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4 Questions On Discrimination Attys' Minds In The New Year

By **Vin Gurrieri**

Law360 (January 5, 2023, 6:52 PM EST) -- The discrimination law landscape is teeming with gray areas that warrant attention from lawmakers or the courts, experts say. If lawyers had their druthers, here are four questions they'd tell the courts or Congress to clear up in the coming year.

Can States Curb Employers' Workplace Diversity Training Programs?

Over the past few years, some states, most notably Florida in 2022, have sought to regulate how employers discuss race and gender during training seminars. The Sunshine State's statute, known colloquially as the Stop the Wrongs to Our Kids and Employees Act, or Stop WOKE Act, barred various race-, sex- and ethnicity-based concepts from being taught in schools and workplace trainings. The controversial statute has since been enjoined, a ruling the state has appealed to the Eleventh Circuit.

Though federal law already prohibits the use of race, sex or any other protected traits as a basis for decision-making, employers are increasingly wondering whether their training programs or efforts to diversify their staff could put them at odds with state laws, particularly if statutes like the one adopted in Florida become more common.

"The biggest issue I think that we're seeing right now is in the aftermath of #MeToo and the racial equity movement, a lot of companies have been trying to implement diversity and inclusion programs and have made, I think, real effort to try to increase the diversity of their employee population in order to better serve their clients, customers, communities or what have you," said Jocelyn Cuttino, a partner at Morgan Lewis & Bockius LLP. "At the same time, we obviously have these employment laws that say you cannot make decisions on the basis of protected characteristics. So the question becomes, 'How much can we do from a diversity and inclusion perspective without running afoul of [those] laws?'"

That line is a fine one for employers to walk, Cuttino said, but navigating it in a way that allows employers to legally achieve their diversity goals is doable.

"That's a big question right now, and it's one that we are doing a lot of advice and counseling on because I think people genuinely want to not just improve diversity but also focus on inclusion, keeping people in the organization as happy and ensuring they have a sense of belonging as well," Cuttino said.

"As a lot of them focus on critical race theory, I think there's a widespread misunderstanding of what CRT is and what workplaces and diversity trainings are meant to do," Cuttino added. "The laws say you can't have diversity trainings that teach people that by virtue of their race or ethnicity, they are more

likely to discriminate against people. The diversity trainings that I think are most effective don't say anything of that nature."

Will Federal Law Chill Voluntary Diversity Initiatives?

The U.S. Supreme Court is slated to rule on a pair of appeals lodged by Students for Fair Admissions, an anti-affirmative action group, that challenge race-conscious admissions policies at Harvard University and the University of North Carolina.

The justices, who heard oral arguments in the decoupled cases in October, were asked by Students for Fair Admissions to consider overruling a 2003 decision called Grutter v. Bollinger, in which a majority led by Justice Sandra Day O'Connor upheld affirmative action in student admissions. In that case, the justices concluded that the equal protection clause allowed for "narrowly tailored use of race in admissions decisions to further a compelling interest" in reaping the benefits of having a diverse student body.

The Grutter decision came a quarter-century after the high court blessed the use of race as a factor in admissions in University of California v. Bakke. And in 2016, the justices held that the University of Texas' race-sensitive admissions policy was constitutional, rejecting a challenge by an unsuccessful applicant who said she was discriminated against because she is white.

Even though case law surrounding race-conscious policies differs between the academic and employment contexts, attorneys say that the future of employers' diversity initiatives — which can include efforts to broaden applicant pools or training seminars, among other things — may be significantly impacted if the high court rules against Harvard and UNC.

"That's not in the employment context, but I think employers and folks who care about diversity at companies are watching that case because depending on how hostile the court is, it could certainly have some impact on how [discrimination] cases are handled, especially reverse discrimination cases," said Joshua Zuckerberg, co-chair of the labor and employment practice group at Pryor Cashman LLP.

"Certainly, there [are] all sorts of diversity initiatives that take place and sometimes, when positions are being advertised, employers will say, 'We encourage diverse applications or diverse applicants,'" Zuckerberg added. "And that in and of itself may be rolled back, or there may be more concerns about that type of hiring if we get what we expect to get, which is a decision by the high court on affirmative action that's going to be very hostile to it."

Alyesha Dotson, co-chair of Littler Mendelson PC's EEO and diversity practice group, said that since affirmative action in admissions is distinguishable from voluntary affirmative action or diversity programs that private employers that aren't federal contractors may have, the high court's ruling won't set new precedent for employers.

"On the other hand, I do think that it will kind of ring a bell, tell the world how the [justices] are thinking, and I think it will have repercussions in how [diversity, equity and inclusion] programming is conducted moving forward," Dotson said. "I don't think there'll be a direct impact, but I think it will resonate through that space."

Should the justices decide that protected characteristics can't be taken into account in higher education admissions, Dotson said it "would make it even more clear" that they can't be taken into account by

domestic employers, could encourage an even greater uptick in so-called reverse discrimination cases, and might encourage courts and jurors "to even further scrutinize heavy-handed DEI programming."

"Many employers are already doing the right thing — they're not taking protected characteristics into consideration in making employment decisions or [in] fashioning their DEI programs," Dotson said. "But I think they need to be even more careful to evaluate that which they have done, and be more careful in implementing that which they have not yet done."

When Can Changing a Nursing Mother's Job Duties Sustain a Bias Case?

Over the past few years, pregnancy discrimination and accommodations pregnant employees are issued have moved to the forefront of employment law, particularly as Congress last month voted to include the Pregnant Workers Fairness Act as a rider to a $1.7 trillion spending package. Lawmakers also added the Providing Urgent Maternal Protections for Nursing Mothers, or PUMP Act, which expands legal protections related to breastfeeding by closing certain gaps under existing law.

Under the Fair Labor Standards Act, most employers must provide reasonable break time for an employee every time they need to express breast milk for a year after a child's birth, according to the U.S. Department of Labor. Employers must also provide a dedicated, private, nonbathroom space for nursing mothers to take those breaks. The PUMP Act extends those nursing break rights to overtime-exempt professionals.

The U.S. Equal Employment Opportunity Commission, for its part, has also issued various forms of guidance discussing pregnancy bias that make clear that workers can't be treated less favorably because of their breastfeeding schedule.

Since lactation is a medical condition related to pregnancy, bias against nursing mothers could violate Title VII of the Civil Rights Act, the EEOC has stated in guidance, including one issued in 2015 that offered several hypothetical examples of how unlawful bias against nursing mothers might manifest itself.

Thirty states as well as Washington, D.C., and Puerto Rico also have laws that pertain to breastfeeding in the workplace, according to the National Conference of State Legislatures.

But despite the laws already on the books, Victoria Slade, counsel at Davis Wright Tremaine LLP, said one aspect of lactation in the workplace that could use further examination is the extent to which altering a nursing mother's job duties amounts to an adverse employment action that can form the basis of a discrimination claim.

"One interesting issue that has come up for me and a couple of my colleagues recently that seems to be not very well-defined under the law is related to pregnancy accommodation and, more specifically, lactation," Slade said.

Slade noted that the scope of what employers need to do to accommodate an employee who is lactating is a fairly underdeveloped area of law, particularly when it comes to the question of changing a lactating employee's job duties.

"What is a lactating employee permitted? What are the protections for an employee who is lactating and needs breaks, as far as are [employers] allowed to change their duties or not?" Slade said. "Certainly everyone knows you have to give breaks. But the issue [that] has come up for me is whether modifying

the employee's duties to allow for that break can constitute an adverse employment action against them if it's changing their duties in a way that they don't like."

Can There Be Safety Exceptions to Age Bias Laws?

Although federal law is clear that employers can't discriminate against older workers, one issue that is "flying under everybody's radar but presents a contemporary problem" is how private employers should approach situations in which an employee's deteriorating physical or cognitive capabilities create a potential safety risk, according to McDermott Will & Emery LLP counsel Kevin Connelly.

A case that centers the issue, Connelly said, is currently playing out in Connecticut federal court, where the EEOC has accused Yale New Haven Hospital of illegally making physicians and other medical professionals over age 70 periodically take and pass neuropsychological and eye exams to maintain their credentials.

More specifically, the EEOC claims that the hospital's so-called late career practitioners policy flouted the Age Discrimination in Employment Act and that the tests themselves qualify as the sort of medical examinations outlawed under the Americans with Disabilities Act. The three-year old lawsuit is ongoing, with the parties having sparred over multiple discovery-related issues over the course of the litigation.

"[The case] poses an intriguing issue of when should there be exceptions" to laws prohibiting age discrimination, said Connelly, who is not involved in the litigation.

Though the Yale New Haven case involves older doctors, Connelly said the core issue is one that can apply in countless workplaces since "there are individuals in every profession whose abilities run far longer than everyone else for their career span."

Congress, he noted, has written certain exceptions into law that allow certain employers to make employment decisions based on a person's age. For example, airline operators can set age ranges for airline pilots, Connelly said.

"Although Congress is now considering upping the age of pilots because of a pilot shortage, pilots are forced to retire roughly at 65, air traffic controllers at 56, and there's an exception in the ADEA … for state and local police, who can [have differentiating] retirement ages," Connelly said.

However, in the private sector, exceptions to age discrimination laws are few and far between, and employers have to approach situations with anyone in "sensitive positions" where public safety could be implicated on a case-by-case basis "and then with trepidation," according to Connelly.

"At the margin of public safety versus nondiscrimination, there is an intriguing issue," he said. "And every time there is a corner in bias law, where one need meets another … that conflict makes for fascinating debates on both sides and difficult decisions. So too here [for] this issue under age discrimination [law]."

But Connelly expressed doubt that Congress is willing or able to tackle the issue anytime soon, and said it remains far away from any sort of appellate resolution.

"How can Congress take the time you identify every job in America where there's a safety risk for individuals?" Connelly said. "It's left to individualized decisions. In medicine [and] health care, it

becomes more prominent. So the question is, 'Should that be addressed by Congress?' Perhaps in a perfect world. Should it be addressed by the courts? Absolutely. The EEOC and the hospital are going to take this to summary judgment and debate the issue. [It's] a fascinating question for 2023."

--Additional reporting by Braden Campbell, Amanda Ottaway, Patrick Hoff, Chris Villani and Carolina Bolado. Editing by Abbie Sarfo.
