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Implications for Private Employers of the Supreme Court's *Harvard* Decision Banning Race-Based Affirmative Action in College Admissions

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In this article, the authors explain that, overall, the U.S. Supreme Court's Harvard *decision has injected a new element of uncertainty into the future of Title VII litigation, as well as best practices for employers in achieving workplace diversity equity and inclusion goals. However, according to the authors, employers should be confident that they can remain committed to their diversity values and goals while ensuring that they pursue such values and goals using thoughtful and fair methods.*

At the end of its last term, the U.S. Supreme Court held, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*Harvard*)[1] that it is unconstitutional (under the Constitution's Equal Protection Clause, as to public institutions) and a violation of Title VI of the Civil Rights Act of 1964 (as applicable to private institutions accepting federal financial assistance) for colleges and universities to consider race as a factor in the admissions process. This decision upends decades of precedent and has caused employers in the private sector to ask: How does this decision impact diversity, equity, and inclusion (DE&I) initiatives or employment decisions? Should employers change any of their employment practices as a result of the Court's decision?

As a threshold matter, the *Harvard* decision did not interpret Title VII of the Civil Rights Act of 1964 (Title VII), which governs the employment

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practices of private employers. The decision principally interprets the Equal Protection Clause of the Fourteenth Amendment and secondarily applies that reasoning to Title VI claims because "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."[2] While the Equal Protection Clause directly applies only to public institutions (including the University of North Carolina (UNC)), Title VI applies to entities that receive "federal financial assistance" (which includes Harvard).

Given the limited scope of the *Harvard* decision, it has no direct, immediate impact on private employers, including federal contractors. (Federal contractors are not covered by Title VI because their receipt of procurement contracts for fair market value does not constitute receipt of federal financial assistance under 42 U.S.C. § 2000d.) The effect of the Court's decision on private employers will instead be indirect.

As a practical matter, employers that hire directly from competitive undergraduate and graduate programs (or that heavily weigh the academic pedigree of experienced lateral candidates) may experience recruitment challenges specifically related to maintaining a strong pipeline of diverse talent. There is historical precedent to support this hypothesis. In 1996, Proposition 209 banned California public universities from considering race, sex, or ethnicity in selecting students for admission. NPR reports[3] that in the first year after the law went into effect, "enrollment among Black and Latino students at UCLA and UC Berkeley fell by 40%." Notably, University of California chancellors submitted an amicus brief[4] to the Supreme Court in support of Harvard and UNC's admissions programs including race as a factor in admission, explaining that alternative race-neutral policies have proven inadequate to address the sharp decline in enrollment of Black and Latino students that followed the passage of Proposition 209.

Employers also may experience an increase in challenges to employment decisions and DE&I initiatives, including in the form of "reverse discrimination" lawsuits. Though it does not apply directly, the reasoning used in the *Harvard* decision may be used by the plaintiffs' bar in future Title VII lawsuits. Indeed, the "anti-woke" movement already has led to an increase in recent years of "reverse discrimination" lawsuits and activity by far-right activist organizations like America First Legal Foundation, which filed such complaints with the EEOC against private companies before the *Harvard* decision was published. At the same time, because the Supreme Court's decision is viewed by many as a roll-back on the focus on social justice and racial equity issues, employers may also see a rise in traditional discrimination lawsuits by racially and ethnically diverse groups asserting that they experienced adverse employment actions for discriminatory reasons.

Against this background, employers are wise to evaluate the implications of the *Harvard* decision on present DE&I programs. To help guide this analysis, below are high-level summaries of the potential impact of the *Harvard* decision on several categories of employment practices and DE&I programs.

INDIVIDUAL EMPLOYMENT DECISIONS (E.G. HIRING, PROMOTIONS, TERMINATIONS)

The *Harvard* decision is likely to have little, if any, impact on the state of the law concerning tangible, individual employment actions. This is due to a fundamental distinction between university admission standards and individual employment decisions. While race was expressly authorized as a factor in making admissions decisions at Harvard and UNC, consideration of race in making employment decisions has long been prohibited by Title VII and its local- and state-law corollaries. That said, *Harvard* will likely embolden more "reverse discrimination" lawsuits in which non-minority litigants argue they were not hired, promoted, or provided another term or benefit of employment in favor of a less qualified racially-diverse employee. *Duvall v. Novant Health, Inc.*,[5] is a recent case in which such an argument was successful. Employers should continue to ensure employment decisions are made based on legitimate business reasons, rather than on race and other protected characteristics. Employers should also ensure best practices are followed in identifying and documenting legitimate, non-discriminatory reasons for employment decisions to protect against both reverse and traditional discrimination lawsuits.

SPONSORSHIP AND MENTORING PROGRAMS FOCUSED ON DIVERSE EMPLOYEES

These programs may be targets for future litigation. Plaintiffs and federal courts may attempt to expand the scope of what constitutes an actionable adverse employment decision to include any term or condition of employment, including any program that can be connected to future tangible employment decisions, such as promotions. Although the ruling in *Harvard* is not applicable to employer sponsorship or mentorship programs, we anticipate that future litigants will urge courts to expand the rationale to Title VII cases, arguing that race should not be taken into account when establishing selection criteria for such programs. Employers who condition selection for mentorship or sponsorship programs on race or other protected categories, such as gender, may be at greater risk for legal claims after the *Harvard* decision. Employers should, therefore, monitor legal developments in this area and make reasoned legal and business judgments on these issues that are consistent with their organization's culture and goals.

AFFINITY GROUPS

These groups, for example women's or Black affinity groups, generally function to provide community, support, mentorship, promote

the development and retention of talent, and host trainings and events related to issues faced by the group. Because these groups often receive ear-marked funding within organizations, and provide various training and sponsorship opportunities, employers should be mindful of the caveats discussed above. To reduce potential risk, employers may consider opening membership in these groups and/or participation in certain affinity group trainings or events to all employees.

DIVERSITY REQUIREMENTS FOR INTERVIEW SLATES

The use of diversity requirements for interview slates – akin to the Rooney Rule[6] in the National Football League – does not constitute an actionable employment decision and is not facially unlawful, as such Rules only operate to combat unconscious bias and ensure that qualified diverse candidates are considered. These requirements accordingly should remain low risk as the subject of successful future reverse discrimination attacks by candidates who were ultimately not hired. Given the benefits they provide and the low risk they pose, employers should maintain these programs unless they are definitively found to be unlawful in the future.

AFFIRMATIVE ACTION PROGRAM (AAP) REQUIREMENTS FOR GOVERNMENT CONTRACTORS

Federal contractors and subcontractors are required to continue complying with Executive Order (EO) 11246 and its implementing regulations, which require the development and maintenance of AAPs. While EO 11246 may be challenged in the future, it is not immediately impacted by the *Harvard* decision. The OFCCP has made it clear in recent years that AAP goals are different from "quotas" and neither EO 11246 nor the regulations require employers to achieve or maintain the goals. The EO and the regulations require employers to identify (based on prescribed analyses) areas where their utilization of minorities or women is "less than would reasonably be expected." Where this underutilization is found, the regulations require employers to implement action-oriented programs to try to enhance the representation of women and minorities. It is unlikely that the OFCCP will change its approach to underutilization, and contractors should continue to conduct the required analyses, but should ensure that they can defend any hiring or promotion decisions made to try to increase the representation of minorities or women. It is important to note that OFCCP audits primarily focus not on utilization rates, but on potential discrimination in such selection decisions and compensation, and these continue to be the areas of the greatest legal risk during an audit.

STATEMENTS SETTING DIVERSITY GOALS

Statements by organizational leaders identifying goals for increasing the representation of diverse talent are not facially unlawful. However, to minimize litigation risk employers must ensure that they can defend their subsequent selection decisions, both statistically (for class action cases) and based on the qualifications and skills of an individual employee or applicant (as implicated by single plaintiff cases).

There is precedent for courts allowing plaintiffs in "reverse discrimination" lawsuits to proceed with their claims in part by relying on alleged organizational statements setting goals for the representation of diverse talent. For example, in *Walton v. Medtronic USA, Inc.*,[7] the plaintiff alleged that he was terminated because he was white. He alleged that his former employer's diversity, equity, and inclusion program's stated "goal of having women in 40% of its leadership positions and people of color in 20% of its leadership positions by the year 2020 was the real reason for his termination." The U.S. District Court for the District of Minnesota granted him leave to file his amended complaint and found that "[a]ssuming all these facts are true, Mr. Walton's proposed amended complaint plausibly suggests that if he had been a person of color, he would not have been terminated."

Employers should ensure that employment decisions do not become focused on race or any other protected characteristic, even as employers continue to work toward achieving previously announced diversity commitments. Instead, employers can take tangible action toward achieving their diversity goals by, for example, expanding recruitment across a broader range of schools, opening or expanding employment opportunities in new geographic areas, training employees on inclusive hiring practices, and investing in the inclusion, development, and retention of current employees.

INTERNAL ANTI-BIAS/ALLYSHIP/UPSTANDER/ AWARENESS TRAININGS

Typically, these types of trainings are available to all employees and generally function to educate and provide professional development skills. They are not connected to any employment decision and are neither unlawful nor impacted by the *Harvard* decision. Employers should continue to provide and encourage attendance at these trainings.

OTHER TITLE VII AND ADA PROTECTED CATEGORIES

The *Harvard* decision specifically evaluated race-based policies, which subjected the policies to "strict scrutiny." Strict scrutiny is the highest

standard of review that a federal court will use to evaluate the constitutionality of race-based laws and government policies, and it also applies to laws and policies that involve national origin, religion, and alienage. Gender-based policies are subject to the lesser, "intermediate scrutiny," while other categories such as disability are subject to the most permissive standard known as "rational basis" review.

Because national origin, religion, and alienage are subject to the same level of scrutiny as race, it would be prudent to equally apply any implications of the *Harvard* decision on race-based policies to policies based on those other classifications. While it is presently unclear how courts would assess a similar gender-based policy as a matter of constitutional review, employers should approach policies impacting all Title VII and ADA protected categories (race, color, religion, sex, national origin, and disability) in the same manner, since the standard of review under these statutes do not vary within each respective statutory scheme.

CONCLUSION

Overall, the *Harvard* decision has injected a new element of uncertainty into the future of Title VII litigation, as well as best practices for employers in achieving workplace diversity equity and inclusion goals. However, employers should be confident that they can remain committed to their diversity values and goals while ensuring that they pursue such values and goals using thoughtful and fair methods.

NOTES

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199, 2023 WL 4239254 (U.S. June 29, 2023).

2. Harvard at 6 n. 2.

3. https://www.npr.org/2023/06/30/1185226895/heres-what-happened-when-affirmative-action-ended-at-california-public-colleges.

4. https://www.supremecourt.gov/DocketPDF/20/20-1199/232355/20220801134931730_20-1199%20bsac%20University%20of%20California.pdf.

5. Duvall v. Novant Health, Inc., No. 3-19-cv-00624 (W.D.N.C. 2021).

6. https://operations.nfl.com/inside-football-ops/inclusion/the-rooney-rule/.

7. Walton v. Medtronic USA, Inc., No. 22-CV-50 (PJS/JFD), 2023 WL 3144320 (D. Minn. Apr. 28, 2023).