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EEOC Commissioners Urge Caution, Care for Employers' DEI Programs

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Covington & Burling's Lindsay Burke, Dana Remus, and Carolyn Rashby say EEOC commissioners have indicated that employers should proceed carefully with their DEI programs after the Supreme Court's affirmative action decision.

After the Supreme Court's landmark affirmative action decision this summer, Equal Employment Opportunity Commission Chairperson Charlotte Burrows, Commissioner Andrea Lucas, and Vice Chair Jocelyn Samuels weighed in with their views. Together, these statements convey a message to employers concerning their DEI efforts: Proceed, but with caution.

In its June 29 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, the US Supreme Court held that the admissions programs of Harvard College and the University of North Carolina violate the Equal Protection Clause of the Fourteenth Amendment.

The decision didn't directly implicate Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race in employment decisions, but many private employers are considering the indirect impact of the court's ruling on diversity, equity, and inclusion efforts.

Within hours of the court's decision, the EEOC issued a press release with a statement from Burrows, who was nominated to the commission by President Barack Obama and designated chair by President Joe Biden. Burrows stated that the decision "does not address employer efforts to foster diverse and inclusive workforces," and that 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."

Commissioner Andrea Lucas, nominated by President Donald Trump, expressed views on workplace DEI programs in a June 29 commentary and during a subsequent media appearance. She noted that the ruling does not alter current federal employment law, but that the ruling should prompt employers to "take a hard look" at their corporate diversity programs. She opined that explicitly or implicitly taking race into account in employment decisions, including through initiatives such as race-restricted

internships or mentoring or making race-focused promotion decisions, may already be a violation of the law.

On July 11, EEOC Vice Chair Jocelyn Samuels published an article expressing her view that the court's ruling did not "kill" DEI at work, and that employers "shouldn't waver." Samuels, who was nominated commissioner by Trump and designated vice chair by Biden, emphasized that diversity, equity, inclusion, and accessibility efforts are crucial to removing barriers to equal employment and benefit companies by making them more innovative, competitive, and attractive to employees.

She advised employers to maintain their commitment to advancing DEIA principles, and recommended an immediate first step for employers looking to do so: "[W]hile there may be circumstances in which employers could lawfully take race into account in making particular employment decisions, employers should start by embracing race-neutral DEIA measures."

Private employers have been permitted to establish voluntary affirmative action programs that involve consideration of race if certain criteria are met pursuant to Supreme Court decisions in *United Steelworkers of Am. v. Weber* and *Johnson v. Transp. Agency*. Such programs must be designed to "eliminate a manifest racial imbalance," be temporary, and not "unnecessarily trammel the interests of [non-minority] employees."

The EEOC issued contemporaneous guidelines for implementing a Title VII-compliant voluntary affirmative action program—distinguishable from affirmative action programs required of federal contractors. The guidelines and subsequent EEOC interpretation provided that a voluntary affirmative action program, such as a race-conscious hiring policy or career advancement training program, may be permissible if the employer engages in a self-analysis that identifies policies or practices that have led to racial imbalances and the action taken is reasonable in relation to the problems identified by the self-analysis. Such programs remain lawful.

In later guidance, the EEOC explained that, apart from formal affirmative action plans, "Title VII permits diversity efforts" intended to open opportunities, such as strategies to expand the applicant pool of qualified Black candidates by recruiting at schools with high enrollment of Black students, or revising a policy requiring a college degree to allow flexibility for applicants to have relevant years of experience instead. With regard to formal affirmative action and DEI programs, the EEOC indicated that "very careful implementation…is recommended to avoid the potential for running afoul of the law."

In recent years, employers have implemented a range of workplace DEI initiatives, distinguishable from voluntary affirmative action programs in critical respects. Affirmative action programs typically involve tangible employment actions intended to remedy the effects of past discrimination, whereas DEI efforts tend to be forward-thinking and crafted in order to create an inclusive workplace where employees of all backgrounds can thrive. Whether an employer's actions constitute a voluntary affirmative action plan or diversity efforts isn't always clear, but the distinction is significant.

Litigation has been brought in the past, and subsequent to the Supreme Court's recent decision, arguing that some employer initiatives unlawfully consider race—such as leadership development programs offered only to employees of a specific race or internship or fellowship programs that consider only applicants of a specific race.

For example, litigation was recently brought against two law firms alleging that application criteria for the firms' diversity fellowships unlawfully includes race. These types of initiatives are different in meaningful ways from more general efforts to improve inclusivity, create equal opportunity, and mitigate workplace bias—such as supporting affinity groups, adopting structured interview processes, or taking steps to ensure a more diverse pool of job candidates.

In considering what initiatives could be targeted for litigation, employers should give thought to the extent to which their DEI efforts and initiatives implicate tangible employment actions and are limited or targeted at employees of a specific racial demographic, or, instead, promote a more equitable and inclusive work experience for all employees.

The cases are Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, US, No. 20-1199, 6/29/23; and Students for Fair Admissions, Inc. v. University of North Carolina, US, No. 21-707, 6/29/23.

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