

# HR Insights

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## Supreme Court's Affirmative Action Ruling Could Impact Workplace DEIB Programs

The U.S. Supreme Court issued several consequential decisions as its most recent term ended, including addressing affirmative action programs in college admissions. While these rulings will likely not directly affect employers, they may impact workplace diversity, equity, inclusion and belonging (DEIB) initiatives, including how organizations promote and implement them.

This article provides an overview of the Supreme Court's affirmative action rulings. It explores how these rulings may impact workplaces in 2023 and beyond to help employers prepare for potential changes and navigate the evolving labor and employment law landscape.

### Supreme Court's Rulings

In *Students for Fair Admission Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions Inc. v. University of North Carolina*, the Supreme Court struck down affirmative action programs at the University of North Carolina and Harvard University, holding that the universities' affirmative action programs violated the Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964. In doing so, the court effectively overruled its 2003 decision of *Grutter v. Bollinger*, which allowed universities to consider race—among other factors—in university admissions because diversity in education was considered a legitimate aim. As a result, these rulings will likely end the consideration of race in university admissions for private and public institutions.

### The Rulings' Impact on Workplace DEIB Programs

The Supreme Court's affirmative action rulings did not change any employment-related laws; however, they could create a framework to challenge race-based recruitment and workplace DEIB programs. As a result, they could have an indirect effect on DEIB initiatives and other programs that promote workplace diversity.

Title VII of the Civil Rights Act prohibits covered employers from discriminating against applicants and employees based on race, color, religion, sex and national origin. While the Supreme Court has approved extremely limited race-conscious hiring plans to address past discrimination by a particular employer, it has not created an exception for making race-conscious employment decisions to improve workplace diversity. As a result, the Supreme Court's decisions regarding affirmative action programs in college admissions could have the following impact on employers:



## *Individual Lawsuits*

While the Supreme Court's rulings did not directly address hiring or employment practices, employers may face increased scrutiny over their hiring practices and DEIB initiatives. This will likely take the form of individual reverse discrimination lawsuits, with applicants or employees claiming to be disadvantaged by an employer's DEIB initiatives. For example, employers that rely on DEIB programs that impact employment decisions could be at a higher risk of potential litigation than those that simply offer employee resource groups (ERG). As a result, the Supreme Court's ruling could impact individual hiring and promotion decisions for organizations with a strong public commitment to increasing workplace diversity.

## *Mentorship Programs, Affinity Groups and Other DEIB Programs*

Some organizations offer mentorship programs, affinity groups (or ERGs) or other DEIB programs to address and strengthen workplace diversity. The Supreme Court's recent decisions could impact these programs and groups. While it's unlikely that employers will need to eliminate these programs and groups in light of the rulings, organizations may face legal challenges for limiting program and group membership based on a specific protected characteristic, such as race or gender.

## *Affirmative Action for Federal Contractors*

Employers who are covered federal contractors are required to engage in affirmative action, meaning they must take action to recruit and advance qualified minorities, women, persons with disabilities and covered veterans. While the Supreme Court's decision does not directly impact this requirement, federal contractors should consider reviewing any actions they take to comply with their regulatory obligations to ensure they don't run afoul of federal law.

## **Considerations for Employers**

The Supreme Court's rulings come at a time when many employers are exploring DEIB programs. While dialing back DEIB programs is an option, these rulings do not mean employers can't or shouldn't have such initiatives. However, organizations may need to be more critical and thoughtful about designing and implementing their DEIB programs.

With so much uncertainty, employers may need to navigate changing legal landscapes and adjust their DEIB programs and strategies accordingly. This may mean casting a wider net when recruiting. For example, employers can advertise job openings in publications, attend more career fairs or use multiple online channels to expand their talent pool. Employers can also continue to focus on creating an inclusive workplace where employees feel they belong and are treated fairly. Additionally, reviewing workplace policies and practices can help employers ensure they do not reflect implicit bias or illegal impact on individuals based on protected characteristics.

## **Takeaway**

How the Supreme Court's affirmative action decisions will impact workplace DEIB programs and initiatives is a developing issue, and it's currently unclear what the landscape will look like for employers. Time will tell whether these rulings will impact or alter established labor and employment laws and workplace DEIB practices. Awareness of these cases and their potential effects on workplaces can help employers prepare and feel confident in their ability to navigate any changes.

Employers should monitor the situation carefully since this is a rapidly developing issue. Consulting with legal counsel can help ensure that employers' DEIB programs comply with any changes or legal developments.

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