



DIVERSITY, EQUITY & INCLUSION

**POST SUPREME COURT RULING:
WHAT YOU NEED TO KNOW**

**PRESENTED BY:
AMELIA J. HOLSTROM, ESQ.
SKOLER, ABBOTT & PRESSER, P.C.**



Amelia J. Holstrom is a Shareholder at Skoler, Abbott & Presser, P.C., where she exclusively represents employers in labor and employment matters. While Amelia has defended clients at all stages of litigation before state and federal courts and administrative agencies, Amelia has developed a practice in which she prides herself on helping her clients stay on the right side of the law by providing, among other things, advice to clients regarding difficult and challenging employee situations and customized training for supervisors and managers.

aholstrom@skoler-abbott.com
www.linkedin.com/in/amelia-j-holstrom
<https://www.skoler-abbott.com/attorneys/amelia-j-holstrom/>

BIO

DISCLAIMERS



- **This presentation is a publication of Skoler, Abbott & Presser, P.C.**
- **This presentation is intended for general informational purposes only and should not be construed as legal advice.**
- **Reading/viewing this information does not create an attorney/client relationship.**
- **Descriptions of laws and regulations are summaries, not legal advice, and should not be relied on without speaking with an attorney.**

AGENDA



- Supreme Court's Affirmative Action Decision Review
- The Employment Law Landscape Since
- Rules about DEI Programs
- What You Should Do Now

AFFIRMATIVE ACTION IN COLLEGES IS (BASICALLY) DEAD..



- Students for Fair Admissions v. Harvard & UNC
 - Decided June 29, 2023
 - Prior case was decided in 2003
- Grutter v. Bollinger (2003) held:
 - Colleges and universities had a compelling government interest to consider race in admission decisions.
 - Select based on race.
- Students for Fair Admissions v. Harvard & UNC
 - Overturned that precedent
 - Effectively eliminated Affirmative Action in college admissions

SFFA V. HARVARD & UNC



- Harvard & UNC argued that had compelling government interest (strict scrutiny) in making admission decisions based on race:
 - Preparing for a diverse workforce, including managers and professionals;
 - Creating a diverse and well educated citizenry;
 - Preparing people for various professions; and
 - Creating learning environment with diverse ideas.
- Court said that the reasons offered were not compelling. Why?

SFFA V. HARVARD & UNC



- Decided: can no longer consider race in college admissions
- Reasoning not compelling:
 - Colleges were engaging in racial stereotyping by assuming that diverse student body led to diverse viewpoints (i.e. stereotyping that people of the same race would have the same view point)
 - Not diverse in other ways, like religious diversity or socio-economic diversity
 - Prior case mentioned 25 years in a footnote ...

SFFA V. HARVARD & UNC



- What can colleges still do?
 - Prioritize:
 - Socio-economic diversity
 - First generation students
 - Geographic origin (not national origin!)
 - Recruit applicants based on race
 - Can consider race related to individual experiences:
 - Cannot ask for essays meant to elicit this information, but can consider:
 - When someone says race contributed to formative experience in life (had to overcome discrimination, etc.)
 - Interests that may be based on race
- Limited Exceptions: remedial measures (specific to school) and military academies

WHAT DOES THIS MEAN FOR EMPLOYER DEI INITIATIVES?



Conflicting Opinions . . .

- What does the EEOC say? Depends on who you ask.
- “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.” Chair Burrows
- Employers should “take a hard look” at DEI programs. Commissioner Lucas
- “Supreme Court Did Not Kill DEI at Work. . . . Employers should not waver.” Vice Chair Samuels

WHAT DOES THIS MEAN FOR EMPLOYER DEI INITIATIVES?



11/1/23, 10:32 AM

Cotton Warns Top Law Firms About Race-Based Hiring Practices

News • **Press Releases**

JULY 17, 2023

COTTON WARNS TOP LAW FIRMS ABOUT RACE-BASED HIRING PRACTICES

FOR IMMEDIATE RELEASE

Contact: Caroline Tabler or James Arnold (202) 224-2353

July 17, 2023

Cotton Warns Top Law Firms About Race-Based Hiring Practices

Washington, D.C.— Senator Tom Cotton today sent letters to 51 law firms detailing the possible federal civil rights laws they and their clients may be violating with Diversity, Equity, and Inclusion (DEI) programs, if those programs treat people differently based on race. The letter advises the law firms to preserve documents relevant to those DEI practices in preparation for congressional oversight and private lawsuits over illegal racial discrimination in DEI programs.

In part, Senator Cotton wrote:

“Federal law has long prohibited treating employees differently because of their race. 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.”

Full text of the letters may be found here and below.

July 17, 2023

WHAT DOES THIS MEAN FOR EMPLOYER DEI INITIATIVES?



- Not disputed that SFFA v. Harvard & UNC does not apply in the employment context, but . . . Employers should be ready for challenges
- Two lawsuits pending under unique theory against law firms
- Original Civil Rights Act prohibits racial bias in private contracts
- Morrison and Foerster and Perkins Coie
 - Fellowship programs that were only open to populations under-represented in law firms:
 - Persons of Color, Disabled Persons, members of the LGBTQIA+ community
- My two cents: tough sell.

EMPLOYER DEI INITIATIVES



- Title VII has **always** prohibited employers from making selection decisions or decisions about terms and conditions of employment based on race, even in DEI programs!
- No hiring quotas
- No reserving positions for persons of particular race
- What can you do?

EMPLOYER DEI INITIATIVES



“DEIA initiatives include expanding recruitment activities to attract a broader applicant pool, tracking the effects of employment decisions on different groups of employees and publicizing the results, and establishing employee resource groups, among other measures. They aim to remove barriers to advancement for underrepresented groups and improve equal employment opportunity for all.”

– Vice Chair Samuels

EMPLOYER DEI INITIATIVES



- Equal access to your systems for all applicants and employees
- Post jobs in locations where they can be seen and applied for by persons of all races and abilities
 - User friendly websites
 - Usual websites plus others (i.e. diversity.com)
- Write inclusive job descriptions
 - Accurate requirements, experience, education, etc.
 - Gender-neutral language
 - Bold and underline rather than italics

EMPLOYER DEI INITIATIVES



- Have an EEO statement viewable by all applicants and employees
- Remove barriers to employment whenever possible
 - Criminal background issues?
 - Consider experience equivalent to degree?
 - More training?
- Standard interview process
 - Questions
 - Documents
 - Interviewers/decision makers

EMPLOYER DEI INITIATIVES



- Assemble diverse interview panels
- Give all employees opportunity to be heard and included whenever possible
- Whenever possible, provide vertical career opportunities
- Track your diversity statistics

WHAT ABOUT AFFINITY/RESOURCE GROUPS?



- Groups of employees assembled to foster workforce that is diverse and inclusive
- Even if focused on a particular group, they must be open to all employees

WHAT SHOULD YOU DO NOW?



- Review your DEI initiatives and confirm race-neutral
- If you have to know a racial characteristic to make a decision, stop that practice immediately
- Race cannot be a tie breaker or plus factor in decisions
- Eliminate quotas
- Eliminate holding positions for persons of certain races
- Allow all to participate in affinity/resource groups

WHAT SHOULD YOU DO NOW?



- Think about what you do to make people feel included
 - Surveys
 - Open door policies
 - Checking in
 - Employee appreciation events
 - Meetings with management
- Who participates in them?
 - Track that data
 - Reach out to those who are not participating

WHAT SHOULD YOU DO NOW?



- Consider neutral language in all policies
- Examine in the background if you have practices or policies in place that may be biased
- Look at overall practices:
 - Do we have a culture of recognizing people when they are doing a good job?
 - Do we have a culture where management is receptive to constructive feedback?
 - Are we receptive to new ideas?
 - Do we value written and non-written communication equally, to the extent possible?
 - Do those in management include others in their decisions whenever possible?



QUESTIONS?





STAY INFORMED

- Sign up for our blogs
 - <https://www.skoler-abbott.com/category/the-law-at-work/>
 - <https://www.skoler-abbott.com/category/immigration-at-work/>
 - <https://www.skoler-abbott.com/category/unions-at-work/>

SA SKOLER ABBOTT

Who We Are Practice Areas

The Law @ Work

WAGE/HOUR

DOL Announces New Program to Encourage Voluntary Identification and Correction of Wage/Hour Violations

MARCH 13, 2018

NATIONAL LABOR RELATIONS BOARD, UNIONS

NLRB Reverses Obama-Era Decision Regarding Scope of Bargaining Units

MARCH 9, 2018

SA SKOLER ABBOTT

Who We Are Practice Areas

Immigration @ Work

DACA, I-9, LEGAL DEVELOPMENTS, VISA

Spouses, Dreamers, and TPS

MARCH 9, 2018

H-1B, IMMIGRATION COMPLIANCE

Employment of H-4 Workers, H-1B Workers at Third-Party Sites in Jeopardy

FEBRUARY 28, 2018

SA SKOLER ABBOTT

Who We Are Practice Areas Our Team

Unions @ Work

UNIONS @ WORK

The State of Unions: Glass Half-Empty or Half-Full?

APRIL 28, 2019

COLLECTIVE BARGAINING AGREEMENTS, CONTRACT NEGOTIATIONS, UNIONS @ WORK

Are Union Fee Payers Still Paying After Janus?

APRIL 17, 2019

ARBITRATIONS, COLLECTIVE BARGAINING AGREEMENTS, CONTRACT NEGOTIATIONS, NATIONAL LABOR RELATIONS ACT, NATIONAL LABOR RELATIONS BOARD, STRIKES, UNFAIR LABOR PRACTICES, UNION AVOIDANCE, UNIONS @ WORK

Welcome to The Unions @ Work Blog

APRIL 17, 2019