

What factors should employers consider in assessing whether their diversity, equity and inclusion practices comply with Title VII?

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For decades employers have sought to promote diversity in their workforces. In recent years, employers have expanded these efforts by establishing policies and practices commonly referred to as diversity, equity and inclusion (“DEI”) programs. Employers have multiple objectives for adopting and maintaining DEI programs. Some do so in connection with their obligations as government contractors to pursue the goals of affirmative action. Other employers do so voluntarily and to pursue equal employment opportunity for members of historically disadvantaged groups. Many employers enhanced their DEI programs as part of their racial justice initiatives following the murder of George Floyd in 2020.

Last year, the Supreme Court decided a case that may affect how employers administer and talk about their DEI programs. In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* (collectively, the “*SFFA* decision”), 600 U.S. 181 (2023), the Supreme Court ruled that Harvard and the University of North Carolina violated Title VI of the Civil Rights Act of 1964 and the U.S. Constitution in their use of race in their admissions processes. Because Title VII of the Civil Rights Act of 1964, which governs private employers’ employment practices, holds important similarities to Title VI, many employment lawyers questioned how the *SFFA* decision applies to employers’ consideration of race in the employment context. A year later, media reports indicate that a number of employers have changed their DEI programs to avoid claims of discrimination by members of majority groups.^[1]

In this article we analyze cases decided both before and after the *SFFA* decision to illustrate how employers and the courts have considered race in implementing and assessing the legality of various diversity initiatives. We then propose several questions employers may consider to ensure legal compliance while also promoting their diversity objectives.

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Background

Title VII provides that “[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin;” or “(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). These prohibitions apply to members of both majority and non-majority groups. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

Despite Title VII’s prohibitions, in certain circumstances an employee’s membership in a protected class can be a basis for an employment decision. In *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), an employer operated a training program that reserved 50-percent of openings in the program to Black employees until the racial composition of the workforce was commensurate with demographics in the local labor force. Brian Weber, a White employee, applied for the program but was denied admission. Weber alleged that he would have been entitled to a spot in the program but for his employer’s affirmative action plan, because he had more seniority than several admitted Black participants. Weber alleged he was subjected to race discrimination in violation of Title VII.

The Supreme Court rejected Weber’s theory of Title VII liability. Acknowledging the potential for dissonance in finding that a statute enacted to eradicate employment discrimination prohibited employers from taking *voluntary* steps to ameliorate segregation in the workforce, the Court nevertheless acknowledged that such actions may run afoul of the text and purpose of Title VII. The Court adopted a three-part test. To be permissible under Title VII, the employer’s voluntary plan must (1) advance the statutory purpose of Title VII by “break[ing] down old patterns of racial segregation in hierarchy” in “occupations which have been traditionally closed to” individuals protected by the statute, (2) not “unnecessarily trammel the interests of [W]hite employees,” and (3) be “a temporary measure [that] . . . is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.” 443 U.S. at 208.

Revisiting the topic of affirmative action plans in *Johnson v. Transp. Agency, Santa Clara Co., Cal.*, 480 U.S. 616 (1987), the Supreme Court clarified its analysis of *Weber*. Santa Clara County adopted a voluntary affirmative action plan that permitted individuals making hiring decisions to “consider as one factor” the sex of an otherwise qualified applicant when filling a position in a role where “women have been significantly underrepresented[.]” 480 U.S. at 620–21. The plan also provided diversity-related targets and explained how the County would continually monitor and adjust its plan. Paul Johnson, an employee who was passed over for an internal promotion in favor of a woman, brought a claim that the plan and the decision not to select him for the promotion

violated Title VII.

The Supreme Court upheld the plan, affirming the County's attempts to correct the "manifest imbalance" in positions that were historically unavailable to women. The Court clarified that a "manifest imbalance" need not be so extreme as to constitute a prima facie case of discrimination. Moreover, the Court determined that the plan did not unnecessarily trammel on the rights of majority group employees because plaintiff had no "absolute right" to a promotion, he retained his job, and because "the sex of Joyce was but one of numerous factors [the hiring manager] took into account in arriving at his decision." 480 U.S. at 638. Finally, the Court determined the non-permanent nature of the plan supported its validity: "the [County's] plan was intended to *attain* a balanced work force, not to maintain one." *Id.* at 639.

DEI Programs

DEI programs take many forms. These programs generally seek to create an environment of respect and fairness and to promote a more positive experience for all workers. Examples of DEI initiatives include conducting outreach to diverse students at college recruitment events, developing inclusive job descriptions and advertisements, establishing mentorship programs, creating summer fellowships, adopting executive compensation incentives, promoting affinity groups, improving diversity training, bolstering anti-discrimination policies and more robust dispute resolution processes.

The purposes of such DEI programs bear many similarities to the purposes of the affirmative action plans addressed in *Weber* and *Johnson* where employers sought to reduce a "conspicuous . . . imbalance in traditionally segregated job categories." While employers always may pursue such objectives, employers also should consider lessons from recent litigation involving challenges to DEI initiatives.

For example, in *Young v. Colorado Dep't of Corr.*, 2024 U.S. App. Lexis 5814 (10th Cir. Mar. 11, 2024), the Tenth Circuit affirmed the dismissal of a former White employee's hostile work environment claim because a single instance of subjectively offensive DEI training was not, on the pleadings, severe or pervasive. Although the employer prevailed, the court criticized the employer's DEI training materials as "troubling on many levels." The plaintiff alleged, among other things, that the training materials stated that "all whites are racist, that white individuals created the concept of race in order to justify the oppression of people of color, and that 'whiteness' and 'white supremacy' affect all 'people of color within a U.S. context.'" Plaintiff also alleged that the training materials stated "white individuals are triggered by feelings of guilt and fear when confronted with 'information about racial inequality and injustice,' " a "phenomenon" labeled as "white fragility." The court observed that the messaging in these training materials "could promote racial discrimination and stereotypes within the workplace" and "encourage racial preferences in hiring, firing, and promotion decisions."

In *De Piero v. Pennsylvania State Univ.*, 2024 U.S. Dist. LEXIS 5768 (E.D. Penn. Jan. 11, 2024), a district court found that allegations about certain of Penn State's DEI initiatives sufficed to allege a racially hostile work environment. In that case the plaintiff, a

writing professor, alleged among other things, that he was required to watch a “training video called ‘White Teachers Are a Problem,’” and a “presentation and dialogue about critical race theory and antiracism” that attacked ‘race neutrality, equal opportunity, objectivity, colorblindness, and merit’ and condemned ‘white self-interest.’” When the plaintiff raised concerns regarding such race-based statements to his supervisor, he was told that “[t]here is a problem with the [W]hite race” and that he should “broaden [his] perspective.” The court found that Plaintiff’s allegations were sufficiently specific and pervasive to establish a plausible claim for Title VII relief because the pleadings contained allegations of conduct which, if taken as true, showed race-based decisionmaking, stereotyping, and harassment. In ruling for the plaintiff, the court expressed the importance of caution when implementing DEI policies: “Training on concepts such as ‘white privilege,’ ‘white fragility,’ implicit bias, or critical race theory can contribute positively to nuanced, important conversations about how to form a healthy and inclusive working environment. . . . But the way these conversations are carried out in the workplace matters: When employers talk about race—any race—with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under federal law.”

Practice Pointers

Employers should consider *Weber, Johnson, Young* and *De Piero* in assessing whether their DEI practices comply with Title VII. Specifically, employers should consider the following questions:

- *Is the practice remedial?* Is the employer seeking to correct manifest imbalances in the labor force among jobs that have been traditionally segregated?
- *Will the practice unnecessarily trammel the rights of non-minorities?* How will the employer ensure protection of the rights of non-minority employees?
- *Who has access to the program or initiative?* Are training and other opportunities available to individuals regardless of protected class?
- *Does the initiative use negative language or stereotypes?* Do training materials refer to protected characteristics with “essentialist, determinist, and negative language?” Will any members in a protected class be singled out?
- *Has the practice been audited?* Many employers now schedule annual or as-needed audits of employment policies and practices to ensure legal compliance and consistency with other employment policies.
- *How will the employer document compliance with Title VII?* What data will the employer collect to assess its processes, and when and how will the employer make those assessments?

[1] See Alexandra Olson et al., *DEI backlash has companies quietly changing their programs to avoid wave of lawsuits alleging discrimination*, *Fortune*, Jan. 15, 2024, [DEI backlash has companies quietly changing their programs to avoid wave of lawsuits alleging discrimination | Fortune](#) (last visited Mar 20, 2024). See also Max Abelson et al., *Wall Street’s DEI Retreat Has Officially Begun*, *Bloomberg*, Mar. 3, 2024, [Goldman, JPMorgan Cut DEI Efforts Over Lawsuit Threats - Bloomberg](#) (last visited Mar. 18, 2024);

Simone Foxman, *Business is Booming for DEI Lawyers as Corporate America Asks 'What's Legal?'*, Bloomberg, Mar. 5, 2024, Business Is Booming for DEI Lawyers as Corporate America Asks 'What's Legal?' - Bloomberg (last visited Mar. 18, 2024).

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