likely that race-based objectives would also be as problematic after the SCOTUS decision. More general statements such as "being representative of the community" or achieving a higher percentage of diversity among the management team may also be challenged – so work with your legal counsel to ensure your objectives are appropriate.
- **Provide DEI Training – But Make Sure it Stays in Bounds:** DEI training initiatives remain a beneficial aspect of your development plans – but you should review them to ensure the content is legally appropriate. Focus on the benefits of diversity and inclusion in the workplace.

Inclusion should be highlighted as a tool to achieve your business objectives (such as getting the most out of all employees) rather than promoting targets or quotas. It is imperative you continue training to eliminate unlawful harassment and discrimination in the workplace by training all employees, including specialized training for managers and supervisors. (Be mindful of specific state laws that might impact DEI training, so check with your legal counsel.)

- **Retain – But Consider Retooling – Mentoring Programs:** Existing mentoring programs that promote career development are generally legal and you should continue them to enhance your company’s development efforts. However, programs should be open to all employees regardless of race or other protected category. Review and update them as needed to ensure they stay within the bounds of the current state of the law.
- **Open Your Employee Resource Groups:** These groups – sometimes known as Business or Affinity Groups – remain legal just as they were before the SCOTUS decision. But you should review membership guidelines to ensure they are open to anyone interested in the topic and not limited by sex, race, or any other protected category.

## Conclusion

The legal landscape for DEI programs remains dynamic and will likely see additional challenges in the future. However, programs operating in compliance with state and federal laws remain important business tools to support employee engagement and long-term business success.

If you have questions regarding best practices for developing, implementing, or maintaining a compliant Diversity, Equity & Inclusion program, please reach out to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Corporate Compliance and Governance Practice Group](#). Make sure you are [subscribed to Fisher Phillips’ Insight System](#) to get the most up-to-date information on this and other employment topics directly to your inbox.