

The Year Ahead 2024: DEI

By Samia M. Kirmani & Michael D. Thomas

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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

Samia Kirmani:

We are so pleased to be here. So our theme for today is everything has changed and nothing has changed at all. It's not lawful to make decisions based on protected characteristics. That's still the case. It is lawful to increase outreach efforts. That's still the case, and it's always come down to positive employee relations and clear communications. Still the case.

Samia Kirmani:

I'm Samia Kirmani from Jackson Lewis Boston and with me is Michael Thomas from Jackson Lewis Orange County and we're co-leaders of our firm's corporate diversity counseling group. And our group was founded decades ago by Weldon Latham, whom some of you may know recently retired. And we advise employers in all industries on DEI programming, what to do, what not to do, what this all means. And we're talking today about DEI is not dead, what legal developments are there out there in which matters.

Samia Kirmani:

So the Supreme Court's decision in Students for Fair Admissions versus Harvard and Students for Fair Admissions versus the University of North Carolina has no direct application outside the context of college admissions. But by finding the use of race and college admissions unconstitutional, the court created an inflection point in perceptions about corporate diversity, equity and inclusion programs.

Samia Kirmani:

So, as we look at the year ahead, while laws prohibiting discrimination in employment and impacting DEI programs have not changed, the scrutiny of DEI initiatives has increased by both advocates of DEI and those who contend that DEI itself is a form of discrimination. The fact is it continues to be a business imperative for employers in order for them to attract talent and attract an increasingly more diverse consumer and customer base. But it's important that employers understand the legal parameters and the risks associated with advancing DEI measures and those associated with retreating from them. So what's the state of the current legal landscape and what do we see coming around the corner in 2024? I guess it's not around the corner, it's now.

Samia Kirmani:

So what are the laws? Title VII has always prohibited discrimination on the basis of race, gender, and other protected characteristics. We have section 1981 of the Civil Rights Act of 1866, which has always and continues to prohibit discrimination on the basis of race with respect to contracts. And under that law, the employment relationship also constitutes a contract. So those laws and similar state anti-discrimination laws remain unchanged. We have Executive Order 11246, which provides for affirmative action for federal contractors. It too prohibits discrimination on the basis of race, gender, et cetera. So it actually remains lawful for employers to implement DEI programs that seek to ensure workers of all backgrounds are afforded equal employment opportunity.

Samia Kirmani:

So Michael, if the law has largely remained unchanged, why are we talking about this? Why are we talking about a DEI push and pull?

Michael Thomas:

Thank you Samia, and thank you all for listening. So let's define that DEI, push and pull first. So the push is really those who seek to advance DEI. They seek to address barriers that exist for underrepresented groups at different stages throughout the employee life cycle. And this is important because often there is actually a statistically demonstrable under-representation, which creates business as well as both legal and reputational risk for employers.

Michael Thomas:

And the pull against DEI program, these challenges recently have been coming from both individuals and organizations, and a lot of these organizations have been formed explicitly for this purpose to challenge DEI initiatives. They are focusing on the belief that DEI programs discriminate against the majority by giving preferential treatment to different groups based on protected categories. And so anticipate hearing a lot from all sides of this conversation as we approach an election year where these issues are going to remain front and center.

Samia Kirmani:

The law hasn't changed, but there are some important legal developments that we should be aware of. So what's the one, the first one that, you and I talk about this all

the time.

Michael Thomas:

It's the one that you're obsessed with, Samia.

Samia Kirmani:

I am.

Michael Thomas:

And this is whether the Supreme Court will broaden the definition of adverse employment action under Title VII. And so the Supreme Court heard oral arguments on December 8th of last year in *Muldrow versus City of St. Louis*. And they heard oral arguments to consider whether Title VII requires a showing of tangible harm for a plaintiff to succeed in an employment discrimination claim.

Michael Thomas:

Now, it may very well be that the Supreme Court eliminates that tangible harm or injury requirement, and if the Supreme Court does so, that's a result that is actually supported by advocacy groups on both sides of the issue. And so such a decision to eliminate the injury requirement would make it easier for plaintiffs from traditionally underrepresented groups to prove their claims. However, it will also clear the way for DEI opponents to argue that DEI programs are discriminatory without having to show that any employee experience materially significant disadvantages or changes in employment.

Samia Kirmani:

So it's interesting, are they going to eliminate the requirement or are they going to dilute it? So in either case, all sides of the DEI issue seem to be in favor of loosening or eliminating that requirement. So, so much for the push and pull, right? What else, Michael?

Michael Thomas:

So the other legal issue is whether majority plaintiffs have to meet a higher burden of proof. And so currently just under half the Federal Circuit courts require plaintiffs bringing reverse discrimination claims to meet a higher burden of proof to prevail. And so majority plaintiffs must prove that the defendant, the employer, is that unusual employer who discriminates against the majority. This is an element that if you are a minority plaintiff, you do not have to meet. And so recently the sixth Circuit upheld the dismissal of reverse discrimination lawsuit because the plaintiff did not meet this higher burden. So if this case comes before the Supreme Court, the court very well may eliminate that heightened burden of proof, which would make reverse discrimination claims a little bit easier to prove.

Michael Thomas:

Another issue that we're monitoring is whether grant, scholarship and internship programs with protected class eligibility criteria are on law for under section 1981.

This issue is currently before the courts. This is an issue to watch and when similar targeted programs have been challenged, some companies remove race-based eligibility criteria rather than risk lawsuits.

Michael Thomas:

The last area of law that we're kind of paying attention to in this DEI space is securities law. And so shareholder proposals and shareholder litigation has increased on both sides. And so pro-DEI proposals and litigation have been brought claiming companies are falling short of their DEI pledges. On the other side, anti-DEI proposals and litigation has largely focused on whether these initiatives breach a company's fiduciary obligations to its shareholders.

Michael Thomas:

And so how successful these proposals and lawsuits will be really remains in flux. At least one quarter in response to a claim that DEI initiatives breach a company's fiduciary obligations to shareholders answered with a resounding no. The court rejected the plaintiff's argument instructing plaintiffs to seek other investment opportunities rather than waste the court's time.

Michael Thomas:

So what should employers do, Samia to prepare for the DEI challenges and opportunities in 2024?

Samia Kirmani:

Yeah. So what we're seeing is that employers are continuing to focus on their outreach efforts, expanding their outreach. The issue is that they're looking for talent. So reaching out to HBCUs, HBCU open universities and employers are really looking at their policies, practices, and communications to eliminate barriers or address bias. And they're conducting an audit of their initiatives for both effectiveness and legal compliance. They're evaluating their communications about their DEI measures and reviewing those communications, those internally shared and also public facing to avoid statements that can be characterized as violations of the law, even if they're not or misinterpreted to suggest noncompliance with the law.

Samia Kirmani:

And then, and this is not new. Ensuring that everybody involved in DEI initiatives hiring, promotion, and employment decisions are based on legitimate non-discriminatory reasons. That involves training and communications about what really the DEI initiative is designed to do and what it is instructing people to do.

Samia Kirmani:

And then finally, focusing on inclusion and wellness. Be clear that the company is committed to inclusion for everybody regardless of race, gender, or any other protected characteristic. And the thing about this is that this is not new. This all comes down to communication and positive employee relations, which is something that employers have been focused on for years.

Samia Kirmani:

So what should employers expect this year?

Michael Thomas:

So I think the big picture for 2024 is that DEI is not dead. It is still a business imperative, but more than ever, it's important to focus on ways to promote a more equitable and inclusive workplace for all employees and to reduce barriers for underrepresented groups. This is good business and also good risk mitigation. So keep in mind that the legal environment with respect to DEI has some unresolved questions that we've highlighted in our conversation today and consider the risk, business legal and also reputational, of advancing and committing to DEI efforts, as well as the risk and retreating from DEI efforts as well.

Michael Thomas:

We thank you for your time. If you have any questions, please feel free to reach out to Samia or myself, or whichever Jackson Lewis attorney you regularly work with.

Samia Kirmani:

Thank you.

Alitia Faccone:

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