Impact of Supreme Court's Fair Admissions Decisions on Employers and Diversity, Equity, Inclusion and Belonging Initiatives

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Today's Agenda

01 Background and Ruling of The Fair Admissions Cases

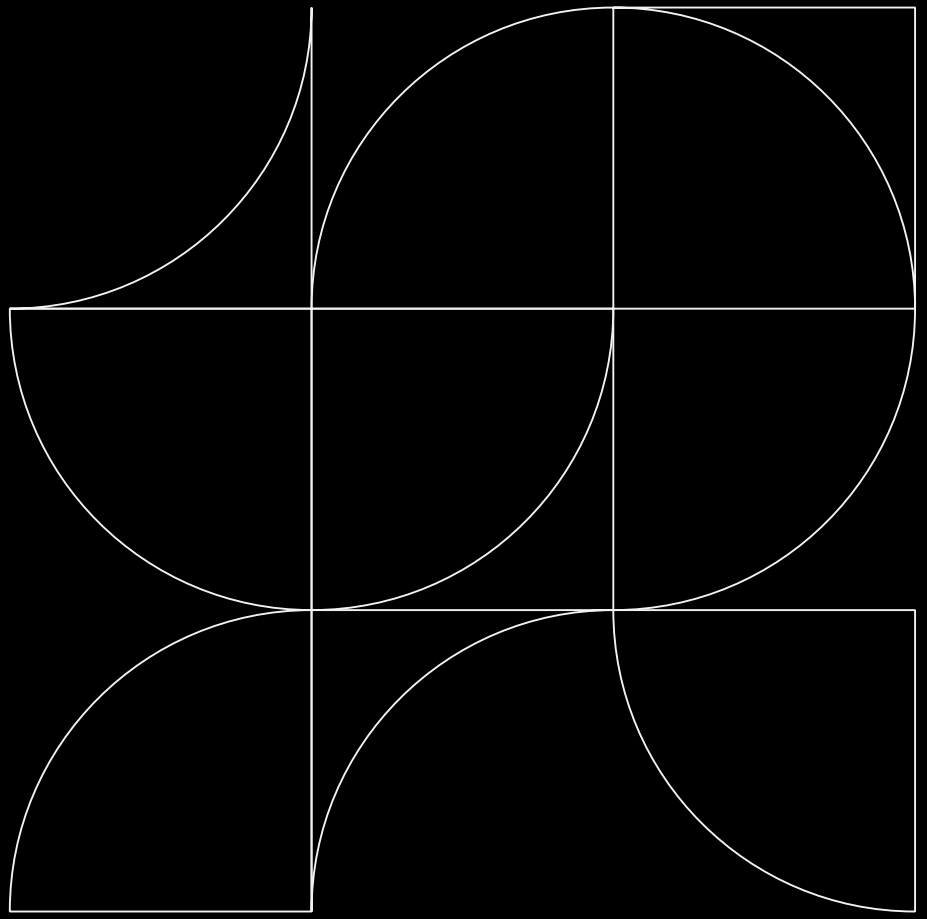
02 Affirmative Action in Employment: The Law and Trends

03 Impact on Employers, and on Diversity, Equity, Inclusion and Belonging Initiatives

04 Practical Takeaways

1

Background and Ruling of The Fair Admissions Cases



SCOTUS' Evolving View of Race-Based Decisions in Education

- Decades of sharply divided opinions
- Is the schools' articulated goal – achieving the educational benefits of a diverse student body –a sufficiently "compelling interest" to justify race-based decisions?
- Can progress towards that goal be measured?
- Are schools' responsive actions "narrowly tailored"?
- Are race-neutral alternatives available?

Bakke v. Regents of the Univ. of California *(1978)*

- No single majority opinion; six separate opinions

==) No racial quotas, but some consideration of race is okay

Grutter v. Bollinger**, 539 U.S. 306 (2003) (5-4)**

- School consideration of race in admissions permissible
  - It was "narrowly tailored,"
  - furthered **a "compelling interest" – the educational benefits that flow from a diverse student body,** and
  - used a highly individualized review of each individual, no "automatic" rejections based on race

Justice O'Connor:

"25 years from now, the use of racial preferences will no longer be necessary"

Fisher v. University of Texas

"Fisher I" – 2013 (7-1 vote to remand)

– Lower courts had not applied "Strict Scrutiny"

"Fisher II" – 2016 (4-3 upheld policy)

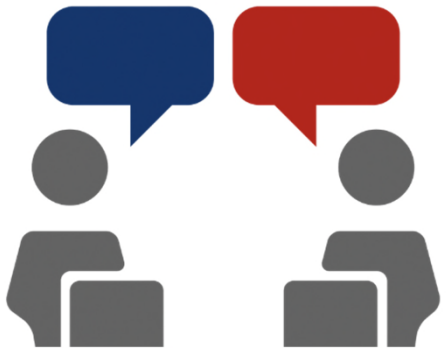
– Policy satisfies strict scrutiny

– **Acknowledged the "compelling interest" in obtaining "the educational benefits that flow from student body diversity"**

- Goals: "**ending stereotypes, promoting 'cross-racial understanding,' preparing students for 'an increasingly diverse workforce and society,' and cultivating leaders with 'legitimacy in the eyes of the citizenry'"**

Today's Context:

- Continuing societal debate on diversity and prejudice
- Varying views on equity and fairness
- The Golden Rule, wanting to do right, but…. what is that?
- Divisive political environment
- Social media
- Shareholder activism
- Advocacy groups



The Students for Fair Admissions Cases

SFFA v. Harvard

Alleged discrimination against Asians

Claim under **Title VI of the Civil Rights Act of 1964**

School allowed race/ethnicity to be considered as part of a candidate's "personal rating" in their application for admission

Goal of admissions policy was to prevent a "dramatic drop-off" in minority admissions compared to the prior class

vs.

SFFA v. UNC

Alleged discrimination against Whites and Asian Americans

Claims under **Title VI and the Equal Protection Clause**

School allowed race/ethnicity to be considered a "plus" factor in an overall "holistic" admissions process

Goal of admissions policy was to ensure that the minority enrollment percentage was not lower than the minority representation in NC's general population

SSFA v. Harvard; SSFA v. UNC

- Both schools claimed their programs were consistent with *Grutter*
  - Race is just one "plus" factor in a comprehensive admissions process
  - Also, schools should have discretion to decide whether to use race based on their experience/expertise regarding the educational benefits of student diversity
- Lower courts agreed.

Issues Framed By the Court:

1. Is the racial classification used to "further compelling government interests?"
2. If so, is the use of race "narrowly tailored" to achieve that interest?

Governing Law

Title VI of the Civil Rights Act of 1964	vs.	The Equal Protection Clause of the 14th Amendment
Prohibits race discrimination by entities that receive federal funding		Requires states and state-run institutions to govern impartially
No person "shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."		Prohibits distinctions between individuals that are irrelevant to a legitimate governmental objective
		No state shall "deny to any person…the equal protection of the laws"

Discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. *Gratz v. Bollinger*

The Court's Ruling

Overruled the lower courts 6-2 (Harvard) and 6-3 (UNC)

Held:

– The policies, which permitted the schools to consider an applicant's race when making admissions decisions, violate the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act.

> ***[T]he Harvard and UNC admissions programs… lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."***

But "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."

Why SCOTUS Said the Practices Failed Strict Scrutiny Review

Interests cannot be subjected to meaningful judicial review or measurement

- *"although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny"*

The policies lack a meaningful connection between the means they employ and the goals they pursue

- *"racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"*
- imprecise race categories

Race may never be used as a "negative" and may not be based on stereotypes

- College admissions are zero-sum—a benefit to some necessarily advantages them over others

Lack of any logical end point

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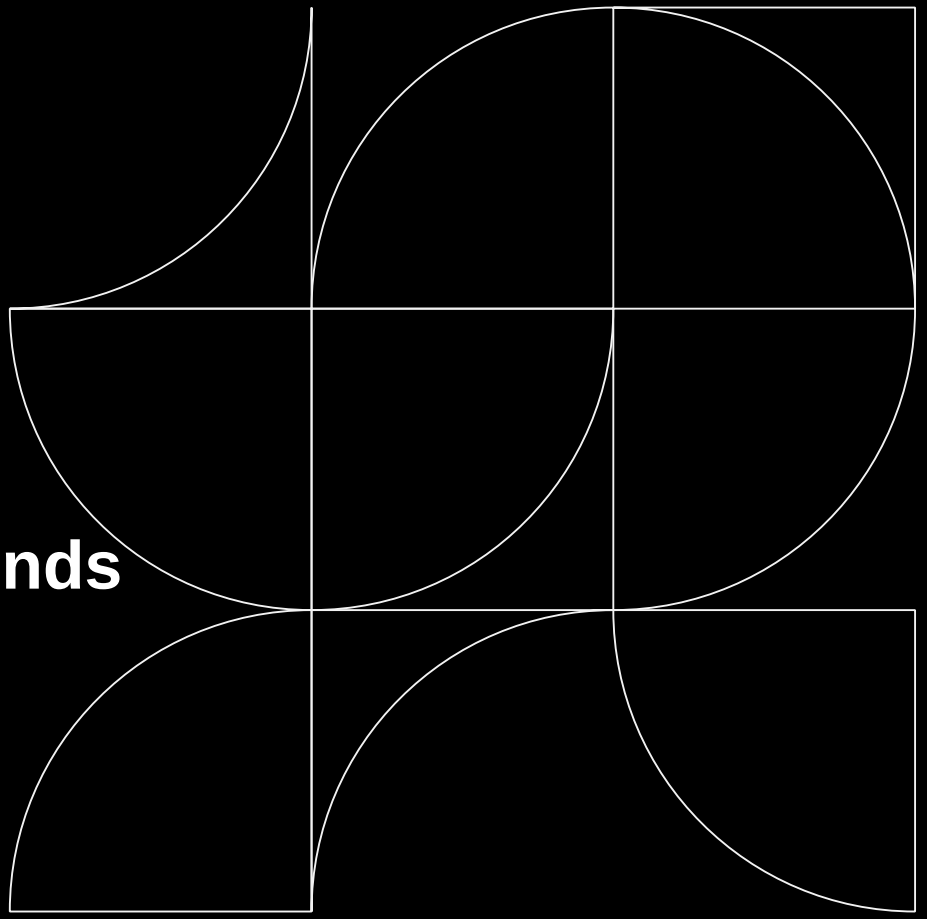
Affirmative Action in Employment: The Law and Trends



The Legal Landscape for Private Employers

Affirmative Action in the employment context is very different than the education context.

Consideration of race and other protected traits in decision-making is strictly prohibited.

The primary civil rights law for these purposes is Title VII of the Civil Rights Act of 1964, which protects against discrimination based on race, color, sex, national origin and religion.

Note:
Race/Gender-based preferences are unlawful except in very narrow circumstances specifically designed to correct "manifest imbalance" in the workplace.

The *Weber* Framework Under Title VII

This standard is used sparingly in the DEI space.

Employers should proceed with caution if making race/gender-based decisions in the workplace, particularly now.

United Steelworkers of America, AFL-CIO-CLC v. Weber
443 U.S. 193 (1979)

An employer can only consider a protected trait in employment decisions under Title VII if it can establish that:

1. There is a demonstrated, statistical, "manifest imbalance" between groups in one or more traditionally segregated or underrepresented groups;

2. The measures implemented are narrowly tailored, and do not "unnecessarily trammel" the rights of others;

3. The affirmative action program is temporary and limited in duration, meaning that the measures will stop once the imbalance is rectified.

"Voluntary" Affirmative Action Under Title VII / EEOC Guidelines

28 CFR 1608.1 et seq.

CM-607

"Affirmative action under the Guidelines is not a type of discrimination but a ***justification*** *for a policy or practice based on race, sex, or national origin."*

"Affirmative action" is permitted:

- based on an analysis that reveals adverse impact, if the impact was likely caused by existing policies or practices
- to correct the effects of past discrimination
- some actions also allowed to address an "artificially limited" labor pool

Must have the "3 Rs" of Reasonableness:

1. a reasonable self analysis
2. a reasonable basis for concluding action is appropriate
3. reasonable action

Note: "Voluntary affirmative action" as described in EEOC's guidance, is not the same as the DEI initiatives implemented by most employers.

“Reverse” Discrimination: Understanding the Issue

“Reverse discrimination” refers to discrimination against members of “historically advantaged” groups on the basis of race, color, national origin, sex, religion, or other status protected under Title VII of the Civil Rights Act of 1964.

- *While the commonly-used term “reverse discrimination” may suggest something else, the EEOC takes the position endorsed by most courts:*

“Reverse” discrimination is discrimination, plain and simple.

- *EEOC pursues reverse discrimination claims using Title VII standards – same analysis*

- *When OFCCP audits federal contractors, it also evaluates employment decisions that impact white and male employees*

Mandatory Affirmative Action for Federal Contractors

- Federal contractors have affirmative action requirements under:
  - Executive Order 11246 (for women and minorities),
  - Section 503 of the Rehabilitation Act of 1973 (individuals with disabilities), and
  - Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA," for veterans).

- Enforced by the Office of Federal Contract Compliance Programs ("OFCCP"), which follows Title VII of the Civil Rights Act.

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
OFCCP
U.S. DEPARTMENT OF LABOR

Mandatory Affirmative Action for Federal Contractors

Required:

- Non-discrimination policies and practices are required
- Contractors must also affirmatively evaluate their policies and practices to ensure no particular race, ethnicity, or gender, is adversely impacted by the company's policies and practices
- Typically involves an evaluation using a statistical or other data analysis of employment decisions (hiring, promotions, terminations, and pay)
- Targeted diversity sourcing and outreach efforts where an analysis shows the available pool has more women or minorities than the contractor employs

Prohibited:

- Use of any protected trait in employment decisions, including as a "plus" factor
- Quotas or set-asides
- Preferential treatment

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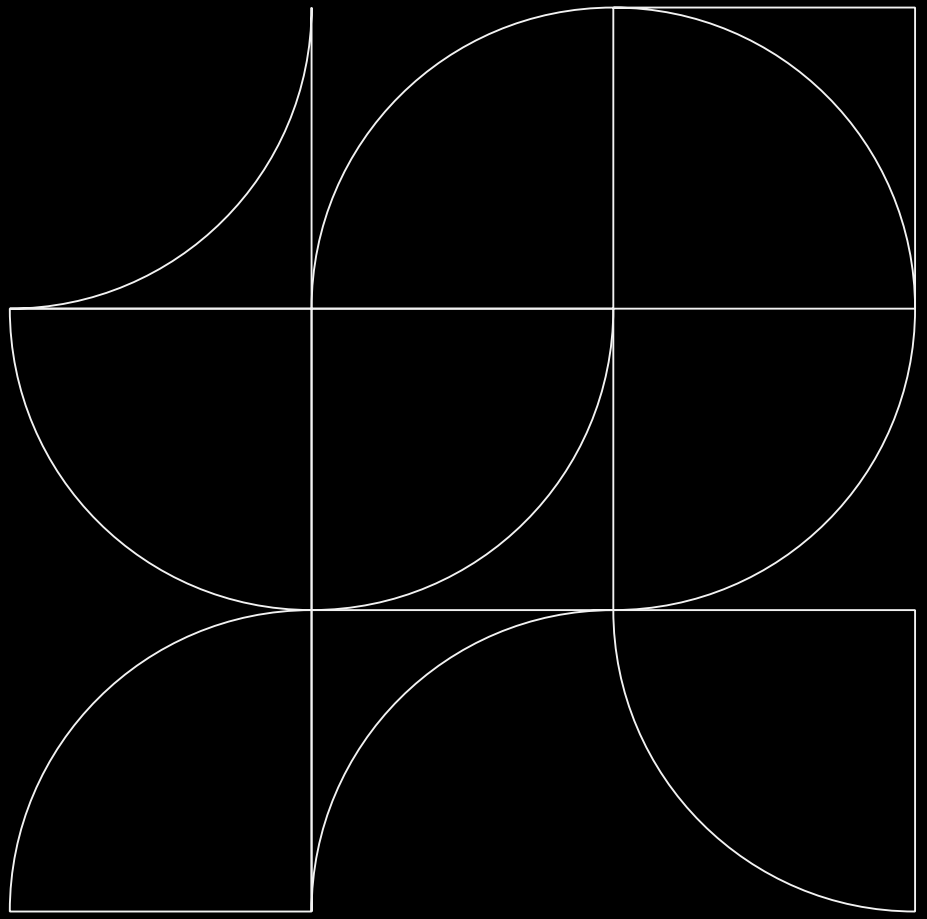
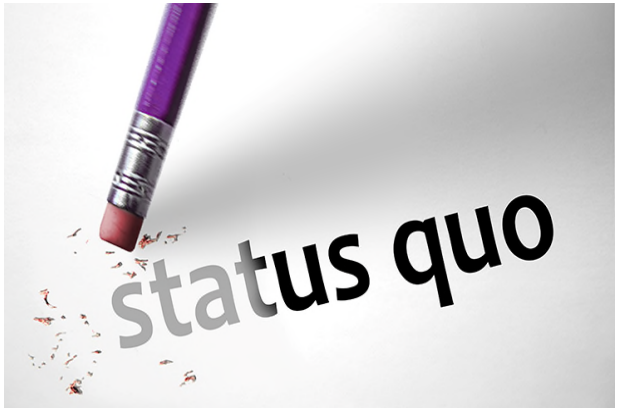
Impact on Employers, and on Diversity, Equity, Inclusion and Belonging Initiatives



Where does this leave your business?

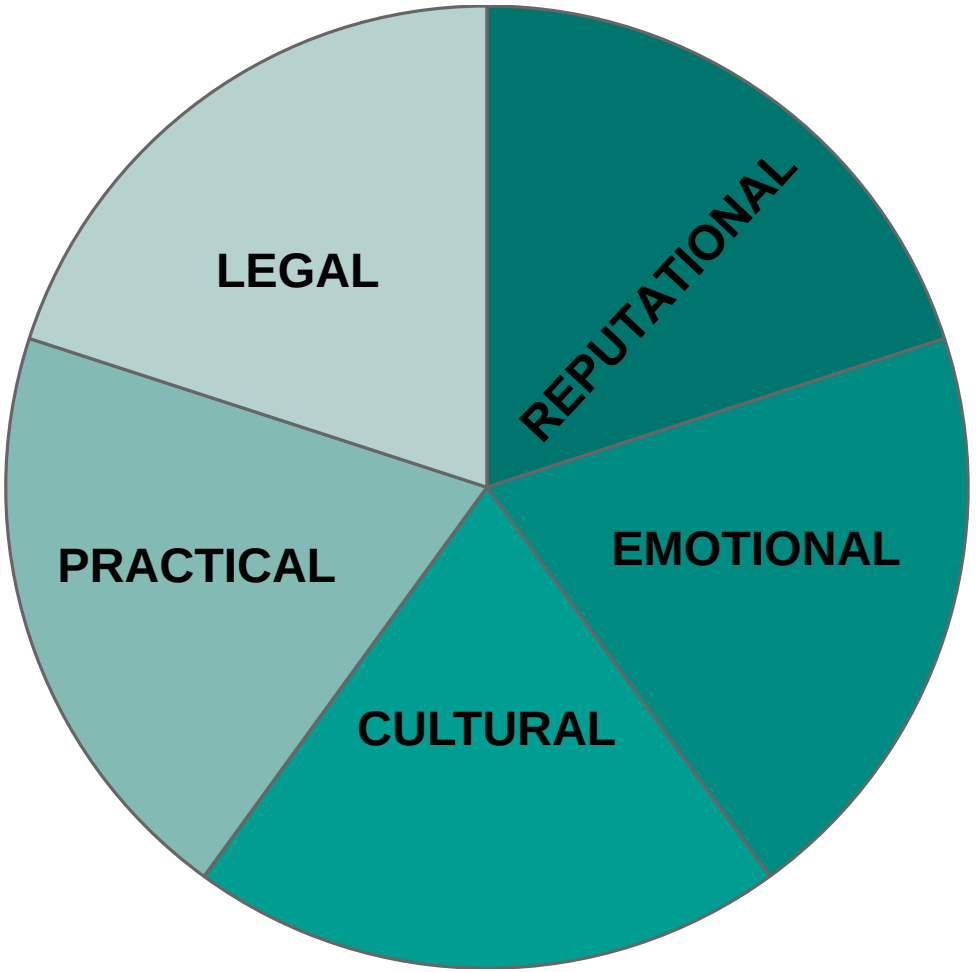
Between a Rock and a Hard Place?

or



Exactly where you were?

Different Areas of Potential Impact



LEGAL:

Is there Any Direct Impact?

No.

- 14th Amendment does not apply to private companies
  – Title VII, not Title VI, governs employment decisions
- No direct impact on federal contractors and subcontractors
  – EO 11246, Section 503, VEVRAA still control

- Employers (still) may NOT:
  – Use quotas or set-asides
  – Motivate decisionmakers to act “because of” race
  – Rely on “stereotypes”

- Employers (still) MAY:
  – Support the concept of diversity in employment
  – Have Diversity | Equity | Inclusion | Belonging | Accessibility policies (DEI, DEI&B, DEIB&A)

Key Takeaways on Immediate Legal Impact

If your diversity, EEO, and affirmative action programs and policies were legal and compliant prior to this decision, they remain so!

- But:
  - There is no better time to review and assess your policies and practices
  - Prepare for additional scrutiny from employees, the public, shareholders, and others
  - Carefully monitor legal developments

All it takes for the landscape to change dramatically is for the right employment "test" case to come before the Supreme Court.

ONGOING AND FUTURE LEGAL CHALLENGES

- Several cases are already before district courts
- Plaintiffs include employees, former employees, “think tanks” and shareholders
- Challenging different aspects of employer DEI efforts
  - Distributing employee DEI data internally to leaders
  - External and internal announcements of specific numerical DEI goals
  - Failure-to-hire reverse discrimination cases
  - Practices that encourage the promotion of only minorities and/or women
  - Alleged removal of white male(s) to improve diversity
  - Actions geared towards achieving or maintaining racial “balance”
- *What may be next?*

Is the Current Supreme Court Likely to Rule Against the *Weber* Exception and/or Affirmative Action in Employment?

Justice Gorsuch, concurring (emphases added):

- "If this exposition of Title VI sounds familiar, it should. **Just next door, in Title VII,** Congress made it 'unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1).'"
- "This Court has long recognized…that when Congress uses the same terms in the same statute, we should presume they 'have the same meaning.' …And that presumption surely makes sense here, for as Justice Stevens recognized years ago, **'[b]oth Title VI and Title VII' codify a categorical rule of 'individual equality, without regard to race.**'"
- "[E]verything said here about the meaning of Title VI tracks this Court's precedent in Bostock interpreting **materially identical language in Title VII."**
- **"The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next."**

PRACTICAL, CULTURAL, EMOTIONAL, REPUTATIONAL

IMPLICATIONS

Potential Indirect Cost and Impact:

- Employee confusion
- Decreased employee morale
- Personal disagreement or distress over outcome
- Negative PR if policies are viewed (rightly or wrongly) as problematic
- Time spent preparing, communicating, and responding to questions
- Lessened support for DEI initiatives

Potential Future Issues:

- Impact on pipelines (less diversity?)
- Loss of ground in workforce diversity
- Enhanced scrutiny and challenge to initiatives
- Increased number of (more aggressive) charges, complaints, and lawsuits
- ***Losing the Benefits That a Diverse Workforce Provides***

Some of these considerations are in tension with each other….

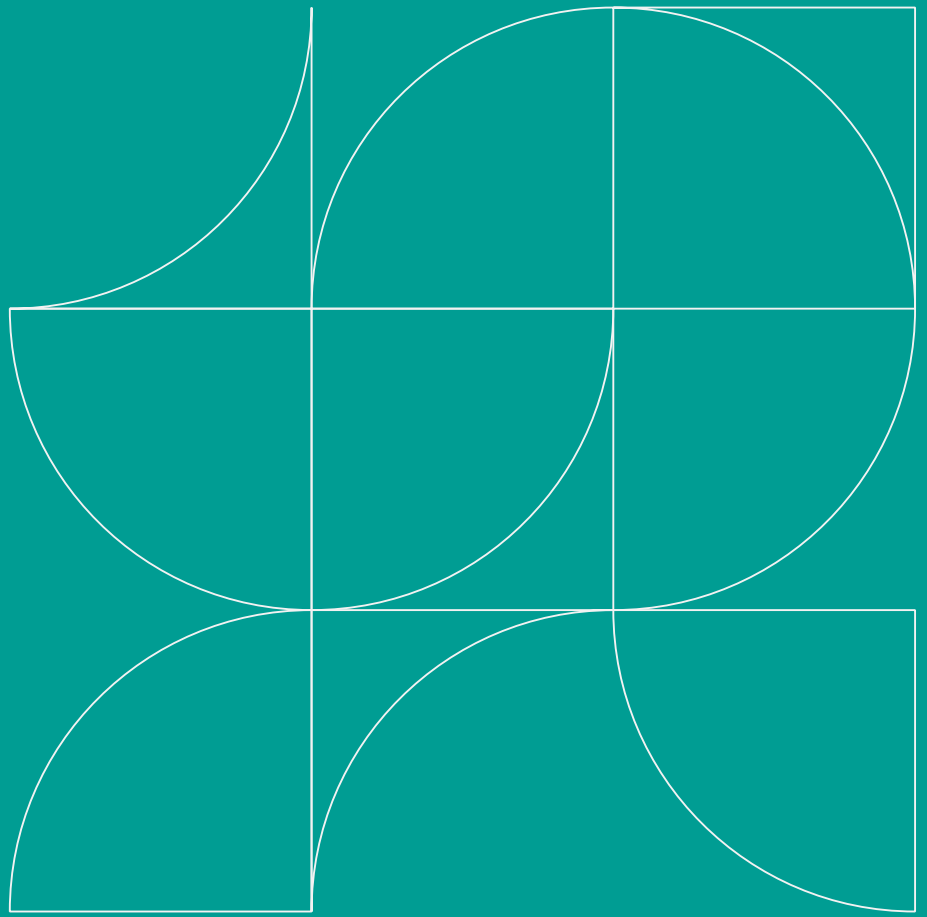
If DEI efforts become more conservative, legal risk goes down.

But….

That could lead to practical issues, such as disappointed stakeholders and disheartened DEI proponents.

In the world of DEI, both acting and doing nothing (or doing less) have their own risks….

How (if at all) do the Rulings Impact An Employer's DEI Risk Assessment?



The Legal Limitations Have Not Changed… Yet

Reasonable Action

- Engaging in targeted sourcing and outreach that focuses on certain populations as part of an overall / larger recruitment strategy
- Establishing non-discriminatory training programs to overcome a lack of skilled applicants
- Expanding training programs to include things like unconscious bias, bystander intervention, etc., consistent with any applicable state law.

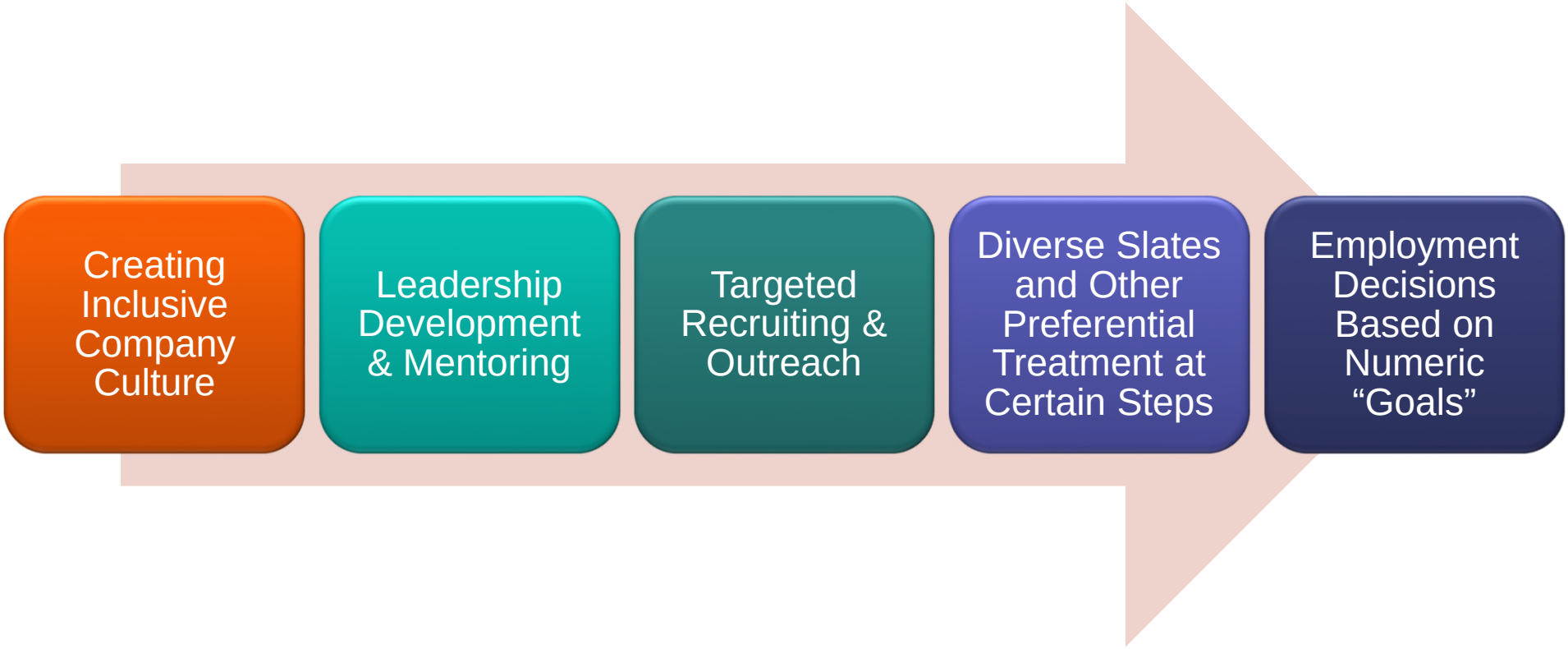
vs.

Unreasonable Action

- Discharging White or male employees and replacing them with People of Color or females
- Creating or setting aside job openings that are only available to a specific race or gender
- Establishing a training program that is only offered to specific groups of employees (e.g., women or certain minority groups)
- Refusing to hire or promote, or deciding to terminate, employees in order to maintain a certain balance by gender or race
- Setting numerical goals that are inconsistent with, greater than, or not tied to, an imbalance

Balancing Risks Continues to be Complex

Risk Spectrum for DEI Programs (the same today as before)



Context is everything…and everything (may be) discoverable

Diversity materials, metrics and goals can be taken out of context.

Unless they are privileged, they are discoverable in litigation

Risk Mitigation for DEI

- Standardize dashboards and metrics to avoid ad-hoc (and potentially inconsistent) reporting
- Limit access to the smallest possible group
- Develop governance around use and sharing of HRIS data
- Require legal involvement in sharing analysis of data metrics
- Use disclaimers: e.g., “Data is based on raw statistics that do not account for relative performance, qualifications or interest.”
- Diversity targets should not override non-discrimination commitments – always be mindful of the balance

What IS different today, because of this ruling?

- The likelihood of legal challenge
- The likelihood of an adverse ruling by the current Supreme Court (as opposed to previous compositions)
- The frequency and nature of DEI discussions
- The level of tension around DEI
- The movement of DEI from “behind the scenes” to “front and center”
- The importance of regularly monitoring this area.

You’re right to be planning and preparing.

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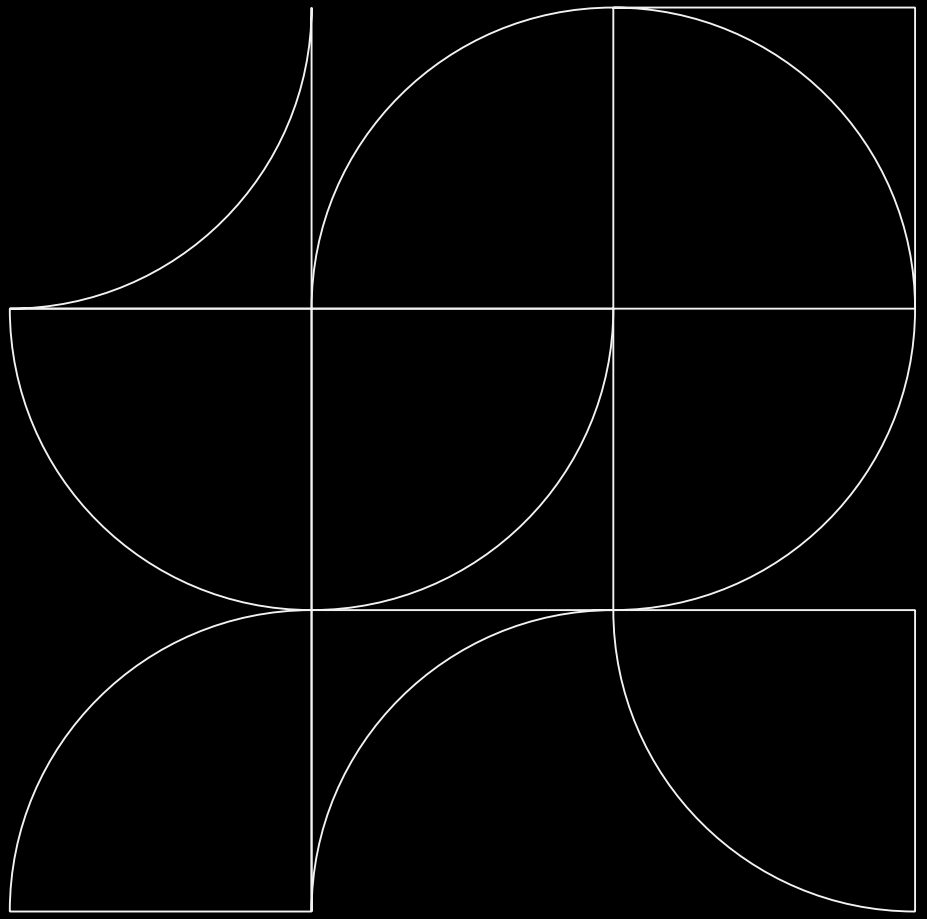
Practical Takeaways



“Top 5” Takeaways

1. “Affirmative action” in education is very different from “affirmative action” in employment.

2. The *Fair Admissions* cases do not change any law or legal standard impacting employment.

3. If a company’s DEI initiatives were lawful before, they still are.

4. Unlawful (overly aggressive) DEI efforts are now more likely to be challenged, and thus present more legal risk.

5. Expect dialogue around this issue; and be prepared.

What actions should be taken immediately?

1. **Decide how DEI fits into your corporate priorities and values, if you haven't already.**
   - The Company may or may not want to change its current priorities and paths
   - Depends on your particular DEI journey

2. **Develop a communication plan**
   - Messages may be different internally v. externally
   - Different levels of detail for internal audiences

3. **Educate and Train**
   - Develop guidance to ensure leaders understand any information presented to them, permissible vs. non-permissible action, and the implications of disclosure

What actions should be taken immediately?

4. **Coordinate Legal, HR, Talent, Recruiting, and Diversity Teams as relates to DEI**
   - The “left hand” and the “right hand” should work together

5. **Conduct an in-depth legal assessment of existing and proposed / planned DEI initiatives**
   - The company may need to place things on hold or apply the brakes if programs have been designed to take race or other protected categories into account.
     - **This is not new, but the SCOTUS decision serves as a good reminder of what is permissible and not permissible in the employment context.**

#1 Tip for Today's DEI-Focused Employer

Be willing to do the hard work.

- Examine and understand your workforce.
- Analyze specific, current, representational data.
- Consider all viewpoints.
- Use outside professionals if you don't have the needed in-house expertise.
- Find the "why" behind the "what."
- Institutionalize, and create a true culture of, DEI.
- Avoid hasty actions and reactionary pronouncements.

Creating an Inclusive Culture is Effective and Low Risk

Concluding Thoughts

- Nothing is as good or as bad as it seems…..
- There is no immediate legal effect on employers
- This could be viewed as an opportunity:
  – to review DEI initiatives with fresh eyes
  – to make changes if needed
  – to recommit to DEI values
- Monitor this area of the law closely
  …Change may (or may not?) be coming

thank you

contact information

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