The Work Week

Bassford Remele Employment Practice Group

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Welcome to another edition of *The Work Week with Bassford Remele.* Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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Are DEI Initiatives a Litigation Risk?

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On June 29, 2023, the United States Supreme Court struck down affirmative-action programs in two cases, *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*. The Court ruled that race-conscious decisions in college admissions violate Title VI of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

Private employers are governed by Title VII, which prohibits discrimination on the basis of race, color, religion, sex and national origin. Under Title VII, employers are prohibited from making hiring and promoting decisions based on race.

Diversity, Equity, and Inclusion ("DEI") programs typically comply with Title VII because they do not allow for race-based hiring decisions. Rather, they promote broad initiatives to build more inclusive environments and widen the scope of applicants, resulting in more-diverse workforces. There is also a carveout in the law that allows for employers to increase recruitment of candidates who have been historically marginalized and excluded from specific job categories.

Still, the Supreme Court's recent decision has created questions as to whether DEI programs and diversity hiring by private employers might be the next litigation target.

The basis for the Supreme Court's affirmative action rulings was Title VI. Like Title VII, Title VI prohibits discrimination on the basis of race, color, religion, sex, and national origin, but it applies to higher education institutions receiving federal funding, not to private employers.

While the Supreme Court decisions did not address Title VII directly, Justice Gorsuch, in his concurring opinion, noted the overlapping language of Title VI and Title VII and emphasized that the two laws should be interpreted and applied in the same way. This analysis could be a gateway for the Court to expand its

affirmative-action ban to the employment sector. Certain diversity initiatives in hiring, like internship programs that are only open to underrepresented minority groups, may be especially vulnerable.

In fact, prior to the Court striking down affirmative action in collegiate admissions, litigation targeting DEI programs was already underway. Last year, Starbucks was sued for a DEI initiative that tied executive compensation to meeting diversity goals in hiring.

For the moment, most DEI initiatives are safe from lawsuits. But employers should check their policies to make sure they're racially neutral and clearly distinguishable from affirmative action programs in higher education.

At Bassford Remele, we routinely track changes in employment law on both a nationwide and statewide basis. As the seemingly inevitable attacks on DEI initiatives work their way through the legal system, we'll be sure to keep you all posted on forthcoming developments.

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