

Faegre Drinker: Designed for Clients

THE RAPIDLY EVOLVING DEI LANDSCAPE

AGC Minnesota Construction Summit

Scott Chinn & Erik Mosvick

January 17, 2024

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Public Issues ESG



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Faegre Drinker Affirmative Action Task Force

- Multi-disciplinary task force created shortly before 6/29/23 SCOTUS decision
- [Affirmative Action Task Force Assembled to Support Clients](#)
- Lots of client alerts and presentation material to this point
- <https://www.faegredrinker.com/en/insights/topics/affirmative-action-task-force#tab-Overview>
- Task force members speaking all across the country
- Representing clients on these issues in many industries:
 - higher education
 - construction
 - local governments
 - public utilities
 - non-profits
 - corporate trade associations
 - manufacturing
 - banking/finance
 - health systems
 - charitable foundations



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2023

Harvard/UNC Decision


Background

- At both Harvard and UNC, race was used as a plus factor during an extremely competitive admissions process. For some applicants, race was a determinative factor.
- Both programs were structured in a manner consistent with the prior Supreme Court guidance.
- Students for Fair Admissions challenged these race-conscious admissions programs.
(Two cases, one decision)

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Grantmaking Considerations in the wake of *Students for Fair Admissions*

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Five Questions

Is the Harvard/UNC decision limited to higher education admissions?

- No. While the direct holding in the case only applies to higher education admissions, the rationale clearly applies much more broadly.

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Five Questions

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What is the essential rationale of the decision?

- Race-conscious programs or policies designed to address historical inequities or to promote diversity in higher education – even though potentially valuable to a university – are not lawful on that basis.
- Any racial classifications made by the government or by other organizations that are legally required to act without race consciousness are prohibited unless they are narrowly tailored, temporary, and further a compelling interest — like remediating specific instances of recent discriminatory actions.



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Five Questions

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How would the rationale apply to organizations as a legal matter?

- Because organization is a government
- Because organization receives federal funds or is a party to a federal contract
- Because organization is employer covered by federal and/or state anti-discrimination laws
- **Because organization has contracts with other private persons or entities that identify race as a material consideration for the provision of benefits**
- Note: Organizations in some states should expect new laws to be considered and/or passed aimed at forbidding preferences and DEI in various contexts



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Five
Questions

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What are likely non-admissions contexts for application of the rationale?

- Education
 - Admissions based on facially neutral criteria that serve as proxies for race/ethnicity
 - Minority scholarships, financial aid and other awards
 - Campus programming and affinity groups
- Employment
 - Hiring, retention, and promotion goals targeting racial and ethnic minorities
 - Public spending on minority recruitment programs (e.g., targeting HBCUs)
 - Pipeline and mentoring programs
 - DEI programs and training
 - Reevaluation of existing programs aimed at addressing past discrimination
- Contracting and supplier diversity
 - XBE programs (MBE, WBE, VBE, other)
 - Public support of supplier diversity organizations
- State and local government programs and spending, including to self-identifying minority organizations
- Federal contracting, spending and grant programs in contexts that support race-conscious activity
- Private philanthropy with race conscious elements secured by agreement

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Five
Questions

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How would the rationale apply to organizations as a legal matter?

- In theory, rationale could apply to any protected class
- However, at least under traditional Equal Protection Clause analysis, race-based action would be most disfavored – with the application of “strict scrutiny”
- Gender-based classifications must further important government interests by means substantially related to that interest
- Other classifications (e.g., disability, veterans) might only be subject to rational basis
- In the employment discrimination context, the standard is whether an employee of any protected class has been subjected to an “adverse employment action”
 - Note: There is a case pending in the U.S. Supreme Court that could change the trigger for Title VII applicability to events that do not rise to an “adverse employment action”

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Ripple Effects

Litigation after *SFFA v. Harvard/UNC*

- *Ultima Services Corp.*
 - federal SBA minority business government contracting program struck down
- *Landscape Consultants v. City of Houston*
 - City contractors suing to invalidate long-standing MBE and WBE program criteria
- *Fearless Fund*
 - challenging private grant program open only to black women-owned businesses; 11th Circuit preliminarily enjoined program
- *Perkins Coie, MoFo, Winston & Strawn*
 - challenge to law firm minority fellowship or summer hiring programs; program changes have led to voluntary dismissals of *Perkins* and *MoFo* cases
- *Compass Group*
 - Former manager sued employer after termination for requesting religious accommodation to avoid managing diversity program available only to women and people of color
- *U.S. Military Academy*
 - SFFA has sued U.S. Military Academy at West Point for race-conscious admissions policies (SCOTUS reserved question of application to service academies)
- *Doe v. New York University*
 - Lawsuit under Title VI and Title IX alleging law school law review improperly gives admission preference to groups other than white, heterosexual men

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Employment Issues

1. Hiring, retention, and promotion goals targeting racial and ethnic minorities
 - Recent AGC Release: *Hourly Wages for Production Workers Climb 5.1 Percent over the Year, Outpacing Overall Private Sector; Association Survey Finds Most Contractors Plan to Add to Headcount in 2024 but Anticipate Difficulty*
 - Mandated affirmative action (federal or state contract requirements)
2. Pipeline and mentoring programs (e.g., targeting HBCUs or similar educational institutions at varying levels)
3. DEI programs and training

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Employment Issues

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Office of Federal Contract Compliance Programs > Frequently Asked Questions > Affirmative Action Frequently Asked Questions

Affirmative Action Frequently Asked Questions

Are the affirmative action obligations OFCCP enforces similar to the affirmative action steps taken by some educational institutions to increase the racial diversity of their student bodies?

No. OFCCP enforces nondiscrimination and affirmative action obligations to ensure equal opportunity in the federal contractor workforce, while some post-secondary educational institutions have implemented a wholly distinct concept of affirmative action that permitted the use of race to be weighed as one factor among many in admissions processes. Further, the Supreme Court's decision in *Students for Fair Admissions* applies only to higher education admissions programs and does not address the employment context. See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, slip op. at 2-5, 23-30 (U.S. June 29, 2023). There continue to be lawful and appropriate ways to foster equitable and inclusive work environments and recruit qualified workers of all backgrounds. OFCCP's affirmative action requirements enable employers to reduce the risk of discrimination in their workforces and recruit and retain diverse talent.

[Affirmative Action Frequently Asked Questions | U.S. Department of Labor \(dol.gov\)](#) - Last Accessed 1/8/2024

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Supplier Diversity Programs

1. Public Sector Construction
 - Applicability to goals-based XBE programs
 - City of Houston lawsuit
 - Certifying organization issues
2. Private Sector Construction
 - Section 1981 claims applicable to private contracts discriminating on basis of race
3. Federal Issues
 - Ultima Services decision regarding presumption of disadvantage (SBA, Section 8(a))
 - Challenge to Minority Business Development Agency
 - Other federal funds/federal contracts issues

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ESG Issues

1. Anti-ESG/Anti-Woke Actions in States
 - Boycott lists for financial services firms
 - Compliance challenges in pro- and anti-ESG states
 - Anti-DEI legislation proposed in nearly half of states (e.g., Florida “anti-woke act”)
2. Green Bonds and ESG Ratings
 - Public Finance Green Bonds increasing
 - S&P Global Decision to abandon ESG scores
3. Greenwashing
 - Enhanced scrutiny over ESG-related claims from international, federal and state regulators – and from private deceptive practices complainants
 - California law regarding business claims regarding carbon emissions (effective 1-1-24)

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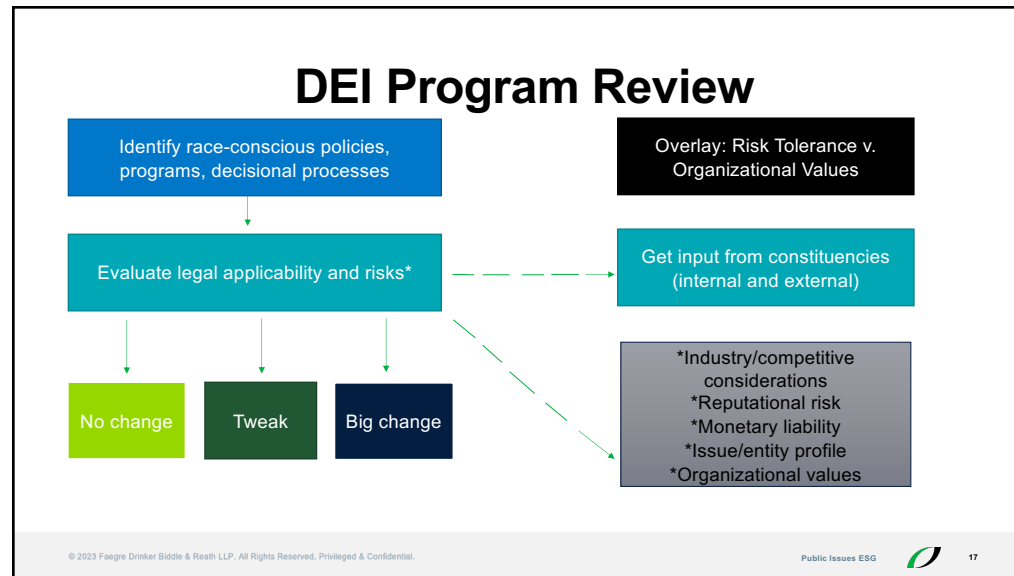
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Examples of Public Issues

Reproductive rights and sexual privacy	LGBTQ+ issues, including marriage equality and transgender sports participation	Gun rights reform
Public safety and criminal Justice reform	Diversity, equity and inclusion	Climate change and sustainability
Education issues (book banning, parental rights, curriculum disputes)	International issues	COVID-19 regulation/ vaccine hesitancy
Voting Rights	Election Law/Administration	Political Giving

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Top Line Summary

- Non-higher education organizations aren't at immediate risk for obvious legal non-compliance with the Court's decision — but organizations should take immediate action to internally review their race-conscious policies and programs while everyone begins to cope with the fallout in the legal and political universes
- DEI programs don't have to be abandoned, but also are under scrutiny
- Each organization should deliberately evaluate its policies and programs that are arguably race-conscious and determine if some modification is warranted
- Finding balance between risk tolerance and adhering to organizational values is key
- We are likely in for a long legal slog before context-specific rules are known, marked in part by culture war battles singling out particular issues and organizations
- Organizations will have to determine how public and engaged to be in the struggle to preserve equity-promoting programs

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