

Managing in a Regressive Legal Environment: Employers Need to Stay the Course of Nondiscrimination

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Federal law expanded civil rights and equal opportunity to all employees. Major U.S. employers have embraced the expansion by using affirmative action plans and diversity, equity, and inclusion policies. Concerns raised by a more conservative Supreme Court and its reversal of affirmative action in higher education, the recent enactment of regressive state laws aimed to diminish the rights of the LGBTQ+ community and invalidate affirmative action and DEI efforts should not be allowed to discourage the progress made. Employers can and should stay the course of expanded civil rights and equal opportunity in the workplace for all firm employees.

Keywords: affirmative action, diversity, equity, inclusion, nondiscrimination

INTRODUCTION

U.S. employers increasingly tailor their HR policies and practices toward full protection of minority employee rights, a more balanced workforce, and greater diversity, equity, and inclusion in the workplace. This is so despite the backdrop of the Supreme Court's recent denial of affirmative action in higher education and attempted state legislative measures designed to diminish LGBTQ+ civil rights and workplace DEI policies. Unfortunately, politics and hatred toward minorities appear to be motivating factors.

Part I of this article will consider the vitality of federal law protecting LGBTQ+ workers civil rights and recent surveys showing that employer practices have consistently and exceeded those standards. A review of new state laws negatively affecting LGBTQ+ rights will be reviewed. While state law in conflict with federal law is invalid, and as most anti LGBTQ+ laws have so far been directed at targets rights outside the workplace, still adverse impact on employees and their families is a concern.

Part II will review affirmative action in the public sector and the Supreme Court's recent decision setting aside decades of settled judicial support for affirmative action in higher education admission policy, now declared unconstitutional. Review will also be given to recent state legislative efforts to invalidate DEI policies of the public schools and employers. Federal law supporting private sector employers' right or obligation to initiate affirmative action plans and/or DEI policies starkly contrasts negative trends in the public sector. Still, the question of whether those trends might influence private sector policies in the future will be considered.

Finally, Part III will discuss the management implications of this challenging legal environment. Suggestions will be made for implementing protective and balanced policies while minimizing the risk of claims.

LGBTQ+ CIVIL RIGHTS AND RECENT CHALLENGES

Decisions by the Court

Following its landmark decision in *Obergefell v Hodges* (2015) that afford Constitutional Equal Protection and Due Process privacy rights for gay married couples, the Supreme Court in *Bostock v Clayton County, Georgia* (2020) extended statutory protection for employment rights to LGBTQ+ employees under Title VII of the Civil Rights Act of 1964. (CRA, 1964). However, the *Bostock* decision specially left several issues undecided. The Court said it was not addressing possible discrimination against LGBTQ+ employees concerning parental leave, healthcare, medical and leave accommodations for transgender and transitioning employees, the right to same-identity bathrooms and lockers, or dress code tolerance. The guidances of the Office of Personnel Management governing federal employers (OPM, 2021), and the Equal Opportunity Commission (EEOC) for private-sector employers has directed that these benefits be provided to employees as part of their nondiscrimination policies. (EEOC, 2021). However, EEOC guidances are not binding on the courts, some of which have considered the right to them an open question.

Also of concern to the LGBTQ+ community is a potential waiver of the Court's support for a Constitutional right of privacy, demonstrated by its decision in *Dobbs v Jackson Women's Health Organization* (2022), *overruling Roe v. Wade* (1973), an established 50-year-old precedent that held a woman's right to choose was a right of privacy under Due Process. Suggestions that the Court should do the same to gay marriage have been voiced in the concurrence of Justice Thomas in *Dobbs* and in a statement made by Justice Alito, (VanSickel, 2024), attached to the Court's ruling in *Missouri Dept. of Corrections v Finney* (2024), both expressing the view that the Court's previous holdings of privacy protection for rights, including gay marriage, should be reexamined. Only two justices on the current Court voted to protect gay marriage in *Obergefell*. Were the Court to revisit gay marriage and thereby nullify gay marriage rights, the underlying legal basis for many economic and social benefits LGBTQ employees now equally enjoy, that do not depend on Title VII, could well be threatened. Coupled with the listed exceptions from Title VII coverage noted in *Bostock*, legal protection of those would devolve to the state and local governments to provide- making the decided trend of recent adverse state legislative efforts even more concerning.

New State Laws adverse to the LGBTQ+ Community

Over 600 anti-LGBTQ+ bills have been introduced in state legislatures in 2023. A third of them targeted youth in the LGBTQ+ community and aimed at transgender to restrict gender-affirming care for minors, but in many cases for adults as well. A survey of anti-LGBTQ+ bills also show the legislation is primarily aimed at public schools and public employers and frequently sought to limit identity-specific pronoun usage, sports team membership, and bathroom access for transgender youth. These laws generally do not address the workplace rights of LGBTQ+ employees under Title VII. Still, the Human Right Campaign (HRC), a leading nonprofit advocate for LGBTQ+ rights, in its 17th Annual LGBTQ+ Community Survey, found "anti-LGBTQ+ legislation creates real, measurable, and tangible strain on business operations broadly and individual workers and their families." (HRC, 2024) It also found that one in three surveyed felt less safe and likely to relocate from states with such legislation. (HRC, 2024) It can easily be anticipated that such laws will result in increased LGBTQ+ worker anxiety and workplace distraction and impair impact on firm recruitment and retention of talented LGBTQ+ workers.

Private Employers' Nondiscrimination Efforts Continue

Legal adversity presented by recent adverse state laws comes while more Americans than ever support the LGBTQ+ community. U.S. employees are 4.5 times more likely to work for an employer publicly committed to that support (Bloom, 2022) and in its 2023-2024 nationwide survey of corporate employers, the HRC reports that while "we saw state legislators attack our transgender and non-binary community members and we saw extremists in opposition of LGBTQ+ equality, take aim at our corporate partners.... corporations rose to the challenge and continued their commitment to maintaining and improving upon their workplace environments to be inclusive of all employees." (HRC, 2024). Corporate employer efforts inside

and outside of the workplace have been the highest recorded in the 20 years the survey has been conducted, and supportive efforts broadly include nondiscrimination policies, equitable benefits to LGBTQ+ employees and their families, and a supportive and inclusive firm culture, and efforts beyond the firm as part of social responsibility. In 2002, the HRC had 13 companies with a score of 100% for these efforts. In 2023-2024, some 545 major companies earned that perfect score.

Firms also reported concrete benefits from inclusive LGBTQ+ efforts. They include higher brand recognition, increased sales and customer loyalty, and improved recruiting and retention of talented employees. (HRC, 2024)

AFFIRMATIVE ACTION PLANS AND DEI POLICIES

Affirmative Action in Higher Education -The Harvard Decision

The current Court reversed yet another settled Constitutional precedent with its decision in *Students for Fair Admission v. Harvard* (2023), striking down the use of race as a factor in public sector higher education affirmative action. A compelling interest of student body diversity was first recognized in *California v. Bakke* 1978 which while rejecting use of racial quotas, upheld use of race as a factor in admission decisions. Use of race as a factor to achieve diversity had been reaffirmed several times by the Court in *Grutter v. Bollinger* (2003) and again in *Fisher v. University of Texas* (2013). *Harvard* closed the race as a factor exception, finding its use violated Constitutional Equal Protection. The decision was fact specific, emphasizing Harvard's plan had the effect of excluding Asian students and, therefore, failed judicial scrutiny, because it did not improve student body diversity on campus. It is noteworthy that *Harvard* was not extended to the military academies which still can use race as a factor in admissions. See *Students for Fair Admission v. U. S. Military Academy at West Point* (2024). Still, the view held by some critics after *Harvard*, is that any affirmative action plan using race as a factor, even if designed to improve racial diversity, is unconstitutional and that current DEI policies that attempt to do the same should also be subject to challenge in the courts. However, the view is unfounded as applied to the private sector employer. That is because private sector mandatory federal contractor and voluntary affirmative action plans to further diversity and equal opportunity are well-established exceptions to a finding of Title VII discrimination and not the subject of judicial strict scrutiny under Equal Protection. The DEI policies extending those diversity efforts may well likewise be considered lawful and appropriate.

Private Employer Affirmative Action

Voluntary Affirmative Action by Private Employers: United Steelworkers v Weber (1979)

It is important to note that private employer affirmative action has other sources of legal authority and is subject to different legal scrutiny. Title VII of the Civil Rights Act specifically allows the federal courts to order mandatory affirmative action plan as a remedy for past intentional discrimination by private employers. (CRA, 1964). Further, private employers have also been authorized to use affirmative action, by the Court's decision in *Weber*. The case involved a training program adopted by the employer and approved by the employee's union, to increase the percentage of minorities into the employer's skilled positions, where they were historically excluded due to past discrimination. Weber was a white male with seniority who was otherwise qualified, but excluded from the training initiative because seats were reserved by a quota established for minority trainees. His successful suit for race discrimination was set aside by the Court's finding that the plan was permissible under the Civil Rights Act. By a review of legislative history, the Court found that Congress, in passing the Act, intended that employers be permitted to use affirmative action to eliminate the effects of past discrimination. The Court was careful to note affirmative action by a private sector employer did not involve state action and therefore no Constitutional strict scrutiny under Equal Protection was due. However, the Court also observed that the plan had been formally adopted rather than created ad hoc, to address an existing imbalance of minorities and that the plan: 1. did not unnecessarily trammel the interests of white employees, cause their discharge, or create an absolute bar to their advancement; 2. was temporary, to eliminate imbalance rather than maintain balance, and 3. would terminate as soon as the percentage of minorities approximated those in the local labor force.

Mandatory Affirmative Action for Federal Contractors: Executive Order 11246

The Court's own established case law and those from the Federal Circuits continue to uphold Executive Order 11246, requiring affirmative action plans be developed by federal contractors with 50 or more employees or federal contracts greater than \$50,000, as a condition for government contract work. Beginning in 1965, in support of the 1964 Civil Rights Act, EO 11246 has been administered by the Department of Labor and supervised pursuant to regulations by the Office of Federal Contract Compliance Programs (OFCCP). The EO requires government contractors to include no discrimination provisions in all advertisements for employment and substantial contracts and develop and administer affirmative action plans to achieve balance for minorities and women in the workforce working Federal contracts. OFCCP and the EEOC handle complaints of discrimination and noncompliance against contractors Government contractors. Violations can lead to remedies, including contractor debarment.

EEOC Affirmative Action Guidance (CM-607)

In 1981 the Commission issued its affirmative action guidance, confirming the vitality of EO 11246 and the Court's requirements in *Weber*. An employer may adopt a voluntary affirmative action plan and not be subject to a reverse discrimination claim under Title VII, provided it complies with the guidance. The guidance provides that employer can use affirmative action to promote diversity and equal opportunity and involve race, sex, or national origin considerations. While evidence of past discrimination or a judicial record of same are not prerequisites, plans must involve a reasonable concerted self-analysis, a reasonable basis to conclude affirmative action is appropriate, and reasonable action to achieve action intended. Pre-approval is required for mandatory affirmative action plans required by law or judicial order. Unapproved employer plans for voluntary affirmative action require guideline procedures to be followed. (EEOC, 1981).

The EO 11246, *Weber*, and EEOC CM-607 all continue to be good authority for a private sector employer to mandate or allow adoption of an affirmative action plan to address workplace underrepresentation of minorities (and women) in the firm. Further, even public employers' affirmative action to correct historic imbalance still appears supported by the federal courts, even though those plans are subject to the higher Constitutional "strict scrutiny" review to satisfy Equal Protection. See *Johnson v Transportation Agency, Santa Clara Cal.* (1987).

DEI Policies in the Workplace

Private Employer DEI

While encouraged by the EEOC training, private sector employer DEI policies have remained largely unregulated and discretionary to employers. Private employer DEI policies predate EEOC efforts and are increasingly popular with employers. Since Congress passed the 1960's civil rights legislation, DEI policies have also been used in the private sector to supplement and reinforce approved federal employment objectives of nondiscrimination for contemporary equal workplace opportunity. By doing so, DEI has also served employer efforts to improved firm culture.

Diversity supports the rule of nondiscrimination in hiring. It also recognizes the inherent advantages of a workplace with balance, and new approaches and ideas afforded by diverse employee backgrounds and perspectives.

Equity goes beyond equal treatment. It recognizes that some employees will need further accommodation to contribute successfully after being hired.

Inclusion furthers the fundamental HR principle that firms benefit when employees have a real stake in the firm's success. Inclusion works best when those included are shown that their contributions are valued and appreciated as such.

In contrast a reduction in DEI can negatively impact employee development. An example of the relationship is shown by a recent analysis of aggregate company data showing a decline in leadership positions held by women, with a decline in DEI. (Schwantes, 2024).

Federal Employer DEI

Federal employers' recruitment and hiring DEI formally adopted in 2011, with Executive Order 13583 which established a coordinated government-wide initiative to promote DEI in the Federal Workforce. It was followed by a series of EO's and Presidential and agency memorandum specific to national security workers. Most recently EO 14035 broadens protection further to add accessibility as part of a federal policy for all federal employment. In response, the EEOC established a series of DEI workshops for public and private sector training and for its own internal office, to further DEI within the agency. (EEOC, 2021). Yet while benefits of DEI are apparent in application by private and public employers, use of DEI by state public schools and in state employment has come under attack. The final effect of these state measures remains to be seen.

State Laws Seeking to Invalidate Public “Woke” DEI Policies

Conservative-led efforts have resulted in an eruption of bills passed or pending in 30 states (Adams, 2024) seeking to negate existing public school and state agency DEI policies frequently labeled “woke”. The term has its historical origin as a cautionary slang term of the black community, expressing the need to be aware of racially motivated risks to minorities in society. It has since been arguably misused, as a racial slur, to denounce and degrade DEI legislation or policies seen by opponents as excessively accommodating toward minority rights. (Romano, 2020). Woke has frequently been used as part of a racist backlash to describe the Black Lives Matter movement and to attack curriculum taught about race relations and gender identity.

Most anti-DEI measures have been aimed at invalidating DEI programs adopted by public schools, colleges, and universities, using a variety of rationales. DEI is touted as divisive-fostering white guilt, contrary to academic freedom, free speech, and derogation of merit as a basis for hiring and enrollment decisions. Texas and Florida were early to banish DEI initiatives from their state's public colleges and universities. (Confessore, 2024). Several other states, including North Dakota and North Carolina have joined in to ban submission of diversity statements as part of their applicant hiring and promotion and student enrollment procedures in public schools. In December 2023, Texas Congressman Dan Crenshaw went further by announcing his House bill to prevent federal funding of all U.S universities that require employees, students, or applicants to submit or endorse DEI statements as a condition of employment or enrollment. (Seminera, 2024). Such actions demonstrate a continuing determination of conservative lawmakers to roll back DEI initiatives in public school settings.

However, efforts to disrupt DEI have also extended to the private sector employer. Since the *Harvard* decision, conservative political action groups have made a number of letter demands and filed suits against large US employers seeking to force them to resend their DEI policies. So far, those demands have been rebuffed. (Scheiber, 2023).

Private DEI Policies Remain Lawful

While employee support varies by gender and ethnicity, a Pew Research Center poll conducted in February of 2023 showed that overall, a 56% majority of employed Americans said that increasing DEI efforts was a good thing. (Minkin, 2023) A Marist national poll in 2024 found less support but perhaps uncovered an underlying rationale for DEI. More than eight in ten Americans thought the diversity of races, ethnicities, and religions in the U.S. strengthens the country. (Marist, 2024)

Along with continuing federal support efforts, several states have either passed or are considering new measures to implement new DEI policies in their public sector, including California, New Jersey, and Michigan. A recent pro DEI bill passed in Maryland encourages private sector adoption in the state. (Bhabba, 2023).

Private employer DEI policies are consistent with the EEOC's position. *According to acting chair Charlotte Burrows, the decision “does not address employers’ efforts to foster diverse and inclusive workforces or engage the talents of all qualified workers, regardless of their background, Harvard changed nothing in the law governing DEI.* It remains lawful for employers to implement diversity, equity, inclusion,

and accessibility programs to ensure workers of all backgrounds are afforded equal opportunity in the workplace.” (EEOC, 2023).

Risk of Reverse Discrimination Claims

Employers must follow the legal requirements of affirmative action and use best practices when adopting a DEI policy. In the extreme case, poorly administered affirmative action and DEI policies have been evidence for suits of “reverse discrimination”- brought by a protected majority class plaintiff (frequently white) discriminated against to favor minorities. Reverse discrimination claims only account for 10% of race-based claims filed with the Commission. However, some have featured ad hoc affirmative action or DEI policy decisions, or employers use those policies as a guise for intentional discrimination. Given widespread use of DEI policies in private employment, these claims are likely to rise even if used by employers in good faith. (Guynn, 2023). Examples include *Johnston v School District of Philadelphia* (2006) where plaintiff school district employees were told “there’s too many males managers in the office”, resulting in a jury award of \$2.96 million in damages, *Duvall v Novant Health Inc.* (2022) where the jury awarded \$10 million in damages for the termination of a white male hospital director with a strong performance record replaced by two women with far less qualifications. Evidence that the employer had a DEI goal of increasing the percentage of women in senior leadership was used in part to support the claim and in *Lutz v Liquidity Services Inc. v. Maryland* (2022) a white male sued claiming the CEO told him he was terminated as a component part of the diversity efforts of the firm.

Similar claims are pending for terminations claimed in part motivated by corporate DEI objectives against Gannett in *Bradley et al v. Gannett* (2023), a class action of 5 “non-minorities” terminated by a New York newspaper and replaced by minority employees plaintiff alleged to improve diversity, (Telford, 2023) and against Morgan Stanley in *Meyersburgh v Morgan Stanley & Co LLC* (2023) brought by a former white male managing director replaced by a less experienced black female that he alleged was caused by firm diversity and inclusion initiatives. Two major corporate law firms were also recently sued by the same legal counsel that brought *Harvard* to the Court, alleging the diversity plan for hiring decisions in their law student fellowship programs caused reverse race discrimination. (Mark and Telford, 2023). While affirmative action plans and DEI policies that deny hiring or cause termination based on Title VII protected classifications would pass the minimum requirements of *Weber* or the EEOC guidance, such reported claims are relatively few. Still, given the misplaced and opportunistic reliance on *Harvard* and prevalence of existing DEI, they likely will increase. One thing is certain: Neither affirmative action nor DEI policies are without risk, if poorly administered. As firms seek to protect employee civil rights, affirmative action rules and DEI best practices must be followed.

MANAGEMENT IMPLICATIONS AND BEST PRACTICES

The initial concern for the organization is legal compliance with federally mandated civil rights law. Established nondiscrimination policies that protect the rights of all employees must be enforced. That includes the recently recognized rights of LGBTQ+ minorities. State laws adverse to LGBTQ+ have not yet targeted the workplace. If they do, they will be inconsistent with federal law, invalid and unenforceable, and should be regarded so by employers.

Federal law continues to extend the right of private sector employers to use affirmative action plans and DEI policies to establish a more representative and balanced workforce. In doing so the firm’s approach should be measured and thoughtful. Reverse discrimination must be avoided, following well-established rules. With the advice of legal counsel, the firm should apply the rules by *Weber* and the procedures for approval by EEOC guidance. The firm will need to be vigilant to avoid the use of racial, ethnic or gender-based quotas and policies that limit the rights of other protected classes. DEI policies must be created and implemented with goals and objectives conceived in advance and communicated to employees. The benefits of a balanced and more representative organization the firm seeks to establish should also be clearly explained and communicated. These efforts should be supported by education and training. Changes in the law must also be monitored. A position of advocacy for continued enforcement and improvement of legal

protections of the rights of employees and their family members from discrimination should be part of the firm's social responsibility. To recap, employers, with the guidance of legal counsel should:

1. Establish and continue nondiscrimination policies that protect all employees.
2. Pursue balance and DEI policies as needed. Care is taken to avoid claims caused by quotas and unnecessary entanglements.
3. Regularly consult EEOC guidance and monitor changing legal measures and decisions.
4. Advocate for continuing protections and improvements in the law.

CONCLUDING REMARKS

Despite regressive state laws and uncertainty brought by recent decisions of the current Supreme Court, employers should stay on the course of equal opportunity and nondiscrimination in the workplace. A balanced and thoughtful approach using affirmative action plans and DEI policies should be used to further that course.

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