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The Supreme Court's Affirmative Action Ruling: Ramifications for All Employers

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Disclaimer

These materials have been prepared by the lawyers of Ogletree Deakins to inform our clients of important information in these areas of law. They are not, of course, intended as specific legal advice, but rather are offered to alert our clients to important developments and potential problems that may affect their business operations. When clients are faced with actual or potential business problems relating to these areas, they are encouraged to seek specific legal counsel by contacting the lawyers in our firm with whom they normally work.

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SFFA v. Harvard/UNC, 143. S.Ct. 2141, 2169 (2023)

Supreme Court in 6-3 decision held use of race in college admissions unconstitutional under Equal Protection Clause of 14th Amendment and violated Title VI of Civil Rights Act, because the admission programs:

- Lacked sufficiently focused and measurable objectives warranting the use of race
- Unavoidably employed race in a negative manner
- Involved racial stereotyping
- Lacked meaningful end points

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SFFA v. Harvard/UNC, 143. S.Ct. 2141, 2169 (2023)

- Chief Justice Roberts characterized diversity goals in educational settings as "commendable" in his majority opinion, but he stated that "racial classifications are simply too pernicious to permit."

- Concurrence by Justice Thomas: "Both experience and logic have vindicated the Constitution's colorblind rule."

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Does the SFFA Decision Apply to Employers?

- Not directly. The decision directly affects admissions policies at higher education institutions.

- But private employer DEI policies and initiatives, voluntary affirmative action programs, and environmental, social, and governance (ESG) efforts may also face scrutiny and legal challenges, and employers may need to adapt to the evolving legal landscape.

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How Could the Principles of the SFFA Decision Apply to Employers?

- Employers are prohibited from discriminating based on race and other protected characteristics under various state and federal laws.
- Traditionally, employers have been concerned with discrimination against racial and ethnic minorities and have sought to foster diversity.
- The SFFA decision calls into question the lawfulness of race-conscious considerations, regardless of purpose.

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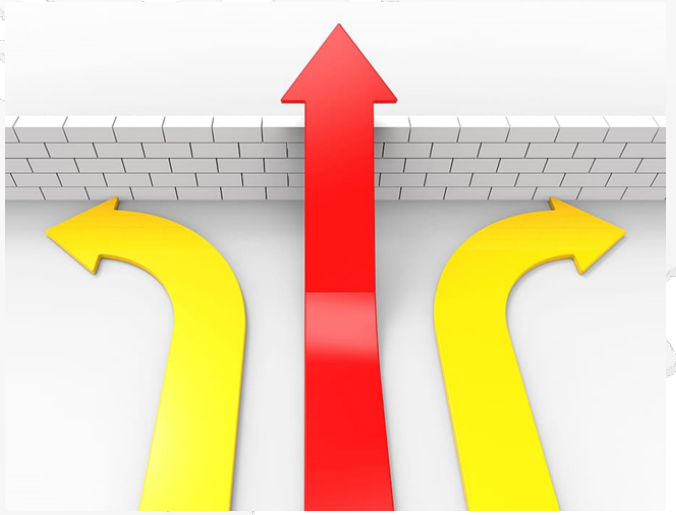
How Might Employer Policies Be Challenged?

- Public perception around diversity and societal expectations regarding affirmative action
- Employer-targeted legal claims
- Increased scrutiny from agencies that enforce antidiscrimination laws
- Action by lawmakers



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Sources of Pressures on DEI Programming

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Balancing Dueling Pressures

- Government agencies
- State regulators and legislators
- Shareholders
- Employees
- Customers
- Activists/general public

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Balancing Dueling Pressures: State Action

- **13 state Attorneys General** sent a letter that race-based preferences "under the label of 'diversity, equity, and inclusion' or otherwise," may violate antidiscrimination laws:

> We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable—sooner rather than later—for your decision to continue treating people differently because of the color of their skin.

- **21 other state Attorneys General** responded to "reassure" companies that "**corporate efforts to recruit diverse workforces and create inclusive work environments are legal** and reduce corporate risk for claims of discrimination":

> The letter you received from the 13 state attorneys general is intended to intimidate you into rolling back the progress many of you have made. We write to reassure you that corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.[3] In fact, businesses should double-down on diversity-focused programs because there is still much more work to be done.

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Balancing Dueling Pressures: EEOC

EEOC Chair Charlotte Burrows:

"[T]he decision . . . does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. **It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace**."

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Balancing Dueling Pressures: EEOC

- EEOC Commissioner Jocelyn Samuels:

"[I]t's past time for us to **recommit ourselves to fair, open, and inclusive workplaces**, and to use all the tools at our disposal, **including robust DEIA initiatives**, to fully realize the promise of equal opportunity for all."

- EEOC Commissioner Andrea Lucas:

"Even though many employers don't use the word affirmative action, it's rampant today, from ESG, to focuses on equity, pretty much everywhere, there's a ton of pressure at the corporate 100 across corporate America to take race-conscious decision-making – **race-conscious actions in employment law, and that's been illegal and it's still illegal**."

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Recent Attacks – "Competitive Advantage"

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EEOC Commissioner Lucas Joins the Virtual Debate

← **Post**

Andrea R. Lucas
@andrealucasEEOC

Can race/sex "be part of the equation" for an employment decision, as long as it isn't the "but-for" factor? Generally, no. Title VII uses "motivating factor" liability. This isn't an opinion; reasonable minds can't disagree on this point. It's the plain text of Title VII.

7:43 PM · Jan 30, 2024 · **53.8K** Views

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← **Post**

Andrea R. Lucas
@andrealucasEEOC

42 USC § 2000e–2(m) states: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

7:43 PM · Jan 30, 2024 · **2,825** Views

13 Reposts **1** Quote **125** Likes **5** Bookmarks

5

Recent Attacks - Diverse Slates

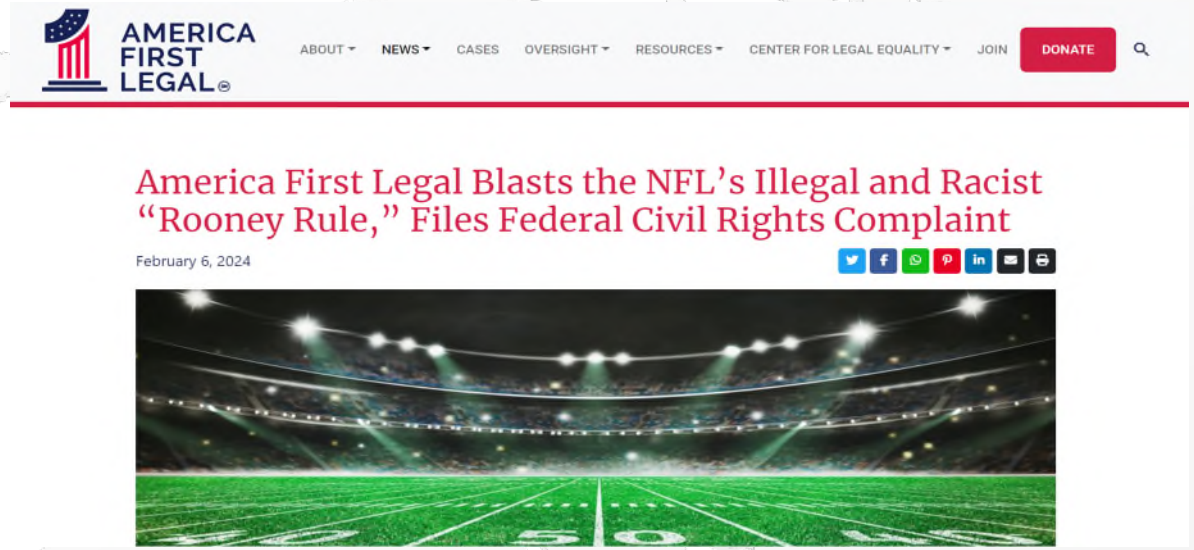
STRENGTHENING THE ROONEY RULE

In recent years, the DEI Committee has proposed additional changes to strengthen the Rooney Rule, including:

- Clubs must conduct an in-person interview with at least two external diverse — minority and/or female — candidates for any GM or head coaching interview.
- Clubs must interview at least two minorities and/or women for all coordinator positions.
- Clubs must interview a least one diverse candidate for the QB coach position or any senior level executive position at the club.

NFL Commissioner Roger Goodell stated that the updates "bolster the current Rooney Rule requirements and are intended to create additional opportunities for diverse candidates to be identified, interviewed, and ultimately hired when a vacancy becomes available."

The committee also supported new accountability measures to ensure that all teams follow the procedures outlined in the rule.



https://media.aflegal.org/wp-content/uploads/2024/02/06180937/Rooney-Rule-EEOC-Letter-02062024.pdf?_ga=2.243653701.1554134292.1707774520-169751639.1707494586

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Balancing Dueling Pressures: Legislators

- Arkansas Senator Tom Cotton:

"Employers should take to heart the Supreme Court's recent declaration that 'eliminating racial discrimination means eliminating all of it.' **Congress will increasingly use its oversight powers—and private individuals and organizations will increasingly use the courts—to scrutinize the proliferation of race-based employment practices**."

- New York Senator Chuck Schumer:

"The Court's misguided decision reminds us how far we still have to go to ensure that all Americans are treated equally. Nevertheless, **we will not be daunted or deterred by this decision** …."

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Balancing Dueling Pressures - State Laws

- Several states have introduced bills banning or limiting/restricting DEI initiatives in higher education

- Some states *require* DEI training in higher education

- Florida's "Stop WOKE Act"
  - 2022 law - prohibited employers from requiring employees to participate in certain types of DEI training
  - Some provisions recently ruled unconstitutional by 11th Circuit Court of Appeals

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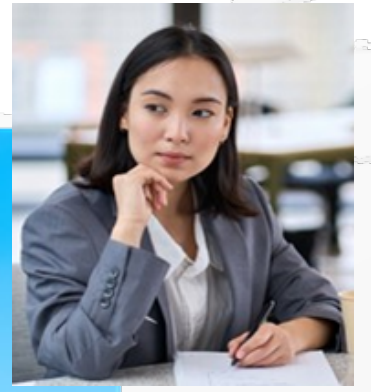
In-House Counsel Can Support DEI . . . With Guard Rails



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Analytical Framework

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Legal Authorities

US federal employment laws prohibit the use of race (or other protected characteristics) in making employment decisions

- Title VII of Civil Rights Act of 1964 prohibits discrimination in terms and conditions of employment based on race, sex, color, religion and national origin
- 42 U.S.C. § 1981
- Executive Order 11246 (federal contractors)

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Causation Test Confusion

- Title VII: "Motivating Factor" Test
  - Section 2000e-2(a)(1): employers may not "fail or refuse to hire or . . . 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."
  - Section 2000e-2(m): an "unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice."
- Section 1981: "But-for" Test
  - "To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Comcast Corp. v National Ass'n of African American-Owned Media,* 140 S. Ct. 1009, 1019, 206 L.Ed. 2d 356 (2020)

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DE&I - Not Just About Race

- Americans with Disabilities Act of 1990
- Age Discrimination in Employment Act of 1967
- Genetic Information Non-Discrimination Act of 2008
- Equal Pay Act of 1963
- Uniformed Services Employment & Reemployment Rights Act
- Pregnancy Discrimination Act / Pregnant Workers Fairness Act

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DE&I - Not Just About US Laws: Special Considerations for Global Employers

- EU Pay Transparency Directives
- Disability Hiring Quotas
- Board Room Ratios
- Nationalization Quotas
- Broader DE&I Reforms

Be careful when it comes to "one brand" messaging.

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Executive Order 11246 – Federal Contractors

- **Prohibits** federal contractors from **discriminating** in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin.
- **Requires** federal contractors to take **affirmative action** to ensure that equal opportunity is provided in all aspects of their employment.
- **Prohibits** federal contractors from, under certain circumstances, taking **adverse employment actions** against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.

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What About Voluntary AAPs?

United Steelworkers of America v. Weber (1979) and *Johnson v. Transportation Agency, Santa Clara County, California, et al.* (1987)

- Programs must:
  i. seek to eliminate manifest racial imbalances in traditionally segregated job categories;
  ii. be temporary in nature; and
  iii. not unnecessarily trammel the interests of [non-minority] employees.

- **Still Good Law? Voluntary Affirmative Action Permitted if Done Lawfully**

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EEOC Guidance on **Voluntary** AAPs (1979)

- "Title VII permits diversity efforts" but "very careful implementation … is recommended to avoid the potential of running afoul of the law."
- Employers are meant to act on a voluntary basis to modify employment practices and systems [that] constituted barriers to equal opportunity
- An employer's reliance on the EEOC regulations [in good faith establishing a voluntary AAP] will entitle the employers to **immunity from Title VII liability**
- Compliant Voluntary AAP consists of (1) a reasonable self-analysis; (2) a reasonable basis for concluding action is appropriate; and (3) reasonable action.

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Expect Scrutiny of DE&I Efforts

- Devil is in the details!
- Formulation: Draft precise plans that do not create evidence of or suggest discrimination.
- Implementation: Instruct trainers, HR, and managers on legal parameters.
- Communication: Use language respectful to and inclusive of all.

Consider data collection, privacy laws, impact on ultimate employment decisions.

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What employment practices may be challenged?

- Targeted recruiting
- Required diverse interview slates
- Executive search criteria
- Diverse internship/fellowship programs
- Minority scholarship programs
- Diverse leadership or talent development programs
- Tracking underrepresented groups in recruitment, retention and promotion
- Referral bonuses
- Representation goals with timelines
- Compensation driven by diversity metrics
- DEI Councils
- ERGs/Affinity Groups/BRGs
- Celebrations and awareness events
- Non-employee issues
  - Board preference
  - Diverse suppliers

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DEI Initiatives – How to Mitigate Risk

- Ensure alignment on company risk tolerance
- Focus on equal employment opportunity
- Concentrate efforts on inclusion versus exclusion (avoid zero-sum advantage)

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Non-Exclusionary DEI Efforts to Promote an Equitable and Inclusive Work Environment

- EEO Statements
- Training
- Expanding opportunities and removing barriers
  - Broaden qualified applicant pool beyond listing with traditional recruiting sources
  - Reconsider the use of certain job qualifications that could remove more diverse candidates
  - Consider alternative language in job ads and descriptions to reflect an inclusive culture
  - Implement measures to reduce bias in selections (e.g., standardized interview questions and selection processes)
- Foster inclusive organizational cultures, including affinity and employee resource groups (ERGs) – and ensure clarity around membership as open to all

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Legal Strategies to Mitigate Risk

- Conduct *attorney-client privileged* assessment of all DEI programs
- Conduct *attorney-client privileged* review of all ESG language, including commitments, public statements, policies, etc.
- Ensure legal risk and business goals/needs are aligned
- Obtain alignment between Legal, HR, DEI, and Risk/Compliance on DEI programs and ESG language
- Examine and leverage data collection and DEI metrics
- Leverage federal contractor compliance and voluntary AAPs, if applicable or possible – BUT – be careful
- Continue to watch case law and guidance, such as *Muldrow*

Corporate DEI Initiative Review Toolkit

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To assist employers with assessing and lawfully advancing their DEI efforts in this new environment, and to help employers prepare for legal challenges, the attorneys in Ogletree's DEI Practice Group have created a toolkit of available resources to evaluate DEI initiatives, assess legal risk, and provide specific recommendations and best practices. The toolkit contains:

1. Written Legal Analysis of Federal and State Laws Regarding DEI Initiatives

- Summary and analysis of federal and state laws on DEI initiatives, including the Rooney Rule, diverse interview panels, and goals/metrics
- Summary of recent and noteworthy "reverse" or majority discrimination cases

2. DEI Affinity Group Best Practices and Templates

- Affinity Group Legal Guidance Memo
- Sample Affinity Group Guidelines
- Tips for Establishing Affinity Groups
- Sample Draft Affinity Group Charter

3. 30-Minute Virtual DEI Learning Session

- 30-minute presentation and discussion regarding legal "dos and don'ts" on workplace DEI initiatives, including appropriate language
- Geared toward Legal, Human Resources, and DEI professionals

**Pricing: $1,500 flat fee includes all of the above.*

Separately, we can conduct a **Privileged Assessment of DEI Initiatives**, including (1) a detailed review of company-provided documents and employee communications to assess legal risk and (2) specific recommendations for potential changes. Because the scope of such an assessment is client-specific, this would be billed at hourly rates.

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DEI Toolkit

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APPENDICES

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Thank you!

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WORKPLACE STRATEGIES 2024

May 1-4, 2024 ♦ Washington, D.C.

Key General and Breakout Sessions

- Keynote Policymaker Perspective: A View From the EEOC *(featuring EEOC Commissioner Kalpana Kotagal)*
- SCOTUS's Affirmative Action Rulings: The Implications for Employers
- DEI + Workplace Investigations = Serious Challenges

To register, visit https://ogletree.com/insights-resources/seminars.

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