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DEFENDING DEI: ARE YOU READY FOR A LEGAL CHALLENGE TO YOUR DIVERSITY, EQUITY AND INCLUSION PROGRAMS?

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While we await the Supreme Court's decision in two cases involving a challenge to race-conscious admissions practices at institutions of higher learning (*Students for Fair Admissions Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*), private employers should be proactively thinking about the potential impact of the Supreme Court's decision and other recent state activity on their diversity, equity and inclusion (DEI) programs. While the legal framework for affirmative action in higher education is different from the DEI programs of private employers, the Court's ruling (which is expected within the next few days) will provide important context and insight relevant to the DEI programs of private employers.

In addition to challenges to DEI initiatives at institutions of higher learning, there has also been an uptick in activity at the state level evidencing increased opposition to certain DEI activities in employment. For example, Florida's Individual Freedom Act (currently on hold while pending before the U.S. Court of Appeals for the Eleventh Circuit), would prohibit employers from implementing any training on race relations or diversity that implies a person's status as either privileged or oppressed is necessarily determined by their race, color, national origin or sex. Similar legislation has been introduced in Montana, which would prohibit mandatory DEI training programs as a condition of state employment if they are aimed at indicating that a group of people are responsible for "and must feel guilt, anguish, or other forms of psychological distress" for historical injustices. In addition, the Texas governor issued a warning to state agencies not to use any DEI hiring programs that are inconsistent with Texas law, such as the use of diversity goals. Recently, in May 2023, a federal district court struck down California's Board Diversity Statute, which required representatives from identified "underrepresented communities" to be represented on the boards of public companies headquartered in California. In that case, the court held that the statute constituted impermissible racial and ethnic quotas and, therefore, violated the Equal Protection clause of the Fourteenth Amendment (that decision is currently on appeal). Similar board diversity rules adopted by Nasdaq are currently facing a similar challenge.

Regardless of the Supreme Court's decision in the pending cases and the outcome of the various state initiatives, one thing should be clear to private employers – DEI programs are currently in the

spotlight and may be subject to greater scrutiny and challenge. While the Supreme Court's decision will not directly alter the legal framework for private employers' DEI programs, there has been, and likely will continue to be, an increase in lawsuits and other activities challenging those DEI programs, as well as more employee claims alleging reverse discrimination.

Employers should work with counsel to review their DEI programs and be prepared to defend them against possible challenge, including:

- Review whether any current programs or policies could be interpreted as establishing race or gender based quotas;
- Review intern, training and mentoring programs to determine whether any are exclusive to individuals of a certain demographic category;
- Review employee resource groups and ensure they are open to all employees; and
- Ensure affirmative action plan language and other Company DEI-related communications are legally compliant and resilient to potential challenge.

RELATED PRACTICE AREAS

- Employment & Labor
- ESG Governance, Compliance & Reporting

MEET THE TEAM

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