Updates
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Affirmative Action: Six Employer Questions After the Supreme Court Arguments

On October 31, 2022, the U.S. Supreme Court held oral arguments in two landmark cases, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard* and *Students for Fair Admissions, Inc. v. University of North Carolina*, arising out of the affirmative action policies of two elite university systems, Harvard University and the University of North Carolina (UNC). The arguments spanned more than four hours with vigorous questioning by all nine justices in the UNC case and eight of the justices in the Harvard case. While these two interrelated cases focus explicitly on university admissions, employers have also been watching these matters closely, wondering whether the outcome of these cases will affect current company policies and practices, especially those focused on diversity, equity, and inclusion (DEI).

Below are six pressing questions employers may be asking after Monday's oral arguments.

What was the lay of the land regarding employment-related affirmative action policies and DEI efforts prior to these oral arguments?

In the 1980s and 1990s, the Supreme Court and various lower courts struck down set-aside programs and hard quota programs that mandated spots for women and ethnic minorities in government contracting, construction, and other areas. At the same time, however, the Supreme Court, in *United Steelworkers v. Weber*, allowed employers to engage in affirmative action efforts under certain circumstances. The tests for affirmative action policies and programs have evolved over time, but employers may engage in affirmative action if a manifest imbalance in representation exists in target positions and the application of affirmative action policies would not "trammel on" the rights of non-minorities. Although the Court's decision in *Ricci v. DeStefano*, which states that remedial efforts must have a strong basis in fact, has been read to heighten the bar for crafting legally compliant efforts to meet diversity goals, this was not an explicit holding in the case. As such, employers have generally been allowed to develop policies that are tailored to meet the manifest imbalances test.

Because the cases are related to education (Title VI) and not employment (Title VII), how are workplaces implicated?

Federal law under Title VI differs somewhat from Title VII; thus, rulings in education cases do not necessarily affect workplace-related policies and efforts. Many courts, however, have relied on the Supreme Court's reasoning in the University of Michigan admissions case, *Grutter v. Bollinger*, to evaluate workplace policies. Courts have leveraged that decision, for instance, to determine that certain affirmative action programs in the workplace did not pass constitutional muster. This signals that the results of these two university cases could affect how courts look at current workplace policies.

What happened at oral arguments?

It was expected that the oral arguments would exceed the allotted time, but the more than four-hour duration indicated the significance of the issues at play. Most attention centered on the questions by Justices Roberts, Coney Barrett, and Kavanaugh, the likely swing votes in the matters. Their lines of inquiry provided perhaps the strongest indication of where the Court will land in its eventual decision. For this crucial block, much of the questioning centered around the 25-year time frame enunciated in *Grutter v. Bollinger*. In that case, Justice

O'Connor said that the limited use of race in affirmative action policies should be contained to 25 years. Asked several times during oral arguments when the affirmative action policies should end, the proponents of the policies sidestepped any definite time frame. The questions in this area indicate that the justices are poised to have the policies sunset under *Grutter's* own terms.

Both the schools and the government attempted to focus the justices on arguments that race plays a minor factor in the consideration of applicants and relied heavily on the benefits of diversity on campus, in the military, and the broader workplace. The proponents also took a page from originalism and argued that race—and particularly racism against African Americans—formed the basis for passing the 14th Amendment. As such, proponents maintained that concepts focused on colorblindness are contrary to the original intent of the 14th Amendment. For the Harvard admissions case, a separate issue relating to whether the admissions policy discriminated against Asian Americans was before the Court. There, the school noted that fact-finders at the district court level ruled in favor of Harvard, determining that Asian Americans were not discriminated against in the admissions process there.

Were there any strong indications that the justices were interested in addressing employment-related Title VII principles?

During the marathon argument and its attendant wide-ranging discussion of the role of race in America, the justices only rarely addressed the role of race in the workplace. Proponents of the admissions policies made broad points related to the benefits of diversity in the workplace in terms of higher productivity and better decision-making. While Justice Kagan voiced support for these benefits, Justice Thomas instead expressed hostility, stating that similar arguments had been used "in favor of segregation." The other justices did not appear interested at this juncture in engaging in a broad discussion of workplace-related policies and commitments.

Is there any indication that the landscape will change for federal contractors' affirmative action obligations if the Supreme Court rules against Harvard and UNC?

For now, it is unlikely that federal contractors will be immediately affected as federal contractor obligations were not at issue in these cases. Federal contractors are subject to very detailed affirmative action requirements that mandate that they conduct numerical analyses of their workplaces and set goals related to hiring and workforce representation. Those requirements are codified through an executive order, two statutes, and various regulations. Cumulatively, those authorities strictly forbid quotas and make clear that federal contractors cannot use a protected category such as race as a factor in making employment decisions. Nothing in the argument suggested that those affirmative obligations would change. Despite this, federal contractors should closely monitor burgeoning challenges to the overall authority of the U.S. Department of Labor (DOL) to impose equal employment opportunity (EEO) obligations under the Procurement Act. In another recent Supreme Court decision, *West Virginia v. EPA*, the Court potentially opened the door to drastically pulling back on agency regulatory authority.

What should employers do now?

Although these cases do not appear to directly implicate employers yet, employers should consider that potential changes to compliance requirements for company policies and programs—especially workplace DEI initiatives—may be prudent. In response to the recent focus on social justice following both the #MeToo movement and the 2020 summer of racial reckoning, many employers have instituted clear numeric goals for

advancing diversity in the workplace. Employers should evaluate employee data and workplace DEI goals to determine whether current policies and programs created to advance social justice could be interpreted as imposing gender- or race-based quotas. If existing policies or programs could be construed as imposing such impermissible quotas, employers should then seek to reformulate those policies or programs in ways that still advance workplace diversity without operating as a *per se* quota. Existing internship programs, employee resource group initiatives, and other special emphasis programs should also be reviewed to ensure that they do not cross the line into impermissibly using protected classes. Additionally, considering the distinct possibility of a negative ruling for the universities, employers should consider drafting proactive statements now that explicate why and how existing workplace DEI initiatives are consistent with the law. Given the changing nature of federal and state law on DEI issues, employers are advised to seek outside counsel for ongoing guidance on the latest legal developments.

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