Podcast

MYR 2024: Private Sector DEI Initiatives Post 'Muldrow' and 'Students for Fair Admissions'

By Tanya A. Bovée & Michael D. Thomas

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Details

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By almost any measure, 2024 is a memorable year for employment and labor law — and it's only halfway done. Our timely report, Mid-Year 2024: Now + Next, takes a closer look at the recent rules, regulations and rulings affecting employers today, the rest of the year and beyond.

Transcript

Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2024 has proven to be no exception, with many significant changes and potential challenges ahead for employers. What follows is one of a collection of concise programs as We get work™; the podcast provides the accompanying voice of the Jackson Lewis 2024 Mid-Year Report, bringing you up-to-date legislative regulatory and litigation insights that are taking place now and what you can expect next in the second half of this year. We invite you and others at your organization to experience the report in full on JacksonLewis.com or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining.

Tanya A. Bovée
Principal

It's the one-year anniversary of the U.S. Supreme Court's*Students for Fair Admissions* decision, which, as a reminder, involves student admissions to universities that receive federal financial assistance. The Supreme Court analyzed Harvard University's and the University of North Carolina's consideration of race and the admissions process under the Equal Protection Clause in Title VI of the Civil Rights Act of 1964.

Both factually and the law applied in the*Students for Fair Admissions* decision largely do not apply to the private sector workplace and do not apply to workplace DEI initiatives. However, even though this decision does not directly apply, it has changed how employers, employees and various other stakeholders discuss DEI.

To take a step back, the law applicable to private sector employers and your DEI initiatives has largely not changed. Applicable to private employers are Title VII of the Civil Rights Act of 1964 and other and federal state laws that prohibit making employment decisions based on a variety of protected characteristics such as race, color, religion, sex, national origin, disability, age, and other factors. So basically, you cannot hire or promote someone because of their race or their gender.

Different states protect additional categories such as natural hair. Also applicable to DEI initiatives is Section 1981 of the Civil Rights Act of 1866, which prohibits entering into contracts based on race or where race is a factor in the enforcement. This often comes up with initiatives that might involve a third party but have exclusive criteria based on protected categories as to who can participate.

And in addition, Executive Order 11246 applies to covered federal contractors and subcontractors and prohibits discrimination against employees or applicants for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin. Executive Order 11246 requires covered federal contractors and subcontractors to engage in affirmative action.

There is a common misperception that the affirmative action and the Executive Order 11246, contractor context, requires or allows covered employers to apply preferences in favor of women and minorities over men and non-minorities in employment, including in hiring and promotion decisions. But it does not. In fact, similar to Title VII, Executive Order 11246 prohibits discrimination against applicants and employees on the basis of all races, including Whites and the other characteristics covered by the executive order. Nonetheless, this law has not changed.

Michael Thomas
Principal and Corporate Diversity Counseling Co-Leader

Thank you, Tanya. And so, the one significant change in the law that we have already seen impacting and increasing discrimination lawsuits involving DEI is the lowering of the injury requirement to bring a Title VII claim that we saw in *Muldrow v. City of St. Louis*. And so, in *Muldrow*, the U.S. Supreme Court concluded that an employee challenging a job transfer under Title VII of the Civil Rights Act of 1964 must show the transfer brought about some harm with respect to an identifiable term or condition of employment. But that some harm need not be significant.

Now, previously, some circuit courts of appeals require Title VII plaintiffs to show serious, significant, or material harm related to terms, conditions or privileges of employment to bring a Title VII claim. And so, in those circuits, employment action such as a transfer without an associated decrease in pay or responsibilities would not meet that higher standard. Although the Supreme Court actually did eliminate that heightened threshold for harm under Title VII, it actually left open the question of what showing of harm would be sufficient for Title VII purposes.

And so, we've already seen different groups, and also individuals, alleging things like aspirational goals alone might meet this lower harm or injury requirement under Title VII. So, in many ways, as Tanya pointed out, the law hasn't changed,

but we have seen at least one significant change recently, and that's lowering the bar for an injury under Title VII.

Now, despite the increased DEI litigation that we've seen over the course of the past year, most employers are still continuing to advance DEI initiatives. And so why?

So, it's largely because under-representation continues to exist in many workplaces. And so, if an employer has statistically significant under-representation of certain groups, not only is that employer excluding potential talent, but there are legal risks. And so, lawful practices of DEI are forward-looking. There are proactive ways to remove barriers, reduce risk of discrimination, and create open and inclusive workplaces for all employees that actually thrive.

And so, they don't involve using race or gender to make individual hiring or other employment decisions. And so therefore it actually remains lawful for employers to take steps to ensure workers of all backgrounds are afforded equal opportunity in the workplace. Again, especially if there is that statistically significant showing of under-representation. In addition, there does continue to be a business case and increased demand for DEI initiatives from shareholders, younger generations and the changing demographics, and the war of talent and for customers and clients.

Again, employers can address under-representation, but whatever you do, you cannot have quotas, set-asides, or use protected characteristics as a plus factor. So essentially, you cannot discriminate against one group to advance another group.

BOVÉE

Thanks, Michael. I would also say that employers are trying to walk a fine line of addressing potential discrimination and bias in the workplace without actually engaging in discrimination. So as a result, you have a push and a pull. There are politicians, attorney generals, shareholders, organizations, employees and job applicants all advocating for DEI and imploring employers [to take on] DEI efforts and commitments. And on the other side, you also have people in the same groups claiming that DEI is a form of discrimination or reverse discrimination. And so, we anticipate voices as well as litigation on both sides to increase in light of *Muldrow* and also in light of the upcoming presidential elections.

THOMAS

Absolutely, Tanya. And so, there's actually been a lot of confusion around DEI over the course of the past year and also confusion around the impact of the Supreme Court's *Fair Admissions* decision. What should employers do?

As you point out, they are trying to walk this fine line. So, when it comes to discussing what employers should do, well, everything has changed and nothing has changed. So, everything has changed in that DEI initiatives are getting a lot more scrutiny. But what employers should and can do has not really changed that much. Employers should, and they always should have, focus on inclusion and wellness for all employees.

Any DEI or DEIA, including accessibility, efforts should begin with self-reflection

— by examining the employee life cycle for possible bias and barriers. This includes evaluating recruiting, hiring, and compensation practices, work assignments, evaluating procedures, employee retention, promotional leadership, and also terminations. These proactive efforts to break down barriers to opportunity are important to ensuring that every worker can realize their full potential and contribute to the workplace.

What else should employers do?

BOVÉE

Well, they can also look at what they're doing to retain employees and the environment that they're creating for all employees. This is where psychological safety and employee wellness becomes important.

Psychological safety is all about creating an environment where everyone's uniqueness can flourish. It's about employees feeling empowered to express an idea or contribute fully without fear of negative consequences to themselves, their status or their career. It includes being courageous enough to showcase their vulnerability, to own their mistakes and turn them into learning and trust that their work environment and coworkers will not shame them for doing so. Psychological safety is critical for employers to get the most from their employees and for employees to feel engaged. Psychological safety also results in cost saving for the employer because it's so expensive to continuously recruit and train new employees.

THOMAS

Thank you, Tanya. We've covered a lot within the past like eight or nine minutes. As we approach the middle of the year and the one-year anniversary of the Students for a Fair Admission decision, there are increased legal risks with DEI initiatives. However, there continues to be recognition that these programs, when carefully and lawfully implemented, are important to breaking down barriers, equal employment opportunities, and preventing discrimination, which unfortunately is still pervasive at times within the workplace.

And so, we want to thank all of you for listening to us and telling us. As always, it's a pleasure spending time with you.

BOVÉE

Same here. And thank you all. See you in the next half of the year.

Thank you for joining us on We get work™. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective.

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