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Attorneys General of 13 States Issue Warning to Fortune 100 Companies Regarding Their Diversity and Inclusion Programs in Wake of Supreme Court's Decision Overturning Affirmative Action in Higher Education

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In a July 13, 2023 letter, Attorneys General of 13 states (Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia) issued a warning to the CEOs of Fortune 100 companies, threatening "serious legal consequences" over race-based employment preferences and diversity policies. The letter refers to the recent Supreme Court decision in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. UNC*, in which the Supreme Court held that two colleges' use of race in their admissions policies was unlawful, and warns that race-based employment decisions likewise violate federal and state laws prohibiting employment discrimination. While the Supreme Court's holding addressed only college and university admissions and not private-sector employers, this letter confirms that the Court's decision may have broader implications that could accelerate an existing trend of challenges to private employers' workplace diversity, equity and inclusion efforts. The group emphasized the Court's statement that "[e]liminating racial discrimination means eliminating all of it," suggesting that this language in the Court's opinion could be used as ammunition to challenge various private-sector diversity policies, including in actions by certain Attorneys General who have enforcement authority under the anti-discrimination laws of their respective states.

In their letter, the group of Attorneys General stated their view that "racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses." They warned that if a company "previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed" as a result of the Supreme Court's decision in *SFFA v. Harvard*, and that those companies must "overcome [their] underlying bias and treat all employees, all applicants, and all contractors equally, without regard for race." The letter provides specific examples of the ways in which employers allegedly engage in unlawful discrimination, such as "explicit racial hiring quota[s]" and preferences to contractors with diverse staff or minority leadership. The letter does not address federal and state government contracting requirements, including for the certification of minority and women-owned business enterprises (MWBEs). The Attorneys General further criticized pledges by several major companies to foster diversity and support minority-owned businesses during racial justice protests in 2020.

The letter indicates that challenges to employers' diversity programs could stem from a

Related People

Jason C. Schwartz

Mylan L. Denerstein

Molly T. Senger

Zakiyyah T. Salim-Williams

Matt Gregory

Angela Reid

comparison of the legal framework under Title VI (which governs race discrimination in government-funded programs) and Title VII (which governs race discrimination in employment). Specifically, the letter refers to Justice Gorsuch's concurrence in the *Harvard/UNC* decision, where Justice Gorsuch reasoned that principles of Title VI "apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting." The letter also notes that courts "routinely interpret Title VI and Title VII in conjunction with each other, adopting the same principles and interpretation for both statutes."

Democrat and Republican appointees to the EEOC have stated that the Supreme Court's decision should not affect employers' diversity programs, although they have widely divergent views on the implications of the decision in practice. The Chair of the EEOC, Charlotte A. Burrows, released an official statement, taking the view that the Court's decision does "not address employer efforts to foster diverse and inclusive workforces," and that "[i]t 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 will preside over a Democrat majority at the EEOC with the confirmation last week of Commissioner Kalpana Kotagal. Although EEOC Commissioner Andrea Lucas similarly stated that the decision does not alter federal employment law, she noted that race-based decision-making by employers is already presumptively illegal under Title VII, and expressed her view that many employers' programs already run afoul of existing law.

The AG's letter serves as an important reminder that employers should carefully evaluate whether any of their diversity and inclusion policies could face additional scrutiny or threats of litigation. Please refer to our previous client alert for an analysis of the Court's opinion, as well as a discussion of some potential implications for private employers.

Please note that the purpose of this alert is to summarize the letter by the Attorneys General, and not to opine on the accuracy of its contents. Gibson Dunn has formed a Workplace DEI Task Force, bringing to bear the Firm's expertise in employment, appellate and Constitutional law, DEI programs, securities and corporate governance, and government contracts to help our clients conduct legally privileged audits of their DEI programs (including for employees, applicants, suppliers, directors and other constituents), assess litigation risk, develop creative and practical approaches to accomplish their DEI objectives in a lawful manner, and defend those programs in private litigation and government enforcement actions as needed.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Molly Senger, Zakiyyah Salim-Williams, Matt Gregory, Angela Reid, and Emily Lamm.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, the authors, or the following practice leaders and partners:

Mylan L. Denerstein – Partner & Co-Chair, Public Policy Group, New York (+1 212-351-3850, mdenerstein@gibsondunn.com)

Zakiyyah T. Salim-Williams – Partner & Chief Diversity Officer, Washington, D.C. (+1 202-955-8503, zswilliams@gibsondunn.com)

Jason C. Schwartz – Partner & Co-Chair, Labor & Employment Group, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)

Katherine V.A. Smith – Partner & Co-Chair, Labor & Employment Group, Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)

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