K&L GATES

What's Next for Employers Following the Supreme Court's Affirmative Action Decision

Craig Leen, Partner | Washington, D.C.
Kathleen Parker, Partner | Boston
Leann Walsh, Partner | Raleigh

July 11, 2023

Welcome and Introductions

Craig Leen
Partner
Washington, D.C.
Craig.Leen@klgates.com

Kathleen Parker
Partner
Boston
Kathleen.Parker@klgates.com

Leann Walsh
Partner
Raleigh
Leann.Walsh@klgates.com

Agenda

Agenda

1. **Where are we?**
   - *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College / University of North Carolina*
   - Mandatory Affirmative Action in Employment
   - Voluntary Affirmative Action in Employment
2. **Where are we going?**
   - Connection between Title VI and Title VII
   - EEOC
   - OFCCP
3. **What do we do now?**
   - Federal Contractors
   - Employers with DEIA or Other Voluntary Affirmative Action Programs

Where are we?

Where are we?

Students for Fair Admissions, Inc. ("SFFA") v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. UNC

- Two cases decided together
  - UNC: 6-3
  - Harvard: 6-2*

    *Justice Jackson recused herself
- 6 written opinions
  - Majority: Roberts
    - Joined by Thomas, Alito, Gorsuch, Kavanaugh, Coney Barrett
  - 3 Concurrences: Thomas, Gorsuch, Kavanaugh
  - 2 Dissents:
    - Sotomayor (joined by Kagan in both cases and by Jackson in the UNC case)
    - Jackson (in the UNC case) (joined by Sotomayor and Kagan)

Where are we?

SFFA Ruling (Cont'd)

- UNC's affirmative action program was assessed under the Equal Protection Clause (14th Amendment) because it is a public/state entity.
- Harvard's program was assessed under Title VI (Civil Rights Act) because Harvard is a private entity that receives federal funds.
- Using race as a "plus factor" violates the law.
- Race can still be considered when raised as part of an essay when it is raised **in a context relating to leadership/advocacy/character** (such as overcoming discrimination or being the leader of an affinity group).
  - This part of the decision makes it possible that non-plus factor affirmative action in employment (and possibly in higher education) may still be upheld.
    - Affirmative action in employment already prohibits plus-factors, preferences, quotas, or set-aside.
- Does not directly address employment
  - Uncertainty as to how broadly courts will apply the decision outside of higher education admissions.

Where are we?

What is Affirmative Action in Employment?

- Goes by many different names.
- In general, it encompasses non-preferential programs aimed at increasing equal employment opportunities.
- Fundamentally different than affirmative action in higher education admissions.
- Can be mandatory or voluntary, depending on the type of employer.

Where are we?

Mandatory Affirmative Action in Employment

- Applies to federal contractors and subcontractors who meet certain employee count and contract size thresholds.
- DOL / OFCCP enforces mandatory affirmative action in employment at the federal level.
- Executive Order 11246
  - Issued under the authority of the Procurement Act (Federal Property and Administrative Services Act).
  - The main source of authority mandating affirmative action and nondiscrimination based on race, sex, sexual orientation, gender identity, national origin, and religion.
  - Also contains a pay transparency requirement.
- Federal statutes impose similar affirmative action and nondiscrimination requirements for disability (Section 503) and veterans (VEVRAA).

Where are we?

Mandatory Affirmative Action in Employment (Cont'd)

- EO 11246 has been upheld by multiple circuit courts
  - *Illinois Tool Works, Inc. v. Marshall*, 601 F.2d 943, 945 (7th Cir. 1979)
    - "As a government contractor, ITW must comply with the terms of Executive Order 11246. This Order … requires affirmative action by government contractors to ensure equal employment opportunities."
  - *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1325 (9th Cir. 1979)
    - "As a condition of doing business with the federal government, larger federal contractors are required to develop "written affirmative action compliance programs" designed to further equal employment opportunity."
- The Supreme Court has never directly opined on EO 11246's constitutionality.
- Congress has referenced OFCCP in various acts and funds OFCCP annually.

Where are we?

Voluntary Affirmative Action in Employment

- The EEOC has primary oversight over voluntary affirmative action programs by private sector entities, including diversity-focused programs and initiatives.
  - CM-607 is the EEOC's Affirmative Action Guidance.
    - Available at www.eeoc.gov/laws/guidance/cm-607-affirmative-action.
    - Cited favorably in *United States Steel Workers of America AFL-CIO-CLC v. Weber, et al*., 433 U.S. 193 (1979).
- Executive Order 14035
  - President Biden's Executive Order on Diversity, Equity Inclusion, and Accessibility in the Federal Workforce.
  - Seeks to create a Government-wide initiative to promote diversity, equity, inclusion and accessibility.
  - The Office of Personnel Management and EEOC have mutual oversight authority over federal programs adopted under EO 14035.

Where are we?

Voluntary Affirmative Action in Employment (Cont'd)

- The Supreme Court has opined favorably on voluntary affirmative action programs in multiple opinions.
- For example - *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 632 (1987)
  - Consistency with Title VII is key
  - Diversity-focused actions should be non-preferential, based on a manifest imbalance, and focused on elimination of past discrimination
- This line of Supreme Court precedent was not addressed in the recent *SFFA* decision, and there is nothing in the *SFFA* decision prohibiting non-preferential actions to address past discrimination (even potentially in higher education)
- Courts may give greater scrutiny to affirmative action in employment that does not strictly follow Title VII case law; this greater legal risk should lead to employers checking their programs carefully with counsel

Where are we?

Voluntary Affirmative Action in Employment (Cont'd)

- There are limitations on voluntary affirmative action programs when they are not focused on manifest imbalance or do not seek to remedy past discrimination.
- For example:
  - *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1557 (3d Cir. 1996) - holding that the program was invalid for failing to have a remedial purpose consistent with addressing past discrimination under Title VII.
  - *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 497–98 (3d Cir. 1999) - invalidating the plan under *Taxman* and Title VII because the "plan itself and the regulations which mandate the plan were not based on any finding of historical or then-current discrimination in the casino industry or in the technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation."

Where are we going?

Where the EEOC, OFCCP, and Courts May Go Following the SCOTUS Decision

Where are we going?

- **Justice Gorsuch's concurring decision discussed the connection between Title VI and Title VII.**
  - "Just next door" to Title VI, Title VII makes it "unlawful…for an employer…to discriminate against an individual…because of such individual's race, color, religion, sex, or national origin."
  - Quoting Justice Steven's opinion in *Regents of Univ. Cal. V. Bakke*, "'[b]oth Title VI and Title VII' codify a categorical rule of "'individual equality, without regard to race.'"
- **Reasonable to assume:**
  - Reasoning and arguments in the SFFA cases will find their way into future Title VII employment discrimination cases.
  - Fellowship, bonus, grant scholarship programs used by employers to attract diverse talent will face scrutiny and be challenged under Title VI.

Where are we going?

THE EEOC

- Statement after the *SFFA* rulings:

  "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."
- BUT employers may see more discrimination cases (i.e., "reverse discrimination") where it is perceived that affirmative action played a role in a hiring or promotion decision.
- If a complaint regarding an affirmative action or diversity initiative is filed with the EEOC or OFCCP, employers should be prepared to show that there is no plus factor, preference, or quota, being used.

Where are we going?

OFCCP

- Employers may see challenges to certain aspects of the current OFCCP affirmative action plan regulations, including:
  - That statistical balancing and diversity-focused recruiting result in making race, ethnicity, or gender-based hiring and promotion decisions;
  - The lack of any temporal endpoint – requiring a covered employer to establish a placement goal in a job category that, in prior years, never needed one; and
  - That the regulations are really aimed at addressing broader, societal discrimination or diversity and not the employer's own potential discrimination.

Where are we going?

BOTH AGENCIES

- May adjust their race/ethnicity categories for use in the employment context to be more specific.
  - SCOTUS questioned whether the standard race/ethnicity categories (e.g., White, Black/African American, Hispanic/Latino, Asian, Pacific Islander, Native American) were specific enough to be good measures of underrepresentation in the admissions context and noted that the current categories are very broad and include many different ethnicities and national origins.
  - The Court pointed out that the categories are opaque and imprecise in many ways, while also being plainly overbroad in some instances and under-inclusive in others.

Where are we going?

PENDING CASES

- There are already a number of lawsuits over corporate diversity programs in federal courts.
- The lawsuits allege that employers violated federal or state laws by considering race in employment or other contracting decisions – most allege discrimination of white individuals or white and Asian-American individuals.
- *Do No Harm v. Pfizer Inc.* (S.D.N.Y. 2022)
  - Plaintiff filed suit under Title VI and other laws on behalf of two of its members one a white undergraduate student, one an Asian-American undergraduate student.
    - Alleged that Pfizer's fellowship program is discriminatory because it excludes white and Asian-American applicants.
  - Dismissed on standings grounds because the members were not identified by name and vague statements by the members were given anonymously.
  - Currently on appeal in the 2d Circuit.

Where are we going?

PENDING CASES (Cont'd)

- *Duvall v. Novant Health, Inc*. (W.D.N.C. 2019)
  - White male executive sued his employer for discrimination, claiming that he and other "white male leaders were dismissed from employment without warning and replaced by women and/or minorities."
    - Claimed that the firing stemmed from a diversity and inclusion effort that "by 2018 had turned into avowed 'strategic imperative' to use racial and gender targets to reshape [the employer]'s workforce and leadership…"
  - Jury found that the executive proved that his race or gender played a role in his termination and he would not have been fired if he was not white or male.
    - 7-day trail.
    - Awarded him $10 million.
  - Federal judge reduced the verdict to $3.7 million.
  - Currently on appeal in the 4th Circuit.

What do we do now?

Compliance Tips and Best Practices

What do we do now?

FEDERAL CONTRACTORS

- Circulate a clear message on the decision and existing obligations.
  - Employees may be confused about the decision and its impact on current programs, so covered contractors should consider proactive messages regarding their covered contractor status and continuing obligations to comply.
- Train! Train! Train!
  - Training can be used to clarify the decision and existing obligations.
  - All covered contractor personnel involved in recruitment, screening selection, promotion, discipline, and related processes are required to be trained to ensure EEO commitments are implemented.
  - Recommend training for human resources professionals, including recruiting and talent acquisition, and all employees involved in the interviewing, selection and hiring processes remain critical.
  - Use this as an opportunity to do refresher training for the entire workforce regarding anti-discrimination, anti-harassment micro-aggressions, etc.

What do we do now?

FEDERAL CONTRACTORS (Cont'd)

- Continue to strictly follow applicable OFCCP regulations and EEOC guidance and be on the lookout for updates.
  - Employment decisions must not consider race or other protected characteristics as part of the decision.
  - Covered contractors are required to implement action-oriented programs to address any identified problems.
  - Review action-oriented programs to confirm none include quotas.
  - Include this work as part of your annual auditing of the effectiveness of your AAP efforts.
    - It is important that your AAP has been reviewed by counsel.
  - Ensure the language in your careers webpage and job postings are up to date and emphasize non-discrimination, including with taglines.
    - Covered contractors are required to ensure that solicitations/advertisements for employees state that ***"all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, veteran status or on the basis of disability."***

What do we do now?

FEDERAL CONTRACTORS (Cont'd)

- Continue to strictly follow applicable OFCCP regulations and EEOC guidance and be on the lookout for updates (Cont'd.)
  - Review records regarding any disparities (e.g., selection, promotion, terminations).
    - Ensure you've run down why any disparities exist and what the next steps are.
  - Ensure your purchase order language is up to date and emphasizes non-discrimination.
    - Differentiating language is required depending on whether the subcontract/purchase order is for $15,000+ or $150,000+.
    - Most contractors use the more fulsome $150,000 language for all orders.

What do we do now?

FEDERAL CONTRACTORS (Cont'd)

- Don't forget accessibility!
  - Contractors are encouraged, but not required, to develop a written procedure for processing requests for reasonable accommodations for disabled applicants/employees.
  - Contractors' electronic/online job application systems should inform applicants how to request a reasonable accommodation so that they can participate fully in the application process.
- Don't forget about PAY EQUITY!
  - Pay equity remains a key focus area.
  - The decision does not impact employer compliance obligations for annual compensation reviews.

What do we do now?

NON-FEDERAL CONTRACTORS WITH DEIA OR OTHER FORMS OF VOLUNTARY AFFIRMATIVE ACTION PROGRAMS

- To avoid potential lawsuits or complaints, as well as confusion relating to the applicability of the SFFA decision, consider moving away from the term “affirmative action.”
  - Use terms like “Equal Employment Opportunities” and “diversity-focused initiatives.”
- No quotas or plus factors
  - Employment decisions must not consider race or other protected characteristics as part of the decision.

What do we do now?

NON-FEDERAL CONTRACTORS WITH DEIA OR OTHER FORMS OF VOLUNTARY AFFIRMATIVE ACTION PROGRAMS (Cont'd)

- Focus diversity initiatives on non-discrimination in employment and ensuring equal employment opportunity in hiring and advancement.
  - Participate in diversity/minority-focused outreach programs and job fairs to ensure that the job posting can reach a large, diverse pool of qualified candidates.
  - Implement/update training, including interviewer and implicit bias training.
  - Implement blind resume screening and hiring practices to help reduce bias.

What do we do now?

NON-FEDERAL CONTRACTORS WITH DEIA OR OTHER FORMS OF VOLUNTARY AFFIRMATIVE ACTION PROGRAMS (Cont'd)

- Consult with counsel
  - Have diversity programs reviewed by counsel to ensure compliance with existing laws and future developments.
  - Any race-conscious initiative (e.g., a diverse slate policy) should be reviewed by counsel and must be based on diversity analytics where the employer has identified a manifest imbalance in its workforce and should be narrowly focused on remedying that manifest imbalance.
    - A diverse slate is where you intentionally start with a diverse pool of qualified candidates.
  - Consult with counsel when making decisions about corporate departments and personnel.
    - Growing discussions about "restructuring" or disbanding corporate diversity and inclusion departments and executive-level officer positions, especially in light of recent legislation targeting DEIA initiatives, which may vary by state.

What do we do now?

NON-FEDERAL CONTRACTORS WITH DEIA OR OTHER FORMS OF VOLUNTARY AFFIRMATIVE ACTION PROGRAMS (Cont'd)

- Don't forget about employee retention!
  - Employee burnout and stress levels are at an all-time high post-pandemic.
  - Ensuring your current employees take care of themselves and are able to maintain a sustainable career in your business will help you retain diverse workers.
  - Use anonymous questionnaires or surveys to poll current employees and gauge burnout, workplace stressors and overall workplace culture to analyze potential employee retention issues.
  - Employee resource or affinity groups can help create safe spaces for intragroup support, while also bringing together different groups, and foster an inclusive work environment.

Questions?

K&L GATES