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## **Students For Fair Admissions United States Supreme Court Decision Invites Revisiting, But Not Rewriting, Corporate DEI Goals and Practices**

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On June 29, 2023, the United States Supreme Court decided *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* wherein the Court held that race-conscious admissions programs implemented by Harvard University and the University of North Carolina were unconstitutional as the programs violated the Equal Protection Clause of the Fourteenth Amendment. In Justice Gorsuch's concurring opinion, he noted that the race-conscious admissions programs at Harvard and UNC also violated Title VI of the Civil Rights Act which applies to institutions receiving federal funds and he repeatedly referenced Title VII of the Civil Rights Act, which also applies to private sector employees. His comparison of Title VI and Title VII, which he referred to as the statute "next door," actually opened "the door" to subsequent lawsuits, threats of lawsuits, and audit requests by individuals and groups seeking rescission or revision to employer DEI initiatives and programs. State legislative actions or proposals aimed at restricting or eliminating DEI initiatives have added to the uncertainty and legal risk for employers with robust DEI programs and initiatives.

Given the significant risk of litigation, increased audit requests, and complaints to various government agencies, employers should revisit their DEI initiatives and programs in the context of the current court decisions, pending litigation and legislation and the Equal Employment Opportunity Commission's most recent guidance. Moreover, if an employer has made any public commitment to diversity, equity, and inclusion on its website or otherwise, the employer could also face litigation or internal or external pressures over alleged misleading representations regarding DEI if the employer chooses to alter or remove the DEI program.

Given all of the activity in this area, to comply with existing law and also maintain the employer's commitment to diversity, employers should: (1) conduct an audit of the employer's diversity, equity, and inclusion programming, preferably with outside independent counsel; (2) communicate the employer's continued commitment to their organization's diversity, equity, and inclusion principles and what that entails; (3) identify measurable objectives for DEI programming; (4) properly educate and train managers and employees regarding DEI limitations under current law and best practices; (5) collect, monitor, and track DEI data; and (6) continue to monitor state and local laws, grassroots efforts, and peer initiatives. To reduce the risk of legal challenges, DEI program reviews and revisions should: (1) ensure that employers do not make decisions or encourage decisions to be made on the basis of race, (2) ensure diversity is appropriately defined in all written materials, and (3) ensure that employee resource groups are clearly communicated as voluntary and open to all.

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