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Impact of Recent Supreme Court
Decisions on Corporate DEI
Programs

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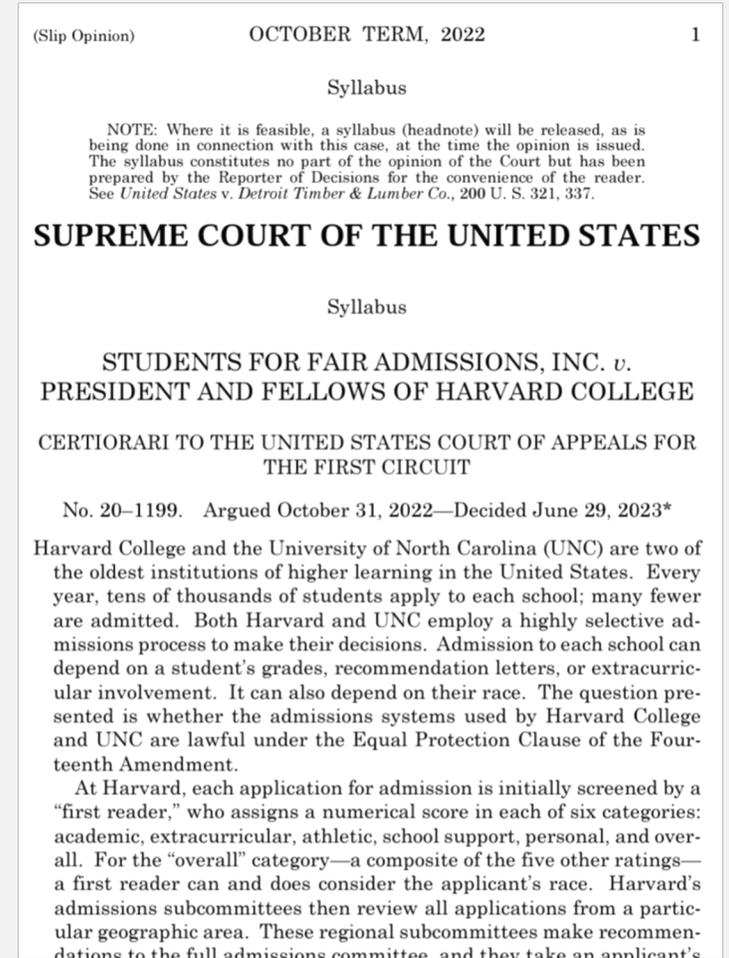
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THE **SFFA** DECISION

01

THE JUNE 2023 SCOTUS AFFIRMATIVE ACTION DECISION (THE “SFFA DECISION”)

- In June 2023, the Supreme Court struck down race-based college admissions in *SFFA v. Harvard*, holding that Harvard and University of North Carolina’s use of race in their admissions processes violates the Equal Protection Clause.
- The Court also noted in a footnote that the Equal Protection Clause applies to Harvard by way of Title VI (which prohibits entities “receiving federal financial assistance” from engaging in race-based discrimination).



THE SFFA DECISION

The Court struck down the universities' affirmative action programs for four main reasons:

- **Fails “Strict Scrutiny” Test** – Purported “compelling state interests” such as “training future leaders,” “acquiring new knowledge based on diverse outlooks,” and “promoting a robust marketplace of ideas” are “not sufficiently coherent for purposes of strict scrutiny.”
- **Zero-Sum Policy** – Racial preferences “provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”
- **Impermissible Stereotypes** – Race-conscious admissions policies impermissibly stereotype along racial lines—for instance, because they grouped all Asians together.
- **Lacks a “Logical End Point”** – *Grutter v. Bollinger* noted in 2003 that “25 years from now” the use of racial preferences will no longer be necessary.



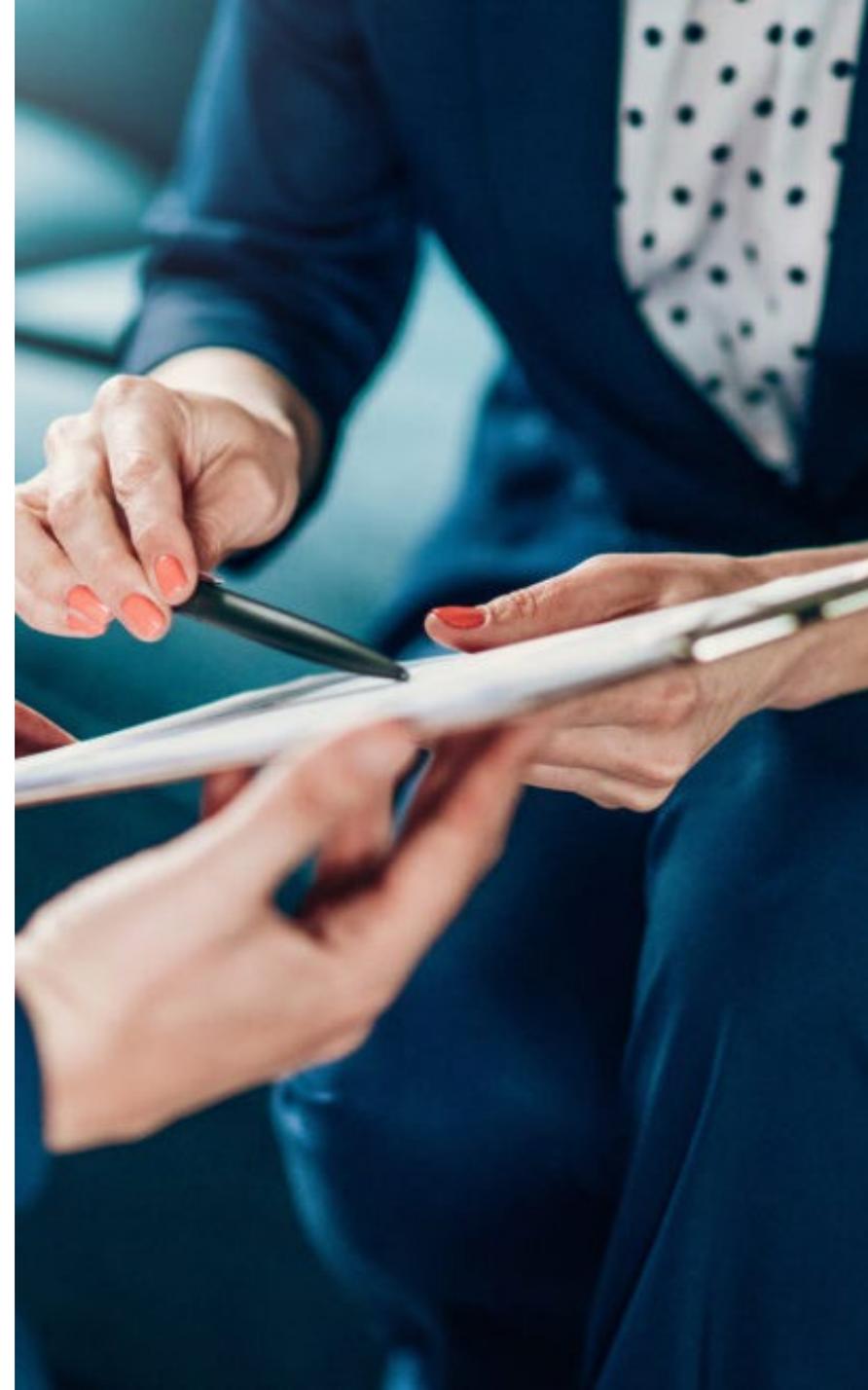
THE LEGAL FRAMEWORK FOR CHALLENGES TO DEI

02

CURRENT EMPLOYMENT LAW: TITLE VII



It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise 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."

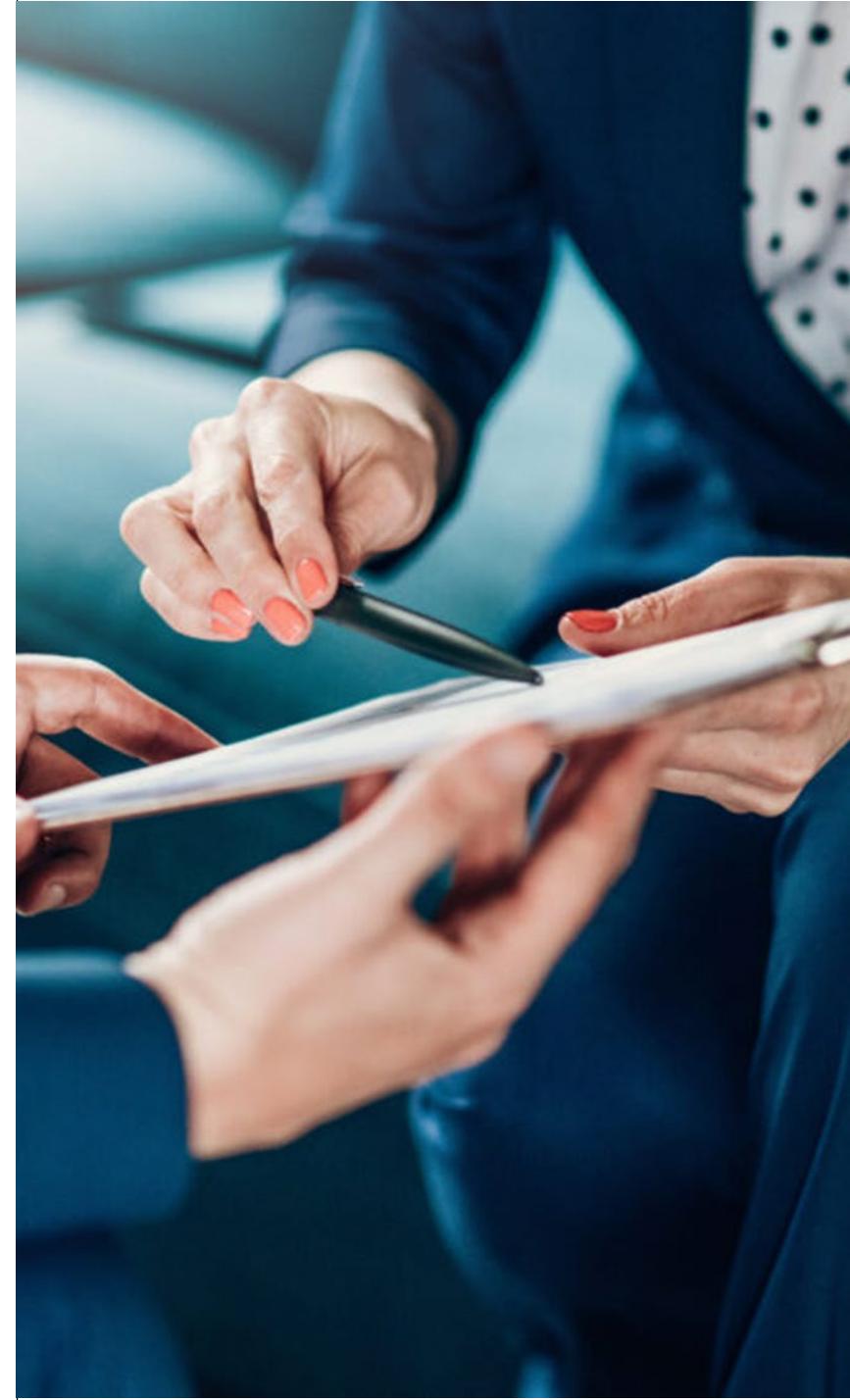


CURRENT EMPLOYMENT LAW: TITLE VII

Discrimination on the basis of race is **presumptively unlawful** unless the employer can establish the “*Johnson affirmative-action defense*”:

- (1) Program is remedial and addresses a **manifest imbalance**
- (2) Program does not **unnecessarily trammel the rights** of non-beneficiaries

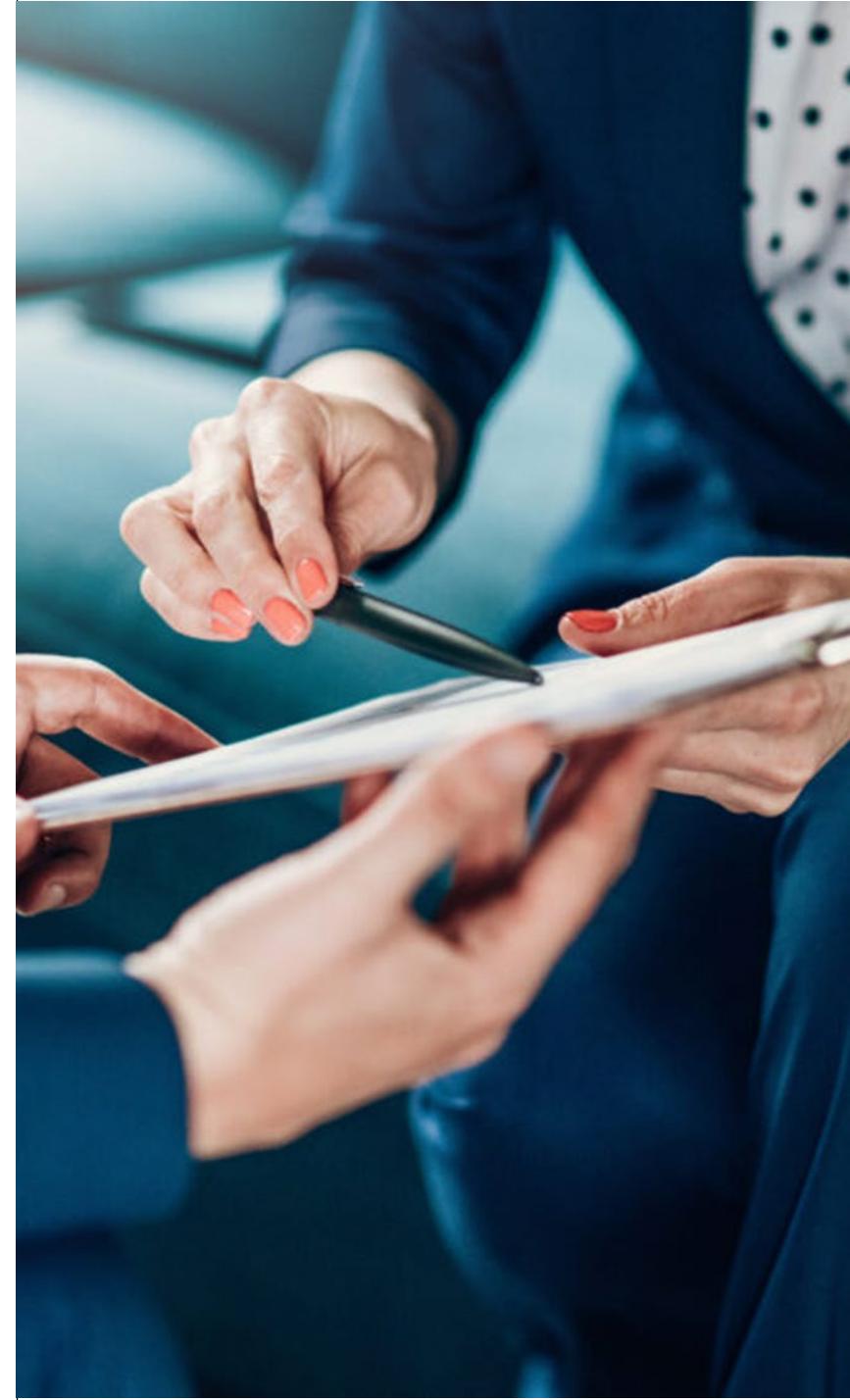
Then the burden shifts to the plaintiff to prove that the “**justification is pretextual and the plan is invalid**”



CURRENT EMPLOYMENT LAW: TITLE VII

In addition, a plaintiff alleging discrimination under Title VII generally must demonstrate an “**adverse employment action**,” or an action that materially affects the basic terms of employment (i.e. terminations, demotions, suspensions without pay, and pay cuts)—increasingly, a low bar

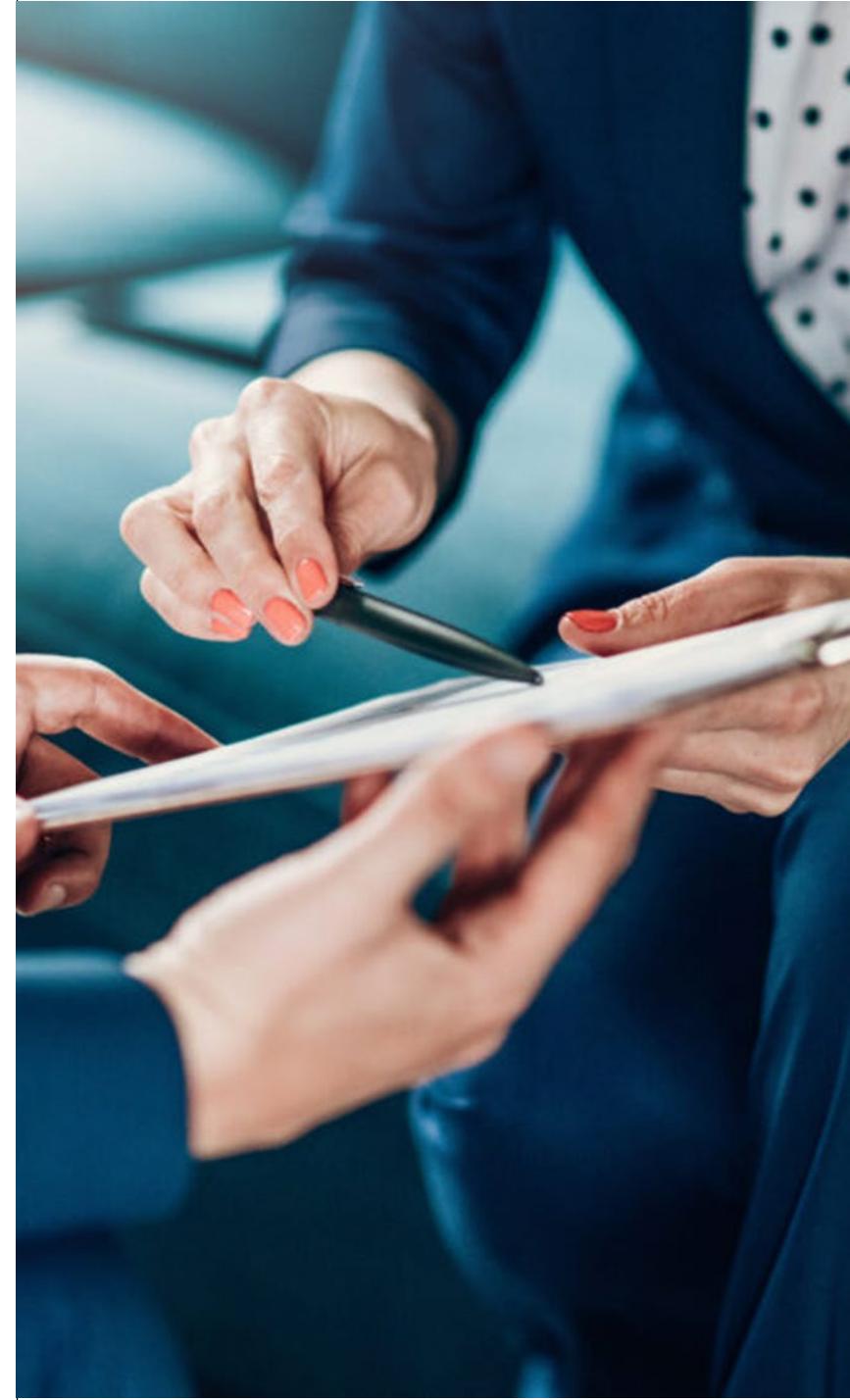
- *Muldrow v. City of St. Louis*



CURRENT EMPLOYMENT LAW: SECTION 1981



All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .”

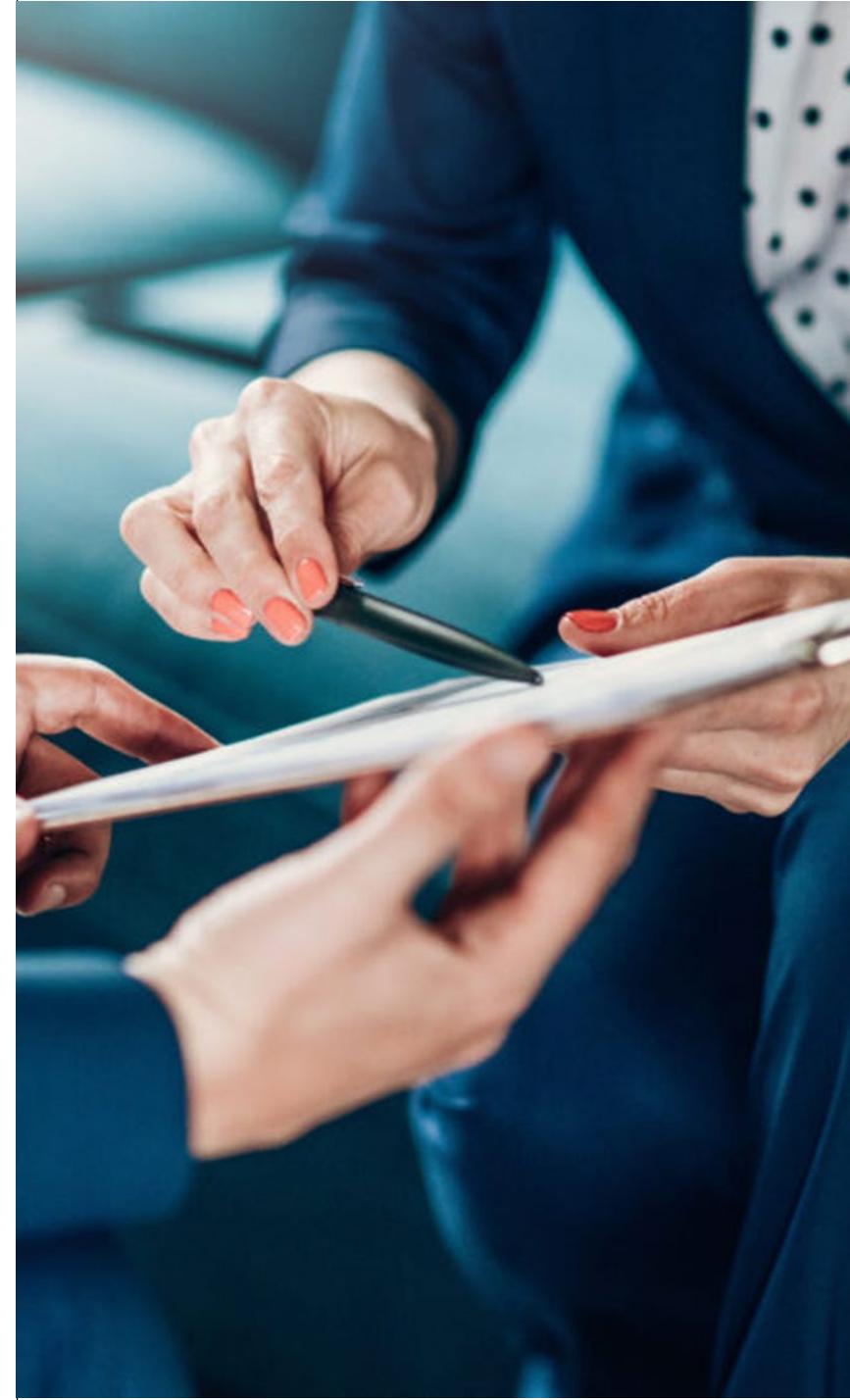


CURRENT EMPLOYMENT LAW: SECTION 1981

Plaintiff must establish that:

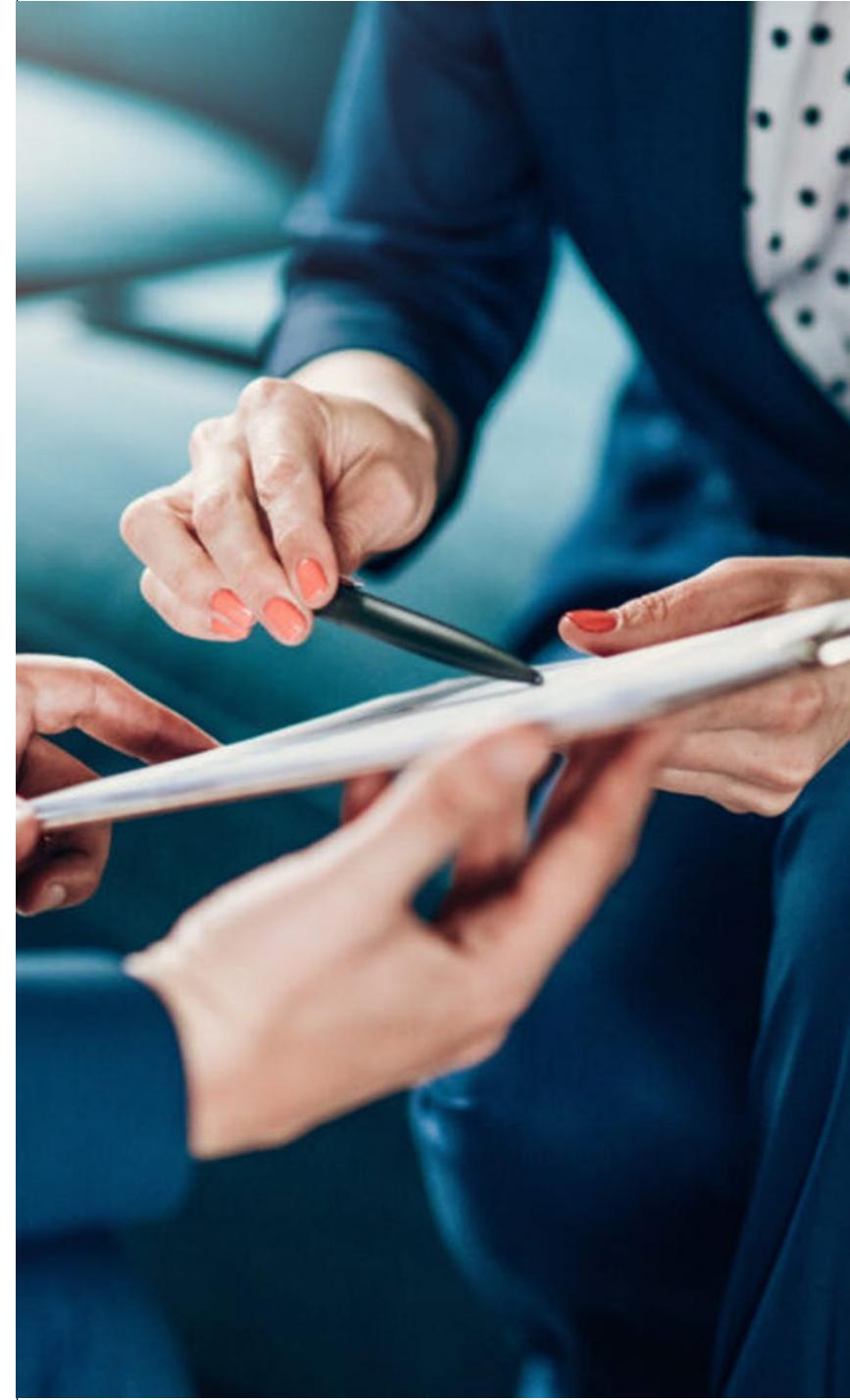
- (1) the defendant “intended to discriminate **on the basis of race,**”
- (2) the defendant “impaired [a] **contractual relationship,**” and
- (3) discrimination was a **but-for cause** of the plaintiff’s injury.

The “**adverse employment action**” requirement is the same for a Section 1981 suit as under Title VII.



NON- EMPLOYMENT CONTRACTS: SECTION 1981

The right “**to make and enforce contracts**” has been applied in the employment context but also applies **more broadly**, i.e. may implicate an employer’s board diversity practices, supplier diversity programs, investments, and charitable contributions.

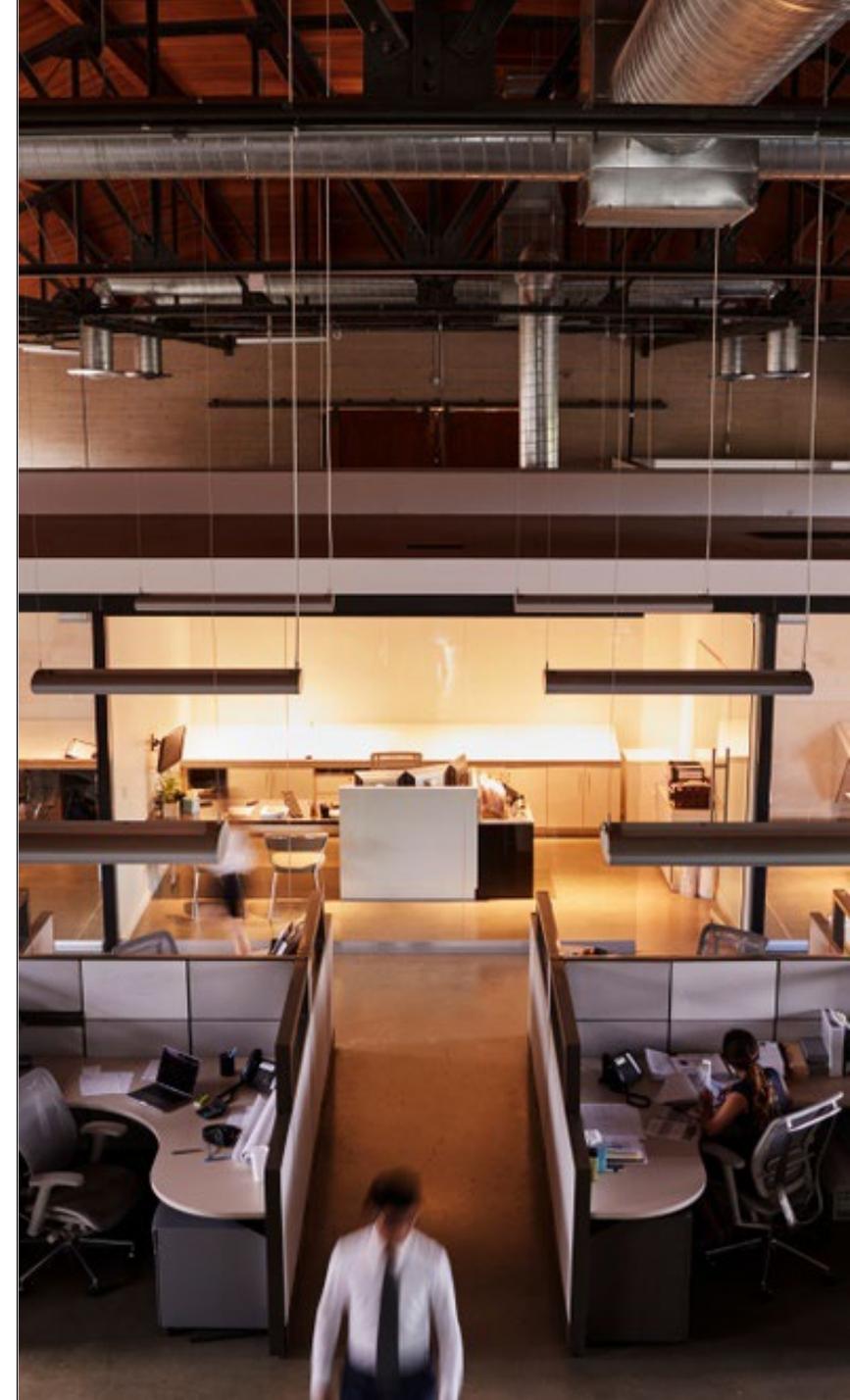


IMPLICATIONS FOR DEI IN THE **EMPLOYMENT** CONTEXT

03

IMPLICATIONS FOR DEI IN THE EMPLOYMENT CONTEXT

- Criticism of policies that bestow “**preferences on the basis of race alone**”
- Comments that “[e]liminating racial discrimination means **eliminating all of it**”
- Direct impact on **employers who accept federal funds**
- Title VI and Title VII use “**essentially identical terms**” and have been interpreted “**the same way**”



IMPLICATIONS FOR DEI IN THE EMPLOYMENT CONTEXT

Potential Legal Avenues to Challenge Workplace Diversity Initiatives

- An uptick in **reverse discrimination lawsuits** challenging diversity programs
- **AG investigations and enforcement proceedings** under state laws similar Title VII and Section 1981
- Potential **legislation** limiting the scope of DEI programs
- Risk of **shareholder derivative suits**



IMPLICATIONS FOR DEI IN THE **EMPLOYMENT** CONTEXT

Dueling Letters by Attorneys General

- 13 Republican Attorneys General issued a warning to Fortune 100 companies, threatening “**serious legal consequences**” over DEI programs and hiring initiatives.
- 20 Democratic Attorneys General responded with a letter that such initiatives are **legal** and reduce corporate risk for claims of discrimination.
- Similar letters have followed for law firms.



LITIGATION TRENDS: WHAT CAN EMPLOYERS EXPECT

04

LITIGATION TRENDS AND AREAS OF FOCUS: WHAT CAN EMPLOYERS EXPECT

RECRUITING, HIRING, FIRING, & PROMOTION

BOARD DIVERSITY

TRAINING, MENTORING, ERG PROGRAMMING

DISCLOSURE STATEMENTS

SUPPLIER DIVERSITY

PUBLIC RELATIONS & MARKETING

LITIGATION TRENDS: RECRUITING, HIRING, FIRING, & PROMOTION

Hiring “Quotas” and Goals

- ***NCCPR v. Starbucks***: “If the plaintiff doesn’t want to be invested in ‘woke’ corporate America, perhaps it should seek other investment opportunities rather than wasting this court’s time.”

Internship or Scholarship Programs

- ***AAER v. Perkins
Coie / Morrison & Foerster
/ Winston & Strawn***



LITIGATION TRENDS: RECRUITING, HIRING, FIRING, & PROMOTION

Promotions

- *Ames v. Ohio Department of Youth Services* – Established a **higher burden of proof for reverse-discrimination cases** that requires plaintiffs to make an additional showing that “**background circumstances . . . support the suspicion that the defendant is that unusual employer who discriminates against the majority.**”



LITIGATION TRENDS: TRAINING, MENTORING, & ERG PROGRAMMING

Training, Mentoring, and ERGs

- ***Harker v. Meta Platforms, Inc. et al.***: Challenging "Double the Line" diversity program designed to increase diversity in the film industry and allowing BIPOC candidates to shadow key production roles
- ***Diemert v. City of Seattle***: Challenged mandatory diversity trainings involving critical race theory and encouraged participation in "race-based affinity group, caucuses, and employee resource groups"



LITIGATION TRENDS: BOARD DIVERSITY

Board Diversity Rules

- ***Alliance for Fair Board Recruitment v. SEC***: Challenging Nasdaq's Board Diversity Rules, requiring (1) disclosure of board diversity data and (2) an explanation if fewer than two board members are diverse.
- ***Alliance for Fair Board Recruitment v. Weber***: Challenge to Assembly Bill 979 requiring boards of public companies headquartered in California to include at least one to three members of "underrepresented groups."



LITIGATION TRENDS: SUPPLIER DIVERSITY

Supplier Diversity

- ***Bolduc v. Amazon.com, Inc.***: Challenging program extending \$10,000 grants to Amazon delivery service providers allegedly based in part on race.
- ***Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co.***: Challenging grant program providing funding specifically to Black entrepreneurs to support their small businesses violated Section 1981.



LITIGATION TRENDS:

PR, COMMUNICATIONS, & DISCLOSURES

Risks in Communications and Disclosure Statements

- ***Craig v. Target Corp.***: Suit following Target's "Pride" marketing campaign, alleging that Target misled its customers and shareholders about its ESG and DEI mandates, causing shareholders to lose billions of dollars.



DEI GUIDANCE FOR EMPLOYERS

05

NEXT STEPS

Employers should conduct an **audit of their existing DEI programs** and be mindful of:

- **Programs** that are limited to certain groups
- **Numerical targets and hiring goals**
- Public-facing and internal DEI-related **policies** and **communications**

Employers should stay up to date on any legal developments in this space—including any **local or state laws and requirements**



NEXT STEPS

General guidance and refreshers for employers relating to **DE&I in the workplace:**

- Express to employees and potential recruits the organization's **broad** commitment to diversity in all respects, including **diversity of experience, background, and perspectives.**
- Focus on building a **supportive and inclusive workplace** that promotes diversity of experience, background, and perspectives, including through robust **DEI trainings.**
- Promote **ERGs, programs, and partnerships** that are **open to all individuals.**
- Conduct **pay equity analyses.**



NEXT STEPS

General guidance and refreshers for employers relating to **recruiting and hiring efforts**:

- Remind employees of existing employment laws that **prohibit the use of protected characteristics in hiring, firing, promotion and other employment decisions.**
- Hold applicants to **objective, consistent qualification standards** in recruiting, hiring, and promotion practices.
- Consider applicants **holistically.**
- Practice **inclusive interviewing and hiring.**
- Engage in initiatives intended to **increase diversity in the applicant pipeline.**



NEXT STEPS

General guidance and refreshers for employers relating to **board diversity initiatives**:

- Similarly emphasize a **broad commitment to diversity** by using terms like diversity of background, experiences, perspectives, and viewpoints.
- Focus DEI efforts on the **search process** and increasing diversity generally in the **pool of candidates** from which board nominees are chosen.
- In evaluating potential board nominees, hold all candidates to **objective, consistent qualification standards** and make decisions based on the **individual**, not their race or protected characteristic.



NEXT STEPS

General guidance and refreshers for employers relating to **supplier diversity initiatives**:

- Maintain supplier criteria that are **consistently applied** to all companies.
- Avoid setting or communicating **quotas, targets, or percentages** for suppliers or vendors based on race.
- Focus on seeking out **smaller, local suppliers and vendors** or suppliers in geographic areas that operate in **underprivileged neighborhoods or zip codes** to help diversify the supplier pool.
- Avoid implementing special programs for minority businesses alone.
- Where applicable, provide **essay-based opportunities** for suppliers in the application process.





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