The Business, Entrepreneurship & Tax Law Review

Volume 8 | Issue 1 Article 11

Diversity On Trial: Navigating Employer Diversity Programs Amidst Shifting Legal Landscapes

Mariana Larson

Diversity On Trial: Navigating Employer Diversity Programs Amidst Shifting Legal Landscapes

Mariana Larson

ABSTRACT

In the Summer of 2023, in a pivotal move, the Supreme Court nullified the application of affirmative action policies in both private and public universities nationwide. The Supreme Court's holding stripped the use of any race-conscious guidelines for admission aimed at enhancing diversity on college campuses. Although the Supreme Court's holding is grounded in Title VI and does not directly implicate employers and businesses, its aftereffects are poised to reshape how organizations approach their diversity, equity, and inclusion (DEI) initiatives. The legal landscape in this area is quickly evolving and employers need to be prepared to evaluate and potentially revise their DEI policies to mitigate legal exposure. This article extends its focus to the implications of the Supreme Court's decision within the employer context and delineates strategies and actions that employers can implement to limit their risk. In the face of legal uncertainties, this article serves as a guidepost, encouraging employers and businesses to not only adapt but to persevere in their pursuit of diversity, equity, and inclusion.

I. INTRODUCTION

Universities historically have been able to use a student's race as a factor in admission since the 1960s and 70s.[1] A school's ability to consider race as a factor comes from race-conscious admissions policies, otherwise known as affirmative action.[2] In a historic decision, the Supreme Court in 2023, struck down and effectively ended the use of affirmative action in college admissions.[3] The Court's decision deviated from decades of precedent that has previously held up race-conscious admission programs.[4] While the Supreme Court's decision does not directly impact employers and businesses, the ruling has the potential to shift how private employers approach diversity, equity, and inclusion ("DEI") policies, initiatives, and voluntary affirmative action programs.[5] The Supreme Court's affirmative action decision will have significant indirect consequences for private employers, as they will face greater scrutiny and legal challenges in their use of DEI programs.[6] Thus, employers, businesses, and companies are going to have to adapt to the rapidly evolving legal landscape in the wake of the Court's decision.[7]

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating based on race.[8] Historically, employers who seek to combat racial discrimination have implemented voluntary affirmative action and DEI initiatives.[9] In order to understand

---

1. *What You Need to Know about Affirmative Action at the Supreme Court,* ACLU (Oct. 31, 2022), https://www.aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court.

2. *Id.*

3. Amy Howe, *Supreme Court strikes down affirmative action programs in college admissions*, SCOTUSBLOG (Jun. 29, 2023, 12:31 PM), https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions.

4. Nina Totenberg, *Supreme Court Reverses Decades of Precedent by ending Affirmative* Action, NATIONAL PUBLIC RADIO (Jun. 29, 2023, 5:16 PM), https://www.npr.org/2023/06/29/1185140161/supreme-court-reverses-decades-of-precedent-by-ending-affirmative-action.

5. T. Scott Kelly et al., *The Supreme Court's Affirmative Action Ruling: A Shift in How Private Employers Approach DEI?*, OGLETREE DEAKINS (Aug. 9, 2023), https://ogletree.com/insights-resources/blog-posts/the-supreme-courts-affirmative-action-ruling-a-shift-in-how-private-employers-approach-dei.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

affirmative action and its impact on DEI programs and initiatives, it is important to break down the history of affirmative action and the Court's most recent decision. It is also necessary to break down the meanings of diversity, equity, and inclusion, and explore the impacts these programs and initiatives can have on the workplace. This comment will discuss the Supreme Court's affirmative action ruling and its potential impact on different types of DEI initiatives and programs that employers utilize. The comment will also look at what private employers can do to avoid potential legal challenges because of their DEI efforts, while still aiming to keep DEI policies.

II. HISTORY AND BACKGROUND OF AFFIRMATIVE ACTION

Affirmative action refers to policies that are used to increase workplace and educational opportunities for underrepresented groups.[10] These policies are meant to focus on demographics with "historically low representation in leadership and professional roles."[11] The polices aim at countering discrimination and reversing historical trends of discrimination against various segments of society.[12] Early implementation of affirmative action policies were mainly put in place to help aid the social segregation of minorities from institutions and opportunities.[13]

President John F. Kennedy signed Executive Order 10925 in 1961 where he used affirmative action for the first time to ensure that federal contractors treated applicants equally without regard to race.[14] After this executive order, future administrations promulgated several other executive orders that helped develop what we currently understand as affirmative action. It was not just presidents that built a legal standard for affirmative action, but in a long line of cases, the Supreme Court did as well. There are two previous Supreme Court cases that have looked at affirmative action within the Title VII context, and

10. Will Kenton, *What is Affirmative Action? How It Works and Example*, INVESTOPEDIA, (Sep. 30, 2023), https://www.investopedia.com/terms/a/affirmative-action.asp.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Affirmative Action Policies Throughout History*, AM. ASS'N FOR ACCESS, EQUITY, AND DIVERSITY, https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp (last visited Dec. 2, 2023).

these are *United Steelworkers of America v. Weber*[15] and *Johnson v. Transportation Agency, Santa Clara County, California.*[16]

In *Weber*, the Court held that Title VII cannot prohibit or condemn all private, voluntary race-conscious affirmative action plans.[17] The petitioner in *Weber* challenged the legality of an affirmative action plan that was collectively bargained by an employer and a union.[18] The plan was designed to eliminate "conspicuous racial imbalances" in the Kaiser Aluminum and Chemical Corp. by reserving 50% of its openings in its training program until the percentage of black workers matched a proportionate percentage in the local labor force.[19] The Court in *Weber* set the standard that employers wishing to justify their adoption of an affirmative action plan need to only point to a "conspicuous imbalance in traditionally segregated job categories."[20]

In *Johnson*, the Supreme Court, relying heavily on *Weber*, sustained an affirmative action plan for the Transportation Agency that aimed to counter the underrepresentation of women and racial minorities.[21] The Court held that the plan did not specifically set aside a position for women, so it did not set up a gender-based quota, but it authorized affirmative action measures when evaluating applicants in the hiring process.[22] The court emphasized that the Agency's plan mainly "intended to *attain* a balanced work force, not to maintain one," (emphasis added).[23] The Agency used numbers and percentages as benchmarks to measure its progress in fixing the underrepresentation of women.[24] The Court called the Agency's plan a "moderate, gradual approach" that "visit[ed] minimal intrusion on the legitimate expectations of other employees."[25]

15. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).
16. Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616 (1987).
17. *Weber*, 443 U.S. at 208.
18. *Id.* at 197.
19. *Id.* at 193.
20. G. Sidney Buchanan, *Johnson v. Transportation Agency, Santa Clara County: A Paradigm of Affirmative Action*, 26 HOUS. L. REV. 229 (1989).
21. *Id.* at 230.
22. *Id*. at 232.
23. Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 639 (1987).
24. *Id.* at 640.
25. *Id.*

III. STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE & STUDENTS FOR FAIR ADMISSION, INC. V. UNIVERSITY OF NORTH CAROLINA

The Supreme Court addressed the same issues in its most recent opinion, *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*[26] and *Students for Fair Admission, Inc. v. University of North Carolina*. The Court granted certiorari to both of these cases, combined the two, and issued an opinion addressing both under *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*.

Students for Fair Admissions ("SFFA"), is a nonprofit membership group, who believe that racial classifications in college admissions are "unfair, unnecessary, and unconstitutional."[27] The purpose of the group is meant to support, create, and participate in ligation that challenges affirmative action policies in higher education with a goal of eliminating race and ethnicity as factors for admissions.[28] The most recent and successful attempt to overturn affirmative action was led by Edward Blum, the founder of SFFA.[29] The group sued both Harvard and the University of North Carolina seeking an end to affirmative action plans used by the universities.[30] SFFA brought these actions arguing that the admissions process for Harvard and the University of North Carolina violated Title VI of the Civil Rights Act of 1964[31] and the Equal Protection Clause of the Fourteenth Amendment.[32] Title VI applies to private universities because they elect to receive federal assistance annually, while constitutional authority is applicable to public universities.[33] The Supreme Court ultimately held that the race-based admissions programs violated the Equal

26. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181 (2023).

27. STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org (last visited Nov. 8, 2023).

28. *Id.*

29. Joan Biskupic, *Challenge to Harvard's use of Affirmative Action was Designed by a Conservative to Reach a Friendly Supreme Court*, CNN (Updated 12:39 PM EDT, Mon Oct. 31, 2022), https://www.cnn.com/2022/10/30/politics/scotus-affirmative-action-college-admissions-edward-blum/index.html.

30. *Id.*

31. 42 U.S.C § 2000d (1964).

32. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181, 197 (2023).

33. *Id.* at 288.

Protection Clause of the Fourteenth Amendment as well as Title VI.[34] The Court further held that Harvard and University of North Carolina did not assert compelling interests to satisfy the Court's application of strict scrutiny in violation of both the Equal Protection Clause and Title VI. which created not only an equal protection violation but also a Title VI violation.[35]

The Supreme Court began its opinion with a lengthy discussion on the Equal Protection Clause's main purpose.[36] The Court surmised that the Equal Protection clause is meant to limit and remove governmentally imposed race discrimination.[37] The Court here specifically applied the two-part "strict scrutiny" test: whether there was a valid and judicially coherent compelling interest and whether the conduct was necessary and proper to achieve the universities' compelling interests. [38] These interests included but were not limited to, "training future leaders in public and private sectors, better educating its students through diversity, fostering innovation and problem-solving, enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."[39]

Writing for the majority, Chief Justice Roberts expressed that even though the universities' goals were commendable, they were illusive, not coherent, and not measurable enough for the purposes of strict scrutiny.[40] The Court used examples like school segregation or workplace discrimination cases to show that these cases allow courts to ask concrete questions that produced concrete answers.[41] For example, in workplace discrimination cases, courts can ask whether a race-based benefit make those in the discriminated class whole for the injury they have suffered.[42] The Court held that the compelling interests identified by the universities were not valid nor judicially coherent.

The majority also ruled that the universities' admissions programs failed to justify the means they used to advance the goals they had set

34. T. Scott Kelly, et. al., *supra* note 5.
35. *Students for Fair Admissions, Inc.*, 600 U.S. at 214.
36. Esther G. Lander, et. al., *Impact of SCOTUS Affirmative Action Ruling on Employers*, AKIN (July 5, 2023), https://www.akingump.com/en/insights/alerts/impact-of-scotus-affirmative-action-ruling-on-employers.
37. *Id.*
38. *Id.*
39. *Students for Fair Admissions, Inc.*, 600 U.S. at 214.
40. *Id.* at 214–15.
41. *Id.* at 215
42. *Id.*

in order to create diversity on their campuses.[43] Harvard and University of North Carolina worked to avoid underrepresentation of minority groups as their main goal,[44] and, in order to accomplish this goal, the universities use specific race classes to measure the racial composition of their incoming class.[45] These categories include Asian, Native Hawaiian or Pacific Islander, Hispanic, White, African-American and Native American.[46] The Court concluded that there was no evidence that established how using and assigning racial categories when making admissions decisions furthered the educational benefits and goals that Harvard and the University of North Carolina aimed to achieve.[47] The Court found the categories imprecise, overbroad, underinclusive and "undermine[d], instead of promote[d]" the universities' goals. The Court held that the means did not justify the goals in affirmative action.

Harvard and University of North Carolina argued that an applicant's race is never considered a negative factor in admission.[48] Here, the Court does not give any credit to the universities' argument as they see college admissions as a zero-sum game.[49] The Court found that it is essentially impossible for race to be a 'plus factor' for some applicants without, at the same time, functioning as a negative for others. [50] The Majority also found that "using race as a plus factor inevitably involves impermissible racial stereotyping."[51] Using precedent from *Grutter,*[52] the court expressed that universities cannot run their admissions programs using a belief that minority students have some sort of minority viewpoint on any issue.[53] When universities use race-based admission standards where some applicants might

43. *Id.*
44. *Id.*at 216
45. *Students for Fair Admissions, Inc.*, 600 U.S. at 216.
46. *Id.*
47. *Id.*
48. *Id.* at 218.
49. *Id.*
50. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181, 219 (2023).; *See also* Erik K. Eisenmann *et. al.*, *Impact of U.S. Supreme Court's Affirmative Action Decision on Private Employer DEI Programs and Recommendations for Employers*, HUSCH BLACKWELL, https://www.huschblackwell.com/newsandinsights/impact-of-us-supreme-courts-affirmative-action-decision-on-private-employer-dei-programs-and-recommendations-for-employers (last visited Nov. 5, 2024).
51. *Students for Fair Admissions, Inc.*, 600 U.S. at 214.
52. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).
53. *Students for Fair Admissions, Inc.*, 600 U.S. at 219–20.

have a step-up solely on the basis of race, the programs endure stereotyping, which is the exact practice G*rutter* renounced.[54]

Ultimately, the Court ruled that Harvard's and University of North Carolina's admission programs lacked measurable objectives for justifying the use of race in a negative matter and in racial stereotyping, as such the programs could not survive strict scrutiny, thus violating Equal Protection and Title VI. Chief Justice Roberts stressed that the decision did not completely bar universities from always considering race, instead, universities can consider an applicant's discussion of how race has impacted their life.[55]

It is important to discuss Justice Gorsuch's concurrence as he wrote more in depth about the Title VII implications than the majority opinion.[56] Gorsuch cites the plain meaning of Title VI, stating that it "prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin." [57] He re-emphasizes the fact that when admission programs use race as a factor, they are treating some applicants worse than others and this conduct is prohibited by Title VI.[58]

What is critical for this comment from Justice Gorsuch's opinion is that he links the Court's interpretation of Title VI to the language of Title VII.[59] He identifies Title VII's similar language that makes it unlawful for an employer to discriminate against an individual because of their race, color, religion, sex or national origin and because of the language similarity, a court needs to assume they have the same meaning.[60] He goes even further to say that both Title VI and Title VII "codify a categorical rule of 'individual equality, without regard to race.'" [61] Gorsuch's concurrence, while not the majority opinion, opens the door to potential issues with employer's diversity, equity,

54. *Id.* at 220.

55. Howe, *supra* note 3.

56. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181, 287 (2023) (Gorsuch, J., concurring).

57. *Title VII & DEI Program Implications of the Supreme Court's Recent Affirmative Action Decision*, DYKEMA (Aug. 16, 2023), https://www.dykema.com/news-insights/title-vii-and-dei-program-implications-of-the-supreme-courts-recent-affirmative-action-decision.html.

58. *Id.*

59. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring).

60. *Id.*

61. *Id.*

and inclusion programs that might use the same rationale as Harvard and University of North Carolina.

Justice Sotomayor wrote a dissenting opinion where she emphasized that when Congress passed the Fourteenth Amendment, they also passed several race-conscious laws to fulfill the Fourteenth Amendment's goal and promote equality.[62] Justice Sotomayor argues that the passage of these laws leaves no room to assume that the Equal Protection Clause does not permit race conscious practices to achieve its goal.[63] She also attacks the majority opinion for its conclusion that "indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions."[64] Justice Sotomayor also emphasizes the fact that the majority's holding "is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today."[65] The dissenters heavily emphasized that the majority turns a blind eye to the racial inequality in today's society and overrules decades of precedent that have upheld means to achieve racial equality which is central to the Fourteenth Amendment and the Equal Protection Clause.[66]

IV. BACKGROUND ON DIVERSITY, EQUITY, AND INCLUSION

Essential to the discussion on the impact of the Supreme Court's affirmative action decision is an explanation of the background and meaning of diversity, equity, and inclusion. DEI programs in the workplace are actions taken by corporations and businesses to raise and establish awareness of diverse backgrounds in the workplace and to create changing mindsets, behaviors and practices to create a more diverse, equitable, and inclusive work environment.[67] While each DEI aspect goes hand in hand with the others, diversity, equity, and inclusion alone have important differences that are critical in understanding the programs. Diversity is seen as all the ways in which people differ.[68] Diversity should be defined as "an embodiment of a group's

62. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College, 600 U.S. 181, 322 (2023) (Sotomayor, J., dissenting).
63. *Id.*
64. *Id.* at 333.
65. *Id.*
66. *Id.* at 333–34
67. *The Complete Guide to DEI* Initiatives, COOLEAF, https://www.cooleaf.com/guides/guide-to-dei (last visited Nov. 15, 2023).
68. *What Diversity, Equity and Inclusion Really Mean*, IDEAL., https://ideal.com/diversity-equity-inclusion (last visited Nov. 15, 2023).

composition."[69] Common types of diversity often do not include just race, age, and gender,[70] but can also include socioeconomic status, education, culture, spiritual and religious beliefs, and job title and professional experience.[71] While diversity can be looked at as how people differentiate themselves and are from different backgrounds and categories, equity is the aspect of DEI where concrete steps are taken to create fair opportunities and access to those who might align with being a part of a diverse background. When implementing equity, it is crucial to create a fair and even playing field.[72] Companies often integrate equity in their talent screening, hiring, and workplace standards.[73]

While a company or organization may promote its diversity and equity standards, it is important to make sure that those who might be in a diverse group also feel included in the company.[74] The best example of inclusion is where women might be represented in higher level management but because a company has a history of gender discrimination, these women might not feel as part of the company or treated as part of the company.[75]

Companies that employ DEI initiatives often see tangible benefits. Recent studies show that companies who prioritize DEI initiatives often see an increase in innovation and better financial outcomes.[76] It has also been reported that "companies with a good diversity strategy experienced a 56% increase in job performance." [77] A large number of people consider DEI programs in the workplace when deciding between job offers or when looking for new career opportunities.[78] This can lead to more effective employee recruitment. Overall, DEI programs can benefit employees, managers, and leaders within an organization and lead to fundamental change within a company.[79]

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *What Diversity, Equity and Inclusion Really Mean*, *supra* note 68.
74. *Id.*
75. *Id.*
76. *Id.*
77. COOLEAF, *supra* note 67.
78. *Id.*
79. *Id.*

IV. TYPES OF DEI INITIATIVES AND PROGRAMS

In their simplest format, DEI programs are meant to increase diversity in the workplace.[80] The main goals for DEI initiatives include "fostering diversity throughout the company, ensuring equity in opportunity, contribution, and advancement, and promoting inclusive teams and leadership."[81] Many DEI "programs today are focused on the selection process" of diverse candidates.[82] This means that many companies in the United States aim their diversity policies toward eligible applicants during their recruitment, hiring, and selection process for new employees.[83] There are also DEI programs that are implemented to continue DEI efforts within the company after the hiring process. The first of these initiatives is referred to as a promotion-based diversity program.[84] This program is considered an internal promotion initiative, where employers consider diversity when promoting internal employees.[85] Employers utilizing promotion-based DEI programs can analyze a candidate's diversity through different lenses, such as through their race, gender, socioeconomic status, and/or sexual orientation alongside other qualifications.[86] The second DEI program that goes past the selection process is a program in which employers take measures to make sure that existing diverse employees feel a sense of belonging.[87] These programs focus on a company's workplace culture to ensure employees are comfortable and feel included.[88]

There has been a modern corporate move to embrace diversity, equity, and inclusion programs in the wake of the Black Lives Matter Movements and it has since grown tremendously in the business

80. Zachary McCoy, *Workplace Diversity, Equity, and Inclusion Programs: Inclusive Environments and Diversity Promotion Programs*, 55 U.S.F. L. REV. 153, 159 (2021).
81. Keith Mackenzie, *What are your top DEI initiatives for the workplace?*, RESOURCES FOR EMPLOYERS (Sep. 2023), https://resources.workable.com/stories-and-insights/top-dei-initiatives-for-the-workplace-dei-survey-report.
82. McCoy, *supra* note 81, at 159.
83. *Id.*
84. *Id.* at 161–62.
85. *Id.* at 161.
86. *Id.* at 162.
87. *Id.*
88. McCoy, *supra* note 81, at 162.

landscape.[89] These new DEI initiatives have ranged from symbolic to systematic.[90] For example, 22Squared, a marking agency out of Atlanta, collaborated with the NAACP to seek out remaining Confederate monuments across the United States in order to let visitors know the history of the statutes, but then allow them to call local officials to call for the statues removal.[91] McDonald's on the other hand has started to offer low-interest loans to new franchisees in order to help increase the diversity of its ownership.[92] These are examples of large corporations employing their own DEI initiatives and programs. While these programs are on the extreme line of DEI initiatives (the programs above were considered to be strong efforts from companies in implementing DEI programs), most companies have implemented DEI plans that fall somewhere in the middle of those described above.[93] These range from evaluating the makeup of a company's workforce and how it can improve on its diversity to allowing employees from within to speak out about their DEI concerns in a DEI-focused-town hall program.[94] One of the largest freight transporter companies, XPO Logistics, became the first in its field to establish a separate DEI office to develop resources and launch programs that aid those in particular demographics and minorities.[95]

There are other programs and initiatives that face a higher risk of being found to be unlawful because these programs are going to specifically look at race as a determining factor or use race as an individual characteristic to implement the program. These initiatives include companies that require diverse interview slates, those that limit opportunities to specific underrepresented groups (these programs include internships or scholarships for specific race/ethnicity or gender groups, businesses' that implement leadership development programs that aim at increasing diversity in leadership, and mentorship initiatives), company programs that set goals and timelines for representation with specific roles, programs that incentivize those making

89. Dale Buss, *12 Ways Companies Are Boosting Their DEI*, SHRM (Mar. 9, 2022), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/12-ways-companies-are-boosting-their-dei.aspx.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Buss, *supra* note 90.

decisions in the company to base decisions on DEI results, or companies that have rules that require diversity on boards of directors.[96] All of these programs focus on race-conscious considerations, which in the wake of *SFFA*, will likely need to be re-evaluated in order to comply with the current law.

V. AFFIRMATIVE ACTION IMPLICATION ON DEI PROGRAMS

Soon after the Supreme Court's decision in *SFFA*, Attorneys General (AG) in thirteen states sent a letter to Fortune 100 companies discussing their thoughts on the decisions and the application of the decision to private employers.[97] The letter threatened major consequences for companies that implemented DEI policies the AGs believed to be in violation of the framework set out in *SFFA*, specifically programs that lack measurable objectives for justifying the use of race, programs that use race in a negative matter or use forms of racial stereotyping.[98] The letter explicitly questioned DEI programs operated by private employers and went on to rationalize that, under the recent decision, racial quotas and preferences in hiring and recruiting are unconstitutional. [99]

In response, the Equal Employment Opportunity Commission Chair released a statement regarding the *SFFA* decision:

> [This decision] does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. 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.[100]

96. T. Scott Kelly, et. al., *supra* note 5.
97. Erik K. Eisenmann *et. al.*, *Impact of U.S. Supreme Court's Affirmative Action Decision on Private Employer DEI Programs and Recommendations for Employers*, HUSH BLACKWELL, https://www.huschblackwell.com/newsandinsights/impact-of-us-supreme-courts-affirmative-action-decision-on-private-employer-dei-programs-and-recommendations-for-employers (last visited Nov. 12, 2024).
98. *Id.*
99. *Id.*
100. *Id.*

Legislators have even sent letters to private employers citing civil rights violations because they maintain DEI programs.[101] Senator Tom Cotton sent letters to 51 law firms alleging that the firms and some of their clients are in violation of the recent Supreme Court decision in *SFFA* for maintaining DEI policies.[102] While the Attorney General's letter, the EEOC chairwoman's statement, and Tom Cotton's letter do not have the force of law,[103] they consist of differing opinions. In the wake of the AG's letter and EEOC's response, it is important to note that most often companies do not implement racial quotas and hiring preferences as practices in their DEI programs and typically do not consider race as the *only* factor in making employment decisions.[104] This illustrates what has led to the confusion of an employer's legal obligation because of the Court's affirmative action decision.

Following the Supreme Court's recent decision and the opinions coming from several Attorneys General across the United States and the EEOC, businesses and companies should be prepared for increased scrutiny of their DEI initiatives and a potential for litigation to rule DEI programs unlawful.[105]

Litigation will likely form through employees, potential employees or applicants, or through groups like *SFFA* where they can file claims for "reverse discrimination."[106] Reverse discrimination happens when "historically advantaged groups consider themselves discriminated against because of certain protected characteristics."[107] This often includes a discrimination claim made by a Caucasian, heterosexual male.[108] Essentially, the decision from *SFFA* may influence those who are in the majority to bring claims against their employer for their DEI programs.[109] These employers must have programs or initiatives that allegedly discriminate against those in majority races. Unfortunately, defending these claims, even when they

101. *Id.*
102. *Id.*
103. Erik K. Eisenmann *et. al.*, *supra* note 98.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. Erik K. Eisenmann *et. al.*, *supra* note 98.

might be unsupported, can cost a company a substantial amount of time, money, and resources.[110]

While *SSFA* does not directly apply or impact private employers since the Supreme Court used Title VI for private universities receiving federal funding[111], Title VII applies to private and public employers with fifteen or more employees.[112] "Justice Gorsuch's concurring opinion puts employer's DEI programs on notice."[113] If an employer's DEI programs use race, gender, gender preferences, sexual orientation, or disabilities in not only hiring but also in deciding promotions, they will come under attack.[114] The Court's affirmative action decision has already impacted large law firms like Perkins Cole, Gibson Dunn, and Morrison & Foerster, and more continue to be brought into litigation.[115] Edward Blum, who led the charge in *SFFA* filed lawsuits against these firms over their fellowship programs that aim at hiring diverse candidates.[116] Blum has created a group called Alliance for Equal Rights which believes that these fellowship programs are "racially exclusive."[117] Employers are already seeing the impact of *SSFA* and its implications on their DEI programs and initiatives.

---

110. *Id.*

111. *Implications for Private Employers of the Supreme Court's Harvard Decision Banning Race-Based Affirmative Action in College Admissions*, CROWELL (Jul. 14, 2023), https://www.crowell.com/en/insights/client-alerts/implications-for-private-employers-of-the-supreme-courts-harvard-decision-banning-race-based-affirmative-action-in-college-admissions.

112. *What you need to know about Title VII of the Civil Rights Act*, THOMSON REUTERS (May 10, 2022), https://legal.thomsonreuters.com/en/insights/articles/what-is-title-vii-civil-rights-act.

113. DYKEMA, *supra* note 57.

114. *Id.*

115. Tatyana Monnay, *Perkins Coie, Morrison Foerster Sued Over DEI Programs (2)*, BLOOMBERG LAW (Aug. 22, 2023, 9:43 PM), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-news/BNA%200000018a1df2da9ba78e9dfaae510001?bna_news_filter=bloomberg-law-news.

116. *Id.*

117. Nate Raymond, *Anti-Affirmative Action Activist Targets 3 More Law Firms' diversity fellowships*, REUTERS (Oct. 12, 2023, 6:34 PM), https://www.reuters.com/legal/legalindustry/anti-affirmative-action-activist-targets-3-more-law-firms-diversity-fellowships-2023-10-12.

VI. Recommendations for Employers to avoid DEI suits while still promoting Diversity, Equity, and Inclusion

In order for companies or businesses to apply DEI programs and initiatives properly, they must comply with Title VII.[118] Title VII has always kept employers from making hiring and employment decisions based on race, gender, and other protected classes.[119] This has not changed when it comes to employers looking to achieve their DEI efforts and goals.[120] While employers and businesses do no not fall under Title VI, they have the potential to face scrutiny over their DEI commitments and programs in the wake of the Supreme Court's holding and reasoning that emerged in *SFFA*. Employers seeking to maintain diverse and equitable workplaces will want to consider DEI strategies and programs that focus beyond just race, like socioeconomic background, education, and life experiences.[121]

Going forward, employers should think about focusing and shining a light on their inclusion efforts, rather than diversity, as it draws away issues of race and reverse discrimination that can create potential legal problems because of *SFFA*.[122] Focusing on inclusion can still advance employers DEI efforts as it is meant to create workplace environments where diverse employees feel "welcomed, respected, valued, and supported."[123] The focus on inclusion means that employers can create specific programs within their company to ensure a more collaborative environment and a workplace where employees feel not only supported but also have a strong sense of belonging. Workplace trainings focusing on inclusion and diversity are programs that employers can continue to provide and should continue to provide as it is the one area that does not create racial segregation or race conscious policies. These trainings should include topics like anti-discrimination, anti-harassment, DEI related topics like cultural competency and implicit bias training.

Companies have been fostering their inclusion and workplace DEI efforts by implementing cultural programs. For example, Unified for Pride Month put together celebratory initiatives that included an informational session hosted by community members centered

118. McCoy, *supra* note 81, at 154.
119. Erik K. Eisenmann *et. al.*, *supra* note 98.
120. *Id.*
121. T. Scott Kelly, et. al., *supra* note 5.
122. *Id.*
123. *Id.*

around supporting LGBTQ+ homeless youth and brought in treats and foods from businesses that were LGBTQ+ owned.[124] Businesses and companies can continue to foster these programs within the walls of their company without fear of facing reverse discrimination claims. These inclusion programs can be as simple as having lunch catered where the food revolves around different cultures every month. This is a simple and easy way to encourage diversity and inclusion *in* the workplace. Since these are not programs that look to hiring or separating individuals in any way because of their race, employers can expect to not face much legal repercussion, while still maintaining some DEI programs within their companies.

Companies and businesses should review all DEI initiatives and programs that they currently have in place in order to mitigate the risk of being targeted for reverse discrimination. First, companies need to ensure that they are not using racial quotas or set asides when making hiring and advancement goals.[125] This means that companies should highly consider (for the time being in the current legal landscape) not setting race centered goals for advancement and hiring opportunities. For example, if a company has a policy that says their next three management team hires need to come from a diverse or ethnic background, employers are putting themselves at a higher risk of being sued for reverse discrimination under the reasoning provided by *SFFA*.

Next, companies need to confirm that they are defining diversity in terms of more than just race and ethnicity.[126] Diversity includes more than just these characteristics, as it can also include education, languages spoken, and experiences had. At the end of the majority's opinion in *SFFA*, the Court stressed that they were not limiting the universities from considering how race has impacted an applicant's life. This means that employers can look beyond just race when considering diversity. Down to its simplest form, diversity entails an individual's characteristics on what makes them unique.[127]

As such, employers should look for applicants that might bring a unique perspective along with the requisite experience or background necessary for the job. The employer will need to ensure that if they

124. Nicole Fallon, *A Culture of Inclusion: Promoting Workplace Diversity and Belonging*, BUSINESS NEWS DAILY (Oct. 19, 2023), https://www.businessnewsdaily.com/10055-create-inclusive-workplace-culture.html#.
125. Erik K. Eisenmann ,*et. al.*, *supra* note 98.
126. *Id.*
127. *Id.*

are drawing on an individual's distinction that they are doing it in order to fulfill a legitimate business need.[128] Employers may need to conduct a thorough job analysis to identify the essential functions and requirements of the job they are needing to fill. This will allow employers to really know the specific qualifications and characteristics they need to aim for to fulfill a legitimate business need. For example, perhaps the job that a candidate is applying for requires a global perspective because they will be traveling to various other countries. This means that when a company is hiring for this job position, they should determine characteristics that are going to be needed to fulfill the business need of being able to do business with people from different cultures and countries.

When reviewing a company's hiring process, employers will need to maintain equitable and fair standards across the board for every applicant they interview.[129] This means asking every applicant the same questions.[130] This also means that employers might need to review their job descriptions and perhaps alter them to ensure that they do not leave themselves open for reverse discrimination suits.[131] Several law firms who had diversity fellowships were forced to change their job descriptions to reflect a more racially neutral position by opening up their fellowships to everyone and no longer limiting the applicant pool to racial minorities and ethnicities.[132] Hiring and applicant pools might need to be expanded or employers will have to draw a clear link between its hiring protocol and its efforts to diversity so it can prove on a challenge that its means were measurable and not broad in order to satisfy present legal standards.[133]

---

128. DYKEMA, *supra* note 57.

129. Becca Carnahan, *6 Best Practices for Creating an Inclusive and Equitable Interview Process,* HARVARD BUSINESS SCHOOL, (May 25, 2023), https://www.hbs.edu/recruiting/insights-and-advice/blog/post/6-best-practices-to-creating-inclusive-and-equitable-interview-processes.

130. *Id.*

131. Samia M. Kirmani & Michael D. Thomas, *Ten DEI Steps Employers Should Consider Now*, JACKSONLEWIS (Sep. 5, 2023), https://www.jacksonlewis.com/insights/ten-dei-steps-employers-should-consider-now.

132. Leah Shepherd, *Law Firms Sued over Inclusion, Equity, and Diversity Programs*, SHRM (Oct. 19, 2023), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/law-firms-diversity-programs.

133. *See generally* Mac McIntosh, *et. al., Expanding Your Recruitment Pool through Increasing Diversity, Equity, and Inclusion*, EDUCAUSE REVIEW (Jun. 5, 2017), https://er.educause.edu/articles/2017/6/expanding-your-recruitment-pool-through-increasing-diversity-equity-and-inclusion.

Companies and businesses cannot have policies that are seen as disadvantageous to a specific category of individuals. Companies will also have to be prepared to articulate compelling interests that can survive under *SFFA*. This means business should conduct DEI audits. DEI audits are a formal analysis and review of "a company's policies, practices, and initiatives as they relate to defined diverse and/or non-white . . . employees."[134] These DEI audits may be critical right now for companies to ensure that its initiatives are non-discriminatory and equitable, to make sure companies can measure the effectiveness of its DEI policies and programs and help to identify changes that a company might need to make in order to produce more inclusivity and equitable outcomes.[135]

The majority in *SFFA* also articulated that in order for affirmative action to be appropriate it requires a logical end point because affirmative action sought to balance the scales in diversity on college campuses.[136] This means that employers should consider DEI programs that are short-term or potentially limited in order to stay in compliance with future developments to show that these programs were used as a way to balance the racial gap in their company. Short-term programs can include a one-year mentorship program for underrepresented groups that has a clear-cut ending date. In order to stay even more compliant under the *SFFA* decision, it would create short term mentorship programs that are open to all employees, but the mentorship emphasizes building DEI culture within the company. Companies could also create a diverse speaker series within their company, where they bring in diverse speakers to share their experiences and insights. This program would need to be short term as well. Short term programs can make a positive impact on DEI efforts into creating a welcoming work environment while still implementing DEI centered initiatives without fear of being sued. The implementation of short-term DEI programs can have a positive impact in creating a welcoming work environment while allowing employers to continue implementing DEI programs without the fear of being sued.

---

134. Valecia McDowell, Esq., Chassity Bobbitt, Esq., and Jonathan D. Gilmartin, Diversity Culture Clashes: the Desire for and Backlash to DEI Audits and Interventions, WESTLAW TODAY (Feb. 9, 2023), https://today.westlaw.com/Document/I86218405a8af11ed8636e1a02dc72ff6/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

135. *See generally id.*

136. Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181, 221 (2023).

In order for employers to mitigate their risk of a lawsuit being brought against them for their DEI programs and policies, they will primarily need to ensure that they are in no way using race as a "plus factor." This means that employers cannot treat similarly situated individuals differently because of their race when they are considering hiring or promoting the individual. Employers will need to review their hiring practices to ensure that racial quotas are not being implemented. They will also need to make sure that race-centered goals for advancement in their management are not set. Employers and companies should also highly consider conducting DEI audits on their policies and programs, in order to really know where they currently stand in terms of the *SFFA* decision. If employers choose to implement DEI programs, they will need to ensure that the programs have a logical end point and are used to fulfill a legitimate business need.

Employers do not have to drop every DEI initiative all together out of fear of being sued. Diversity efforts can have significant impacts on a company and their work culture. As such, employers should consider focusing their DEI efforts on inclusion programs within their company. This includes implementing workplace trainings and hosting cultural programs and events for employees to attend. Employers should also use the SFFA notion that they do not have to eliminate race from consideration completely, as they can consider it in how it has impacted an applicant's life. This means that employers should broaden their definition of diversity and look toward what makes an individual applicant unique. Employers can clearly take steps to mitigate their risk of a lawsuit, but this does not mean that all DEI efforts should be thrown away as a lost cause as DEI is critical for a company's innovation, market and customer understanding, global competitiveness, and increased employee engagement and belonging.

VII. CONCLUSION

In the summer of 2023, the Supreme Court of the United States handed down a decision that changed the landscape of affirmative action to colleges and universities. While this decision does not directly impact employers and businesses, it will shift how employers approach their diversity, equity, and inclusion programs because they may no longer use race-conscious policies to advance their DEI efforts, as they may face potential and costly litigation for reverse discrimination. This includes programs like diversity fellowships, hiring

quotas that center around diversity, and leadership trainings and policies that promote racial or ethnic minorities. In order for businesses and companies to continue to advance their DEI programs they will need to make adjustments in accordance with the ruling from *SFFA.* This entails reviewing and modifying job descriptions, adjusting any policies that treat similarly situated individuals differently because of their race, and focusing on inclusion.