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One Year Later: The Implications of *SFFA* for Corporate America

Publications

July 1, 2024
By: Ishan K. Bhabha, Lauren J. Hartz, Erica Turret

On June 29, 2024, one year passed since the Supreme Court's landmark decision in *Students for Fair Admissions* (*SFFA*), which overturned fifty years of legal precedent in striking down the race-conscious admissions programs at Harvard College and University of North Carolina Chapel Hill. Although the actual legal applicability of the decision was largely confined to educational institutions and recipients of federal funds, the rationale behind the Court's decision—and its very stringent application of the strict scrutiny standard in particular—casts doubt on the legality of race-conscious programs well beyond college admissions. The obvious question, which many have asked, is how *SFFA* might impact the myriad DEI programs that exist in corporate America, programs that are already the subject of political backlash. Now is a good time to take stock.

Beginning with the numbers, *SFFA* has led to an increase in both challenges to DEI programs and fear amongst employers over the continued permissibility of those programs. In 2023, the number of workplace discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) increased by over 10%. The job posting site Indeed saw a 23% decline in the number of job postings with "DEI" in the title or description, after a 29% uptick in such jobs between November 2020 and 2021. Moreover, a qualitative assessment of the litigation being brought over DEI programs bears out what the numbers show.

First, there has been a rise in "reverse discrimination" claims, where a member of the "majority" –a straight white male for example– alleges that he was discriminated against at work in favor of a "minority" candidate or employee. Although these claims predate *SFFA*, plaintiffs are beginning to proffer DEI programs themselves as evidence of an employer's discriminatory intent. For example, in February of this year, a white script coordinator sued CBS Studios, claiming that the company repeatedly hired Black and/or female candidates over him to satisfy alleged "racial quotas" in the writing room. Similar claims are being made against leading newsrooms, financial institutions, and travel technology companies. Moreover, intent evidence based on DEI programs is being marshalled to prove that a general discriminatory bias infuses an organization, even when those programs in practice have nothing to do with the particular adverse employment action being alleged.

Second, well-funded cause organizations like America First Legal (AFL) and the American Alliance for Equal Rights (AAER) are bringing a slew of lawsuits challenging diversity programs under existing civil rights statutes. These lawsuits seek to turn such statutes, passed during the Reconstruction Era and the Civil Rights Movement, on their head to block programs that benefit the very populations those laws were enacted to protect. The diversity programs at issue range from grants to fellowships to training programs targeted at applicants of color. Most recently, the Eleventh Circuit temporarily blocked a grant program that awards funding to Black women-owned businesses, finding that the program was "substantially likely" to violate a Reconstruction-era civil rights law that prohibits racial discrimination in contracting.

Third, the same anti-DEI organizations are now bringing lawsuits against diversity programs that are, on their face, race neutral in addition to those that expressly consider race. For example, in a lawsuit challenging the National Museum of the American Latino's internship program, AAER argued that the program, although lacking race-based eligibility or selection criteria on its face, in practice gave preference to Latinx applicants, an allegation based on the demographic makeup of the selected interns. Though the case ultimately settled, it foreshadows what may be a new frontier of anti-DEI litigation, where the focus of a lawsuit is the DEI program's outcomes, rather than its stated criteria alone.

The outcome of these cases has varied. Some courts have blocked diversity programs while others have dismissed the challenges against them. Some cases are being appealed to higher courts, while others have settled after parties have agreed to change program criteria. A new body of law related to DEI programs is only beginning to emerge as courts wrestle with how to apply the principles of *SFFA* to DEI programs run by private companies, foundations and non-profit organizations, and governmental institutions. While it's easy to draw sweeping conclusions from strongly written decisions on both sides, in reality the jury—or more precisely the appellate courts and the Supreme Court—is still out and until a body of jurisprudence develops it will be hard to understand how big and permanent a change *SFFA* has wrought beyond the narrow context in which it was decided.

Moreover, it would be myopic to only look at the courts. Over 100 bills have been introduced (in more than thirty states) aimed at dismantling DEI programs. Just this month alone, Republicans introduced a bill to ban all federal DEI programs and cut federal funding for institutions that have their own DEI programs. State attorneys general are sending warning letters to and filing charges against leading companies with DEI initiatives, often citing the Supreme Court's decision in *SFFA*. All signs point to DEI continuing to serve as a flashpoint in this hotly contested election year.

Where do companies and public institutions go from here? As lawyers who specialize in DEI issues, we want to be clear: these attacks, though numerous, do not spell out the end of DEI. Indeed, far from it. We see firsthand the commitment of our clients to diversity and inclusion in the workplace, and as we assess programs, we regularly find that the vast majority of what clients do is permissible and not concerning even when considering the evolving legal landscape. But the assessment is important and without digging into the details of a program and understanding how it lines up with a

dynamic legal environment, companies risk either over- or under-reacting. One-size does not fit all and understanding the details of individual programs is the only way to make sure an organization is “risk intelligent”—carefully picking what initiatives to support with full awareness of how those programs fit within a company’s broader culture, identity, and tolerance for risk.

Related Attorneys

Ishan K. Bhabha
Co-Managing Partner
+1 202 639 6000

Lauren J. Hartz
Partner
lhartz@jenner.com
+1 202 637 6363

Erica Turret
Associate
eturret@jenner.com
+1 202 637 6383

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