

## The State Of Play In DEI And ESG 1 Year After Harvard Ruling

By **Toni Michelle Jackson, Roy Abernathy and Tiffany Aguiar** (May 23, 2024, 5:49 PM EDT)

Nearly a year ago, the U.S. Supreme Court decided *Students for Fair Admissions v. President & Fellows of Harvard*. The high court ruled that race-based policies should not be used as a factor in university admissions.

Although a major shift in Supreme Court jurisprudence regarding race-based admissions, based on the court's chosen wording in the ruling, the holding could be narrowly tailored to the collegiate education context.

However, the following year saw a dizzying tailspin of various legal actions given life based on the Harvard ruling. One group seizing on the ruling was conservative state attorneys general, who sought to use the ruling to attack corporate diversity, equity and inclusion plans.

### Summer 2023 Attorneys General Letters

In July 2023, weeks after the Harvard decision, 12 Republican attorneys general<sup>[1]</sup> signed a public letter to Fortune 100 CEOs raising legal concerns over corporate DEI plans. The letter alleged that the U.S. Supreme Court's decision in Harvard made such corporate DEI plans — including programs, commitments, initiatives, etc. — unconstitutional.

The letter highlighted the Supreme Court's recognition that federal civil rights statutes prohibiting private entities from engaging in race discrimination apply as broadly as the prohibition against race discrimination in the equal protection clause of the Thirteenth Amendment.

The July letter called corporate racial discrimination commonplace and articulated that DEI plans were discriminatory and created illegal quotas. Therefore, the undersigned Republican attorneys general were putting corporations on notice and would consider whether these employers should face legal action.

This letter allowed conservative attorneys general to draw a line in the sand against corporate efforts to create DEI initiatives, which is consistent with their broader efforts to challenge corporate environmental, social and governance initiatives.

After this initial salvo from 13 Republican attorneys general, less than a week later, Nevada Attorney



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General Aaron Ford authored a response public letter signed by 21 Democratic attorneys general.[2] Similar to the prior letter, Ford's response was directed to Fortune 100 CEOs.

The Democratic attorneys general letter argued that the Harvard decision "does not directly address or govern the behavior or the initiatives of private sector businesses," leading to the conclusion that corporate DEI efforts generally remain legal.

Further, the letter specifically committed that the Democrat attorneys general would oppose attempts to fight DEI efforts and condemned the tone of intimidation from the Republican attorneys general.

On Aug. 29, 2023, five Republican attorneys general[3] signed another public letter to the managing partners, chairs and CEOs of AmLaw 100 firms.

The second Republican attorney general letter was similar to the first, arguing that law firms were on notice of the SFFA decision and required to refrain from discrimination on the basis of race.

The letter mentioned multiple law firms by name and described those firms' DEI-related recruiting and fellowship efforts, including the Mansfield Rule certifications held by most AmLaw 100 firms.

### **What Followed**

After the attorneys general circulated the various notice letters in 2023, we may have predicted an uptick in attorneys general investigations or lawsuits related to corporate DEI efforts, or more broadly to corporate ESG efforts. However, an increase in such legal actions has not come to pass.

To be certain, there had been an increase in legal actions against DEI programs, but not directly from state attorneys general. The past year has seen multiple private lawsuits, such as from Edward Blum's American Alliance for Equal Rights, against law firms, venture capital firms and others, challenging companies' supplier or contractor programs, employment programs — both recruiting and retention — and financial investment programs.

Some attorneys general have continued to focus on DEI issues without direct legal action against companies. For example, on Oct. 4, Colorado Attorney General Philip Weiser issued a formal legal opinion finding that the Harvard decision did not address workplace DEI programs and did not hold such programs unconstitutional.

In analyzing the decision, Weiser found that the Supreme Court wholly relied upon university admissions case law regarding equal protection and Title VI claims, and did not address the legal framework governing race in an employment context.

In addition, the U.S. Equal Employment Opportunity Commission has received letters seeking investigation into corporate DEI programs.

And, in a statement issued by EEOC Chair Charlotte Burrows on the day the decision came down, Burrows made her views clear — that the decision does not address employer efforts to foster diverse and inclusive workforces: "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."

Looking broadly at attorney general scrutiny of ESG-related efforts, some attorneys general have been more active, specifically focused on investment firms that are members of either Climate Action 100 or the Net Zero Asset Managers Initiative.

Although these actions are more directly motivated by corporate climate initiatives, similar actions by these attorneys general related to corporate DEI initiatives are more than plausible.

For example, Arkansas, in early 2023 with Act 411, created an ESG Oversight Committee to review financial services providers that may discriminate against energy, fossil fuel, firearms, or ammunition companies or otherwise refuse to invest or provide services based on environmental or social justice factors.[4]

The law became effective in August 2023, and Attorney General Tim Griffin appointed Steve Cook, former Senate parliamentarian and chief legal counsel, to the committee.

In March, Arkansas' ESG Oversight Committee found six financial service providers that discriminate against energy and fossil fuel companies and investigated further entities prior to Act 411's May 14 deadline. Statutorily, the ESG Oversight committee is reviewing for corporate discrimination based on both environmental and social factors that may include DEI-related efforts.

Similarly, on Feb. 27, 16 Republican attorneys general sent a letter to the 15 directors and trustees of BlackRock Inc., a worldwide asset manager, presenting approximately six pages of questions to be answered by March 26 related to the attorneys general ongoing investigation of BlackRock.[5]

The investigation seeks to understand how BlackRock's ESG-related commitments relate to asset management and investment objectives.

Relatedly, in December 2023, Tennessee Attorney General Jonathan Skrmetti filed a consumer protection lawsuit against BlackRock for false or misleading representations to Tennessean consumers regarding the extent of how BlackRock's ESG-related commitments affect BlackRock's investment strategies in violation of Tennessee's consumer protection law.[6]

Again, the investigation and lawsuit against BlackRock is environmental-commitment focused, but such attacks on corporate ESG initiatives could provide a path to move from the "E" to the "S" to specifically target corporate DEI initiatives.

In *Alliance for Fair Board Recruitment v. U.S. Securities and Exchange Commission*, the ongoing **lawsuit** in the U.S. Court of Appeals for the Fifth Circuit challenging the SEC's approval of the Nasdaq's board diversity rule, DEI remains front and center.

The rule requires Nasdaq companies to disclose board diversity statistics and provide an explanation for lack of diversity, if the board does not contain at least two diverse directors.[7]

On Feb. 20, an en banc Fifth Circuit order vacated a prior panel order and reinstated the petition for review of the rule. A coalition of 19 Republican attorneys general[8] had filed an amicus brief seeking vacatur of the prior Fifth Circuit panel order and a larger coalition of 24 Republican attorneys general[9] filed an amicus brief regarding the review of the board diversity rule.

The attorneys general argued that the Nasdaq's board diversity rule violates equal protection

guarantees, as well as state authority and state laws. The amicus brief styled the Nasdaq's rule as a so-called quota rule.

Not dissimilarly, in January, a coalition of 19 Republican attorneys general submitted a comment letter on the U.S. Department of Commerce's draft Business Diversity Principles regarding DEI practices.[10]

The coalition stated that race-based discrimination is both "illegal and wrong," and the Business Diversity Principles advocate for such "explicitly race-based employment quotas and decision-making." The coalition cites both the Harvard decision and the aforementioned July letter to Fortune 100 companies.

Although the summer 2023 letters warning corporations about DEI-related initiatives did not lead to an immediate influx of legal actions, attorneys general appear to remain focused on DEI and ESG challenges.

### **How Corporations Should Evaluate Risk**

Up to now and to our knowledge, state attorneys general have not directly brought DEI-related lawsuits, but DEI-related investigations against corporations would remain confidential until a complaint is filed.

Regardless, corporations are experiencing a chilling effect given risk concerns surrounding DEI and ESG initiatives — reasonably so. But, corporations can take steps to maintain confidence in their DEI initiatives.

For example, corporations can actively review and monitor any DEI and ESG-related programs to ensure compliance and proper management. Choices related to DEI and ESG will have impacts on a host of corporate concerns.

Beyond the discussed legal risks, DEI and ESG efforts may promote employee satisfaction, retention and hiring. Such efforts likely also have tangible impacts on consumers' perspectives.

Although we have not seen a proliferation of state attorneys general lawsuits against corporate DEI initiatives, these issues remain politically fraught and top-of-mind for state enforcers. And we expect to see DEI and ESG issues remain at the forefront, particularly as we head into the election season.

We would not be surprised to learn of ongoing attorney general investigations, which may lead to complaints in the coming months.

However, without further guidance from the Supreme Court, or any other court for that matter, we do not expect that corporations will choose to entirely eliminate or shutter away from standard policies centered around inclusion or environmental impact. Such policies are commonplace for a reason.

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[1] Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia.

[2] Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

[3] Arkansas, Iowa, Kansas, Kentucky, and Montana.

[4] Ark. Code § 25-1-1006.

[5] Alabama, Arkansas, Georgia, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Texas, Virginia, West Virginia, and Utah.

[6] Tenn. Code Ann. § 47-18-104(a), (b)(27).

[7] 86 Fed. Reg. 44,424 (Aug. 12, 2021).

[8] Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia.

[9] Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia.

[10] Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Carolina, Tennessee, Texas, Virginia, and West Virginia.