

NOW & NEXT

DEI Alert

JULY 21, 2023

Recent questions regarding the legality of corporate DEI programs

By Kamau A. Coar, Stacie B. Collier, and Kendal H. Tyre

Employers should prepare for challenges to DEI initiatives following the Supreme Court's affirmative action decision and signaling from a number of states.



What's the Impact?

- / In late June 2023, the Supreme Court struck down the affirmative action student admission practices at Harvard College and the University of North Carolina at Chapel Hill, holding that colleges and universities may no longer consider race as part of an overall holistic assessment of student applications.
- / Last week, the attorneys general of 13 states recently sent an [open letter](#) to leaders of Fortune 100 companies asking them to refrain from race-based discrimination, "whether under the label of 'diversity, equity, and inclusion' [DEI] or otherwise."

In the Supreme Court's recent decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, the Court decided that the admissions processes at Harvard and UNC violate Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, ruling that using race as a "plus factor" is unlawful. The Court noted that while promoting the robust exchange of ideas, fostering innovation and problem-solving, and

enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes are commendable goals, students “must be treated based on his or her experiences as an individual—not on the basis of race.”

Following this recent Supreme Court decision, many have wondered about the impact on employers and their DEI programs and initiatives. While the Supreme Court’s ruling only addressed the admissions decisions of education institutions that accept federal financial assistance, companies have begun to question whether the Court’s reasoning would similarly apply to DEI initiatives. From DEI hiring and retention goals, supplier diversity programs, compensation rewarding employees for increasing diverse representation, and programs specifically targeted toward diverse populations, companies have taken several steps towards advancing diversity that may be called into question.

Last week, attorneys general in Kansas, Tennessee, Alabama, Arkansas, Indiana, Nebraska, Iowa, South Carolina, Kentucky, West Virginia, Mississippi, and Montana not only raised questions about the lawfulness of these DEI initiatives, they directly asserted that certain employment and contracting DEI initiatives at various Fortune 100 companies do in fact constitute race discrimination. Specifically referencing the Supreme Court decision, the letter alleged that these DEI employment practices related to hiring, recruiting, retention, promotion, and advancement and DEI contracting practices related to selection, preferential treatment to customers, and requiring contractors to adopt company DEI policies were, in their opinion, unlawful.

The letter continued to warn these companies of potential legal action challenging their DEI practices, stating:

“As Attorneys General, it is incumbent upon us to remind all entities operating within our respective jurisdictions of the binding nature of American anti-discrimination laws... We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable—sooner rather than later—for your decision to continue treating people differently because of the color of their skin.”

Action items

DEI programs have long lived in harmony with anti-discrimination statutes and policies and will, in many cases, continue to do so. Specific initiatives, however, will likely need to evolve in light of the Supreme Court’s rationale and the anticipated legal challenges that will inevitably follow.

To protect their DEI initiatives, employers should consider the following action items:

- / Reviewing their DEI goals and objectives to ensure that they do not create impermissible quotas or improper pressure on employees to reach DEI-related goals.
- / Reviewing DEI efforts to ensure such efforts properly include non-protected characteristics, such as prior work history, educational background, and socio-economic factors.

- / Auditing and assessing employment and contracting processes designed to increase diverse representation for potential differences in experience, impact, and opportunities available to diverse and non-diverse employees and suppliers.
- / Retraining talent acquisition and hiring managers on the intersection between the companies' DEI efforts and non-discrimination policies.

Nixon Peabody's DEI Strategic Services team works with clients to develop inclusive cultures, drive business success, and elevate their brands. Learn more about our [three-phased approach](#) to help clients: (1) assess current efforts, (2) address challenges, and (3) guide long-term success.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

[Kamau A. Coar](#)

312.977.4422

kcoar@nixonpeabody.com

[Stacie B. Collier](#)

401.454.1018

sbcollier@nixonpeabody.com

[Kendal H. Tyre](#)

202.585.8368

ktyre@nixonpeabody.com