DEI, ESG and preparing for the Supreme Court ruling on race-based decision-making

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As we await the U.S. Supreme Court's decisions addressing affirmative action in college admissions programs, employers should contemplate how this decision may impact their diversity, equity, and inclusion (DEI) initiatives and environmental, social, and governance (ESG) commitments. *Students for Fair Admissions, Inc. v. University of North Carolina*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.

While employer initiatives are subject to a different legal framework than the educational admissions programs challenged in these cases, we expect that the Court's decision may have broad-reaching implications across various civil rights laws, including those that impact workplace DEI efforts. As we wait for the Court's opinions, there are steps that employers can take now to best position their DEI programs for future success.

Issues pending before the Supreme Court

The two cases pending before the Court were filed in 2014 by the Students for Fair Admissions, Inc. (SFFA) and challenge the use of race as a factor in admissions by Harvard University (Harvard) and the University of North Carolina (UNC).

SFFA alleges that the use of race in the universities' admissions programs violates Title VI of the Civil Rights Act of 1964 (which prohibits discrimination on the basis of race, color, and national origin in any program or activity receiving federal financial assistance) and/or the Equal Protection and Due Process clauses of the U.S. Constitution (which prohibit federal and state governments from discriminating on the basis of race except when furthering a compelling government interest and using the least restrictive means available).

Harvard and UNC — along with most colleges and universities — are subject to Title VI because they receive federal financial assistance, such as research grants and federal student aid. UNC and other state universities are also subject to the limits imposed by the U.S. Constitution because they are state actors.

These cases are not the first time the Court has reviewed race-conscious admissions programs. Starting with *Regents of the University of California v. Bakke* (1978) and continuing through *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas* (2016), the U.S. Supreme Court has recognized repeatedly that diversity in higher education is a compelling state interest that can justify consideration of race in admissions, provided that the use of race is narrowly tailored to that interest (such as by treating each applicant as an individual, refraining from using racial quotas, and considering race flexibly as one factor among others). The cases pending before the Court now seek to overturn *Grutter* with a ruling that institutions of higher education cannot use race as a factor in admissions.

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While the exact outcome of these cases remains to be seen, the ability to use race as a factor in higher-education admissions may become more limited, if not expressly prohibited.

Potential impact of the Supreme Court's decision on workplace DEI initiatives

It is important to understand the scope of the forthcoming decisions and their impact beyond the college and university admissions context. While the legal questions in these cases are ostensibly limited to higher education, the Court's analysis — and the lower courts' application of that analysis — could have broad consequences for DEI strategies in a range of sectors, including the employment space.

Generally, workplace DEI initiatives are governed by Title VII of the Civil Rights Act of 1964 (Title VII) and other federal, state, and local employment laws. Title VII — like Title VI, the statute at issue in the Harvard and UNC cases — prohibits, among other things,

discrimination on the basis of race. If the Supreme Court were to overturn *Grutter*, the plaintiffs' bar would likely argue that the Court's analysis in interpreting Title VI applies to other civil rights–related statutes.

Depending on how the courts resolve such arguments, there could be significant uncertainty regarding employer DEI initiatives and ESG commitments, as well as race-conscious charitable programs sponsored by companies and nonprofit foundations and race-conscious contracts with third-party contractors.

Finally, from a practical perspective, if the Court's decision were to preclude colleges and universities from engaging in certain admissions programs to enhance diversity on campus, this outcome could reduce the pool of diverse talent available to employers by having a potentially smaller diverse pipeline of students and thus undercut employers' DEI efforts. Overall, such an outcome could be detrimental to company innovation and profitability, the ability to recruit and retain diverse talent, transparency related to DEI strategies, and workplace culture.

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Regardless of the outcome, we expect that the activist groups challenging the use of race in different contexts will be emboldened by these decisions, and they will argue to expand the scope of any holdings to other spaces — including the employment context. Such organizations already have started challenging similar DEI practices in employment and supplier diversity to tee up potential tests regarding the scope of civil rights laws.

Practical next steps for employers

Despite these challenges, we also have seen a renewed commitment to social and racial justice in corporate America, with shareholders, customers, investors, and even the government making DEI and ESG a priority. And there may also be equal legal and reputational risks to not considering DEI. For employers that seek to continue or even expand their DEI commitments and progress while remaining mindful of legal guardrails, the following could be helpful action steps:

- **Assess current DEI programs.** Employers seeking to engage in DEI initiatives first should inventory their DEI and ESG programs and commitments to understand their activity in this arena. It is essential to partner with legal counsel to assess the level of risk of these programs and strategies, in light of both the forthcoming decision from the Supreme Court and in the wake of current challenges.
- **Review policies and training that implicate DEI considerations.** Employers seeking to engage in DEI initiatives should identify and review any other policies, trainings, guidance, and messaging to determine whether additional clarification or training would be beneficial from a DEI standpoint. For example, interviewers and hiring managers should be reminded what DEI is and what it is not. Employees should be reminded that DEI does *not* mean that they should interview, hire, or promote individuals from historically marginalized communities simply to meet diversity goals. Rather, all employment decisions must be based on business-related criteria.
- **Focus on retention and workplace culture.** Much of the legal risk in the realm of DEI comes from the candidate-selection process where employers overly focus on increasing diversity and representation through hiring and lose sight of the importance of inclusion and retention of their current employees and the workplace overall. A focus on the current workforce is equally critical in ensuring long-term diversity and representation within the organization. Such efforts can include evaluating opportunities for advancement, developing mentorship programs, and identifying and mitigating reasons for attrition. Therefore, employers seeking to enhance the diversity and representation of their workforce should continue to focus on efforts to retain diverse workers and create a workplace culture in which they feel included.
- **Understand leadership's risk tolerance.** DEI initiatives will carry some element of risk regardless of the Court's forthcoming decision. Therefore, employers seeking to engage in DEI initiatives should start talking now with their leaders regarding the risks and the company's degree of risk tolerance. This involves not only the legal risks associated with engaging in DEI initiatives, but also those of disengaging from any DEI commitments. For example, there are reputational and employee-relations perils — especially given any historical DEI or ESG commitments the company may have made in the last few years (or, perhaps, its competitors in the industry have made while the company remained silent). There are also productivity and profitability risks, as we know that more-diverse teams are more successful than less-diverse teams on these dimensions. There also remains the risk of a traditional discrimination lawsuit if women and people of color are not getting hired or promoted.
- **Develop a communications strategy.** Employers seeking to engage in DEI initiatives should start thinking about a potential communications strategy in response to the decisions that will be issued in the Harvard and UNC cases. As we saw with *Dobbs v. Jackson Women's Health Organization*, organizations will be looking to their leaders for a response. People will want to know how the decision affects them, and what will happen next. It is helpful to start evaluating whether leadership will make any statement about the decisions — internally,

externally, or both — and if so, what the message is that it wants to convey.

At this time, we do not know when or how the Court will decide the Harvard and UNC cases, or whether and to what extent the lower courts will apply such an analysis under other statutes, such as Title VII and Section 1981. But there are concrete actions that employers can take now to better understand and assess their activity in this space and prepare for the changes to come.

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