
SMITH ANDERSON
Successfully Navigating Change: Legal Updates on Diversity, Equity and Inclusion
Taylor M. Dewberry
October 29, 2024
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Today's Agenda

- Briefly review the SCOTUS decision and its impact
  - More detailed review of the decision can be found in the accompanying notes
- Legal effect of the rulings in employment and supplier practices
- Practical implications with mitigation tips
- Mitigation tips summary

Supreme Court Ruling and Its Impact on Admissions

More on Supreme Court Rulings Regarding Race and Admissions

College Admissions Prior to SFFA (*Grutter v. Bollinger*, 539 U.S. 306 (2003)

Law school applicants to the University of Michigan alleged that the admissions policy encouraging student body diversity violated their equal protection rights.

The Supreme Court held that the school had a compelling interest in attaining a diverse student body and that the admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body and, therefore, did not violate the Equal Protection Clause.

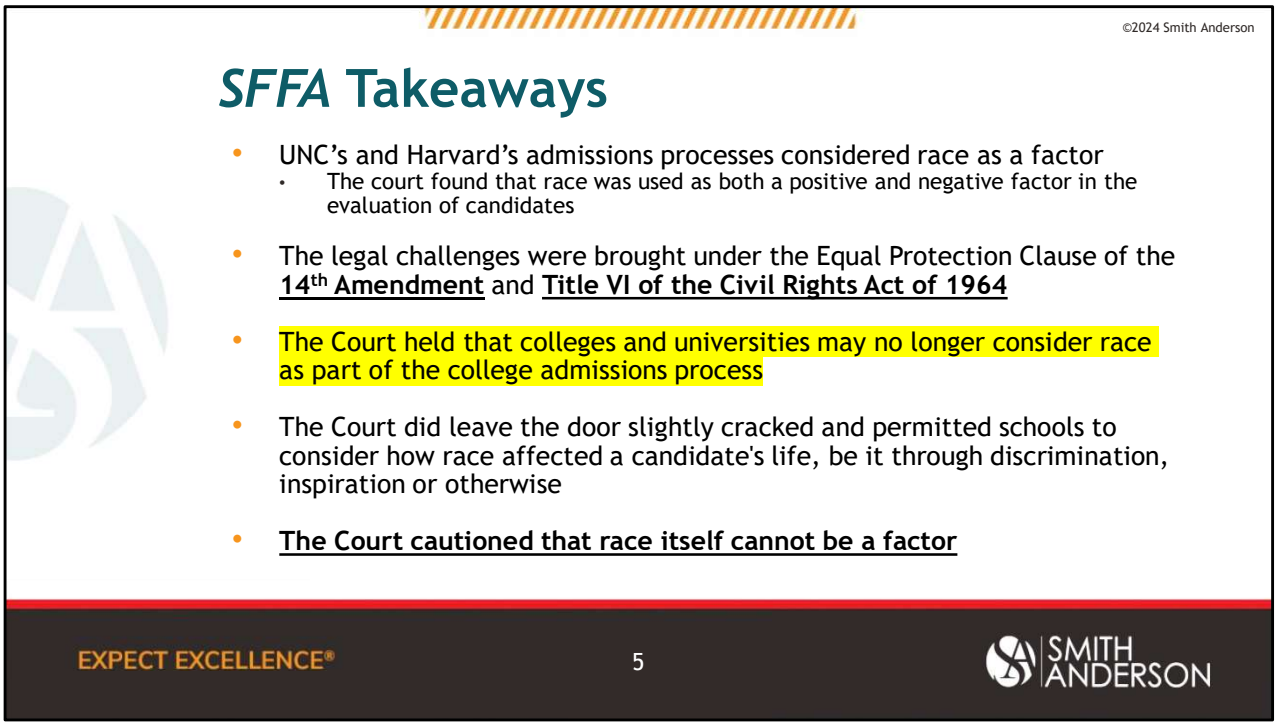
Students for Fair Admissions, Inc. ("SFFA") v. President and Fellows of Harvard College, and SFFA v. University of North Carolina, et al., 600 U.S. 181 (2023)

SFFA Organization Background

SFFA "is a nonprofit membership group of more than 20,000 students, parents and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional." Some of Blum's previous efforts include *Shelby Co.*

Alabama v. Holder (voting rights) and *Fisher v. University of Texas (I and II)* (higher education).
STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org (last visited Oct. 9, 2024).

Edward Blum is a conservative legal strategist and the founder of SFFA. Blum has orchestrated dozens of lawsuits challenging affirmative action and diversity, equity, and inclusion practices in higher education and other industries. *See* The Federalist Society, Edward J. Blum Visiting Fellow, PROJECT ON FAIR REPRESENTATION, https://fedsoc.org/contributors/edward-blum (last visited Oct. 9, 2024) (profiling Mr. Blum); Lulu Garcia-Navarro, NEW YORK TIMES, Jul. 8, 2023, https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html (last visited Oct. 9, 2024) (profiling Mr. Blum).



More on Harvard and UNC Admissions Practices and Results

The admissions policies for both UNC and Harvard permitted a student applicant's race to be considered as part of an overall holistic assessment of the individual, along with things like grades, references, and extracurricular activities.

UNC's Admissions Process

One of UNC's 40 admissions officers reviewed the candidate's application and "readers [were] required to consider 'race and ethnicity as one factor' in their review." Readers considered other factors in their evaluation including: (1) academic performance and rigor; (2) standardized test results; (3) extracurricular involvement; (4) essay quality; (5) personal factors; and (6) student background. Readers provided a numerical rating for the test results, extracurricular activities, essay quality, personal, and essay categories.

Following the first read process, the application then went to the "school group review" where an experienced staff member reviewed every initial decision. This group either approved or rejected each admission recommendation from the first reader. The review committee was allowed to consider the applicant's race.

Harvard's Admissions Process

Every application was similarly reviewed by a first reader who assigned scores in six categories: (1) academic, (2) extracurricular, (3) athletic, (4) school support, (5) personal, and (6) overall. Readers considered the applicant's race in the overall rating.

After the first read, Harvard convened a subcommittee to review applicants from particular geographic regions. The subcommittees could similarly consider a candidate's race.

The full committee then reviewed and voted on each applicant. The committee then discussed the overall breakdown of admitted applicants based on race. Harvard's goal was to not have a dramatic drop-off in minority admissions from the prior class.

Race was the "determinative tip" for a significant percentage of African American and Hispanic applicants.

Basis for Legal Challenge

The UNC case alleged discrimination against White and Asian American students in violation of the Equal Protection Clause of the 14th Amendment.

The Harvard case alleged discrimination against Asian Americans in violation of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color or national origin by federally funded programs.

Ruling and Reasoning

The universities' admissions programs did not satisfy strict scrutiny because there was no way to measure progress towards the universities' stated goals. The Court reasoned that "[a]lthough these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny." The Court found that according to the admissions rates of different races of candidates, race was used as both a positive and negative factor in evaluations. The Court expressed concern that there was no "end point" to the schools' race-based admissions policies.

Result for Colleges and Universities

Colleges and universities may no longer consider race as part of the college admissions process.

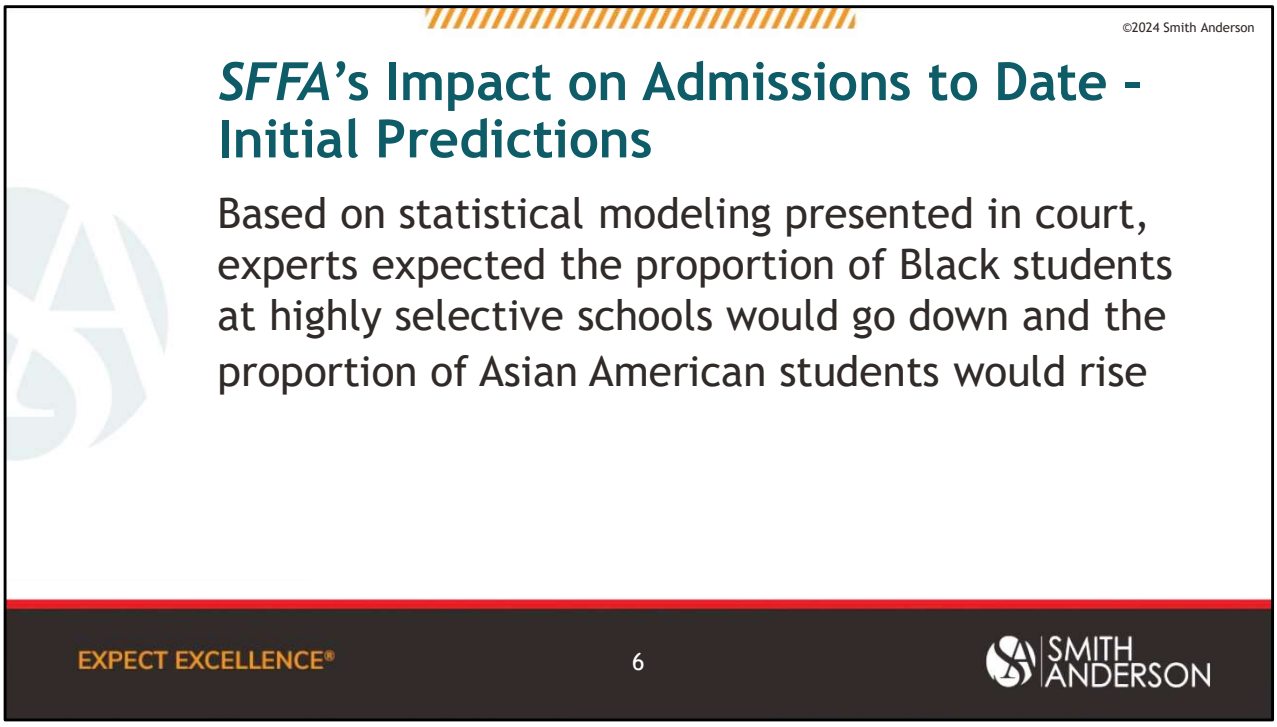
The Court left the door slightly cracked open to allow for the discussion of "how race affected [a candidate's] life, be it through discrimination, inspiration or otherwise." But, the Court cautioned that race itself cannot be a factor:

> A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

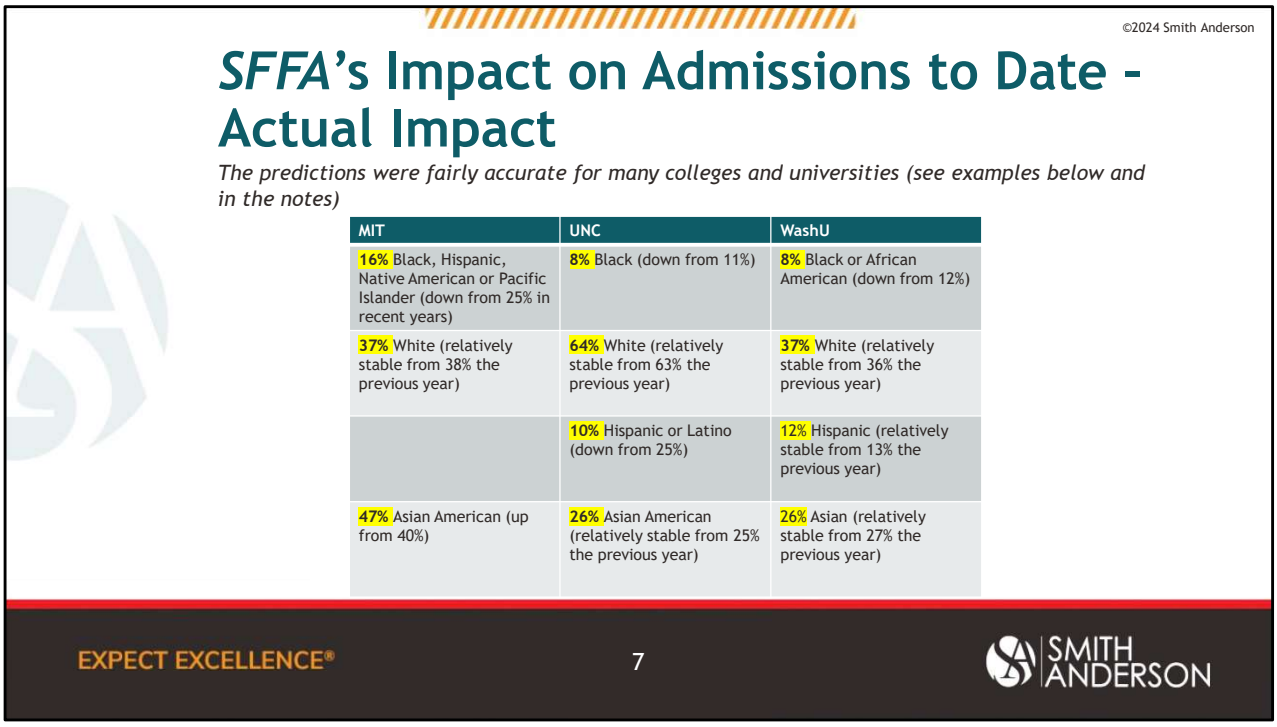
Military Academies

Notably, in a footnote the Court stated "no military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present."

On February 2, 2024, the Court denied an emergency request from SFFA seeking to bar the use of race as a factor in admissions at the United States Military Academy at West Point. *Students for Fair Admissions, Inc. v. United States Mil. Acad. at W. Point*, 144 S. Ct. 716 (2024).



Anemona Hartocollis and Stephanie Saul, Affirmative Action Was Banned. What Happened Next Was Confusing., N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/09/13/us/affirmative-action-ban-campus-diversity.html.



The predictions were fairly accurate for many colleges and universities. *Id*. For example, at MIT, only 16% of the incoming freshman class identifies as Black, Hispanic, Native American, or Pacific Islander. The proportion of White students remained about the same (37 percent in 2024 and 38 percent in 2025). The proportion of Asian American students rose from 40 to 47 percent.

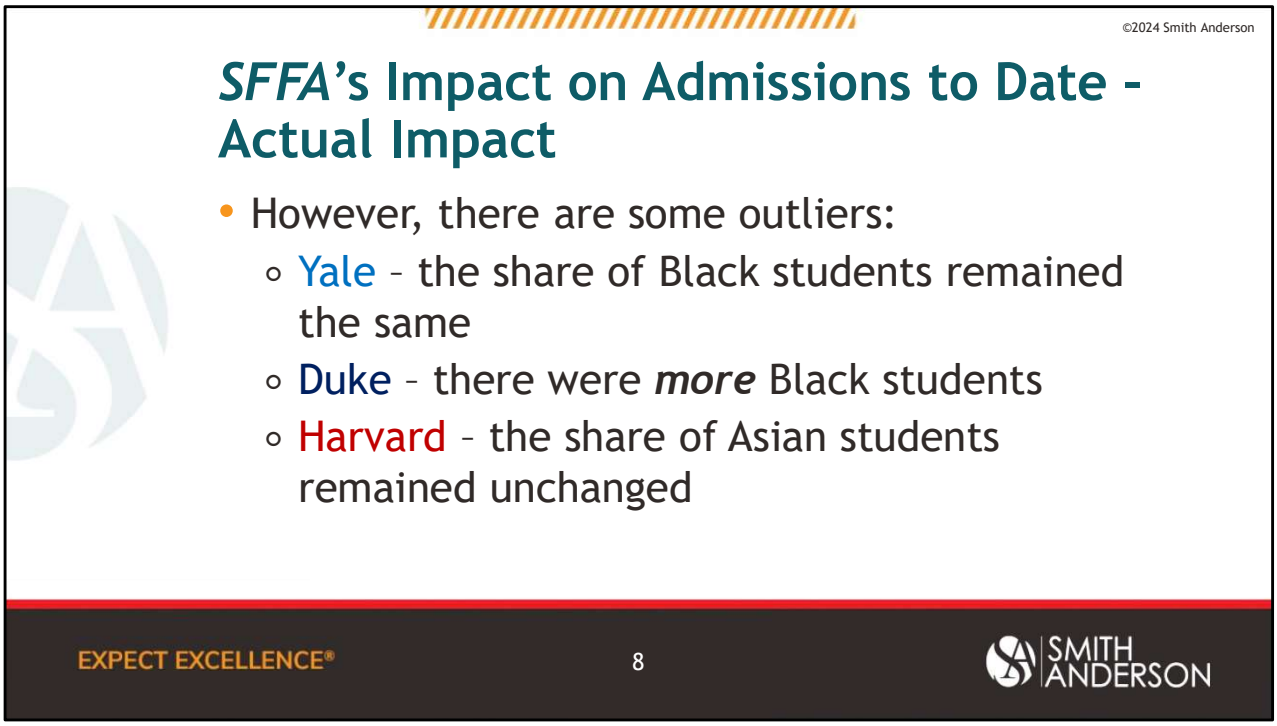
Jessica Blake, MIT's Incoming Freshman Class is Less Diverse Data Shows, INSIDE HIDER ED (Aug. 22, 2024), https://www.insidehighered.com/news/quick-takes/2024/08/22/mits-incoming-freshman-class-less-diverse-data-shows.

Similarly, at UNC-Chapel Hill, the "newest first-year class includes a lower proportion of Black students compared to the previous year…" The most recent incoming class includes 8% Black, 64% White, 10% Hispanic or Latino, and 26% Asian American students. The previous year's class included 11% Black, 63% White, 25% Hispanic or Latino, and 25% Asian American students.

Korie Dean, UNC shares enrollment data for first post-affirmative action class. What does it show?, THE NEWS & OBSERVER (Sept. 5, 2024), https://www.newsobserver.com/news/local/education/article291920935.html#storylink=cpy.

Washington University in St. Louis also saw a decrease in their share of Black students. their incoming class includes 8% Black, 37% White, 12% Hispanic, and 26% Asian students. The previous year's class included 12% Black, 36% White, 13% Hispanic, and 27% Asian students.

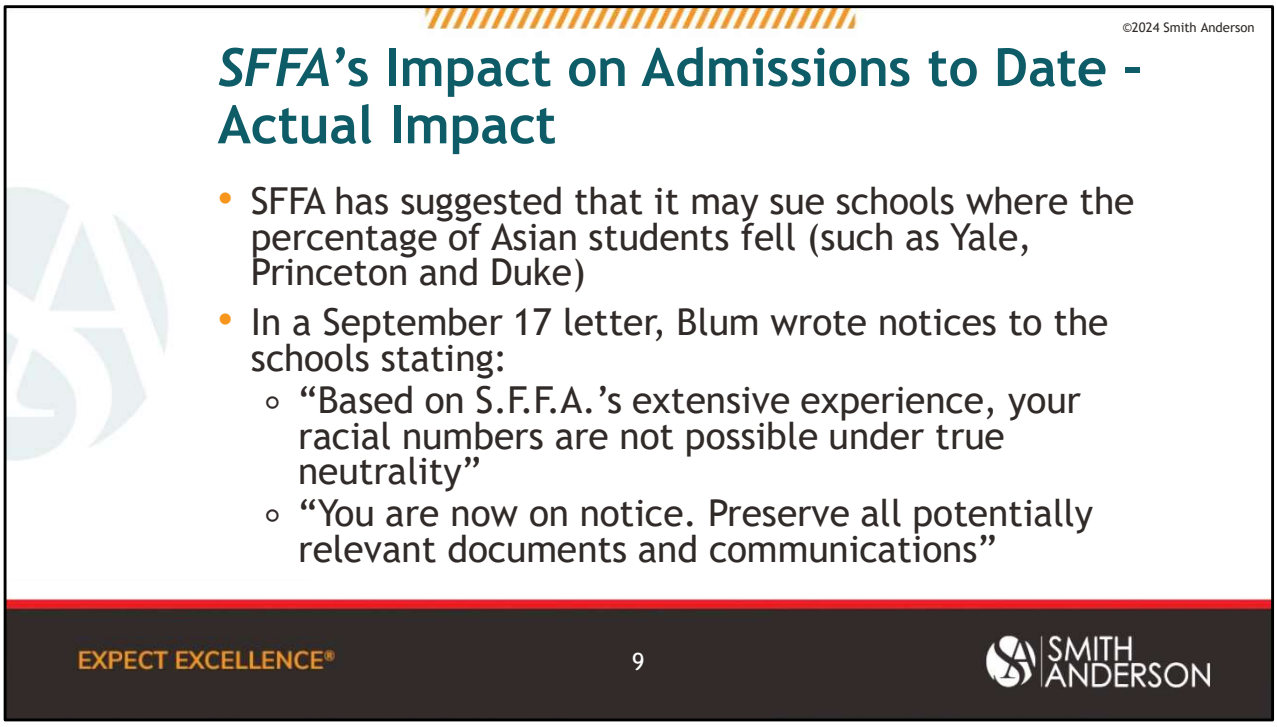
Diane Toroian Keaggy, WashU enrolls more limited-income, first-generation students; share of Black students decreases, WASHU THE SOURCE (Aug. 28, 2024), https://source.washu.edu/2024/08/embargoed-washu-admits-more-limited-income-first-generation-students-share-of-black-students-decreases/.



However, there are some outliers to that trend. Yale's share of Black students remained the same. Duke's share of Black students increased. Harvard's share of Asian students remained the same. The overall results have confused experts. An additional confounding factor is the myriad of ways that schools categorize and supply the data.

Anemona Hartocollis and Stephanie Saul, Affirmative Action Was Banned. What Happened Next Was Confusing., N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/09/13/us/affirmative-action-ban-campus-diversity.html.

For more information, Education Reform Now (as cited by the New York Times) has created a tracker of fifty selective school's demographic breakdowns and changes.
James Murphy, Tracking the Impact of the SFFA Decision on College Admissions, EDUCATION REFORM NOW ("ERN") (Last Visited Oct. 9. 2024) https://edreformnow.org/2024/09/09/tracking-the-impact-of-the-sffa-decision-on-college-admissions/.

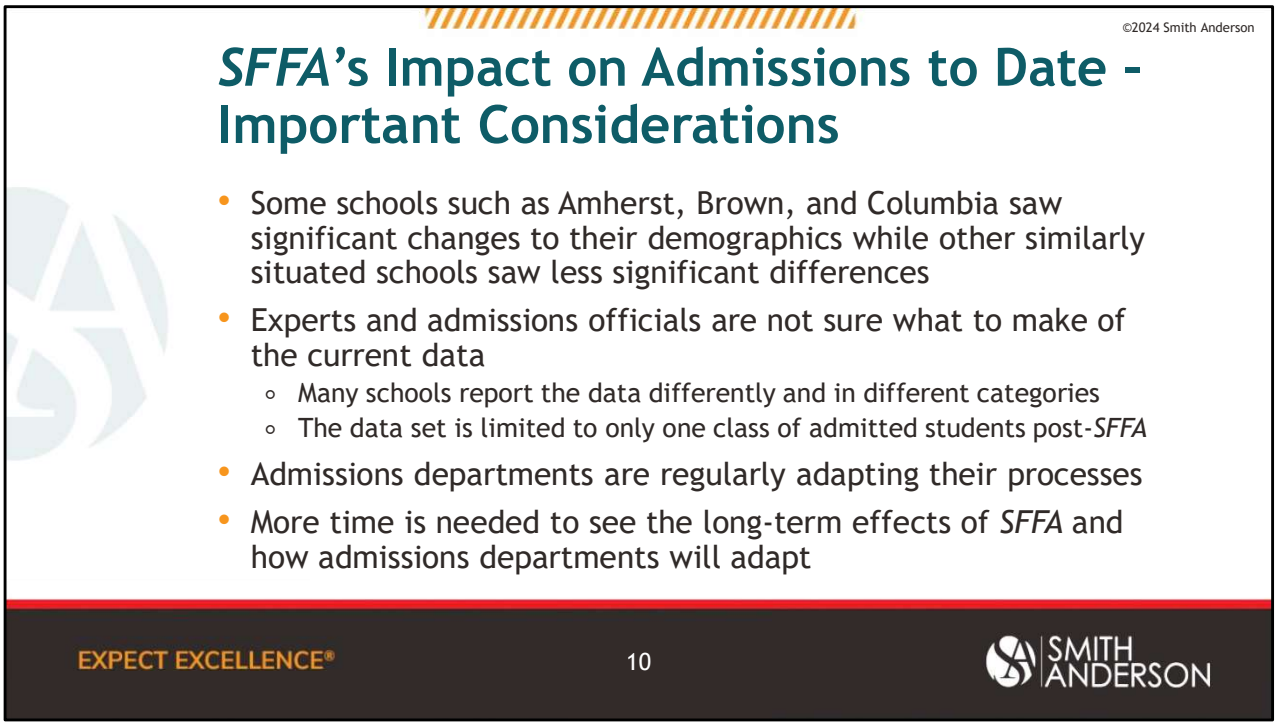


Groups like SFFA appear to be playing close attention to the school's reported statistics as well. In September 2024, SFFA wrote letters to Yale, Princeton, and Duke regarding the decrease of Asian students.

Anemona Hartocollis, Yale, Princeton and Duke Are Questioned Over Decline in Asian Students, NEW YORK TIMES, (Sept. 17, 2024) https://www.nytimes.com/2024/09/17/us/yale-princeton-duke-asian-students-affirmative-action.html

Edward Blum, Students for Fair Admissions Sends Letters to Yale, Princeton, and Duke Questioning Class of 2028

Admissions Processes and Outcomes, STUDENTS FOR FAIR ADMISSIONS, (Sept. 17, 2024) https://studentsforfairadmissions.org/students-for-fair-admissions-sends-letters-to-yale-princeton-and-duke-questioning-compliance-with-sffa-v-harvard/.



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Post-*SFFA* Corporate Shifts

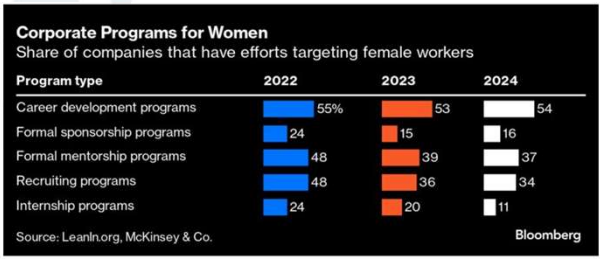
Corporate Pressure

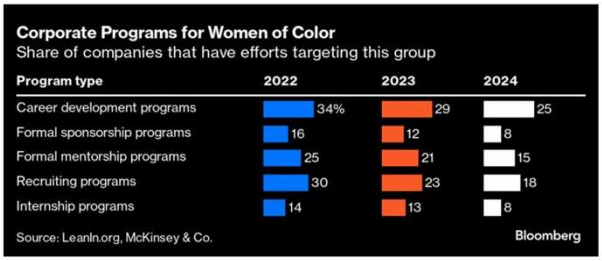
- Some large companies have scaled back their DEI initiatives
  - For example, amid pressures from Anti-DEI activists, Ford said it would no longer engage in the Human Rights Campaign Corporate Equality Index and it refocused employee resource groups and opened them to all workers
  - Tractor Supply Co., Deere & Co. and Harley-Davidson said they would revise their DEI initiatives

Jeff Green and Simone Foxman, Ford Joins Harley in Scaling Back DEI Policies Amid Backlash, BLOOMBERG LAW NEWS (Aug. 28, 2024), https://www.bloomberg.com/news/articles/2024-08-28/ford-joins-harley-in-scaling-back-dei-policies-amid-backlash.

Corporate Pressure

Some employers are cutting programs meant to boost the careers of women and grow the pipeline of women employees, with the pullback especially sharp for programs supporting women of color (see LeanIn.Org and Mckinsey & Co. data)





Bloomberg Law Graphics of LeanIn.org and Mckinsey & Co. Data

Kelsey Butler and Emily Chang, US Companies Nix Career Programs for Women Amid DEI Backslide, BLOOMBERG LAW (Sept. 17, 2024), https://www.bloomberg.com/news/articles/2024-09-17/leanin-mckinsey-see-dei-backlash-hurting-programs-for-women?embedded-checkout=true.

Corporate Pressure

- Meanwhile, some large companies are reaffirming commitments to DEI
  - JPMorgan Chase & Co. CEO Jamie Dimon said DEI is **"good for business"** and **"morally right"**
- Other businesses continue to support DEI programs, but their leaders are talking about them differently

Kelsey Butler and Emily Chang, US Companies Nix Career Programs for Women Amid DEI Backslide, BLOOMBERG LAW (Sept. 17, 2024), https://www.bloomberg.com/news/articles/2024-09-17/leanin-mckinsey-see-dei-backlash-hurting-programs-for-women?embedded-checkout=true.

Clara Hudson, Jamie Dimon Among Fortune 500 CEOs Defying Diversity Backlash, BLOOMBERG LAW (Sept. 13, 2024), https://news.bloomberglaw.com/esg/jamie-dimon-among-fortune-500-ceos-defying-diversity-backlash.

See Avani Kalra, Companies Change How They Talk About Diversity Amid ESG Backlash, BLOOMBERG LAW (Aug. 19, 2024), https://www.bloomberglaw.com/bloombergterminalnews/bloomberg-terminal-news/SIH56PDWX2PS ("Nearly one-third (31%) of 125 major corporations surveyed in the past year by the Association of Corporate Citizenship Professionals, say they have adjusted their language describing DEI projects this year, and 17% have reduced external communication on diversity initiatives. Still, the study found companies remain committed to DEI projects, with 83% saying their initiatives remain the same").

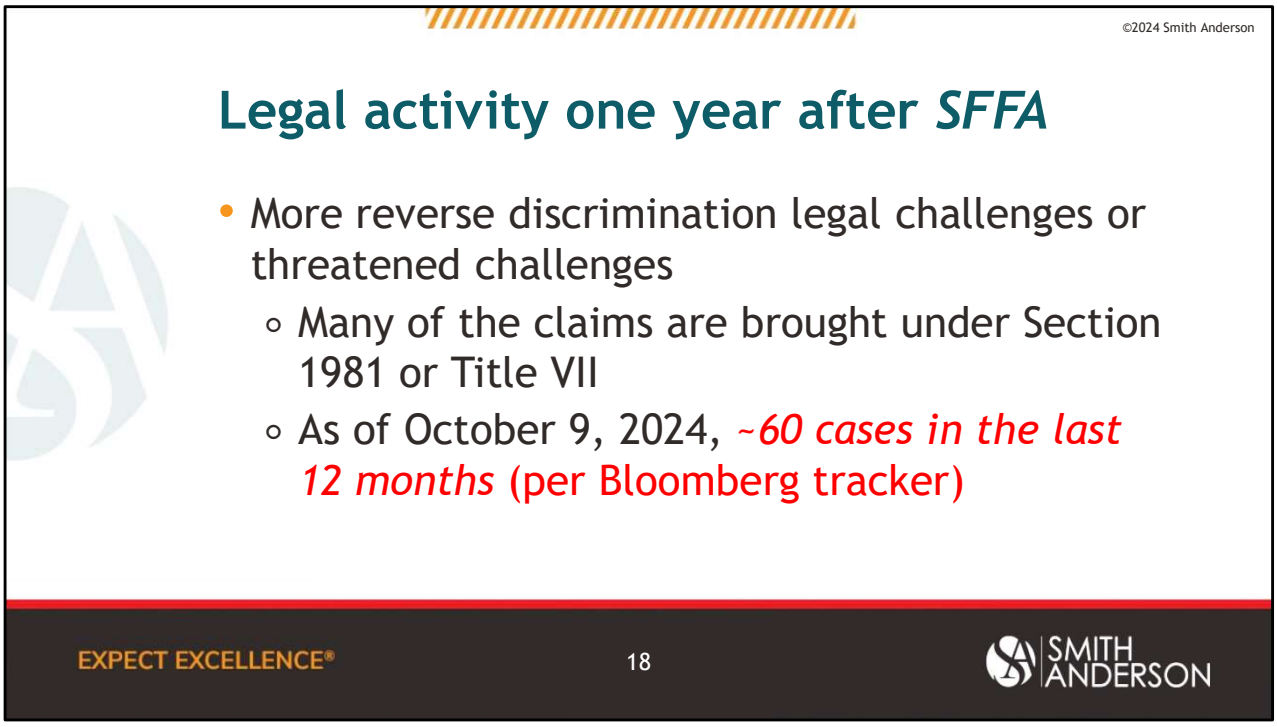
Legal Implications for Employers

Legal Effect of Ruling on Private Employers

SFFA HAD NO IMMEDIATE DIRECT LEGAL IMPACT ON PRIVATE EMPLOYERS

- Not a decision based on federal law that applies to employers – Title VII
- Employers are not legally required to make any changes to DEI, EEO, or affirmative action policies **if such practices comply with existing employment law**
- Employers can still have a focus on diversity as a core value
- Employers can still commit to a culture of inclusion
- Employers can and should maintain their EEO policies

Practical Implications



"Reverse discrimination" cases are becoming more prominent. These are claims brought under Title VII of the Civil Rights Act and/or Section 1981. Title VII protects employees against discrimination based on race, among other things. Section 1981 prohibits race discrimination in the making and enforcement of contracts. This means that White employees are also protected from discrimination under Title VII and Section 1981.

For example, on October 9, 2024, we conducted a search for reverse discrimination cases involving DEI issues on Bloomberg's dockets and found approximately sixty cases filed within the last twelve months. The search terms were:

("diverse" OR "diversity" OR "inclusion" OR "DEI" OR "D&I" OR "equity" OR "discriminatory") NP/3 (program OR initiative OR fellowship OR Mentor! OR ERG) AND (employer OR employers OR hire OR hiring OR promotion) AND "§1981". Of course, this search does not account for threatened reverse discrimination suits that are not yet filed with the court.

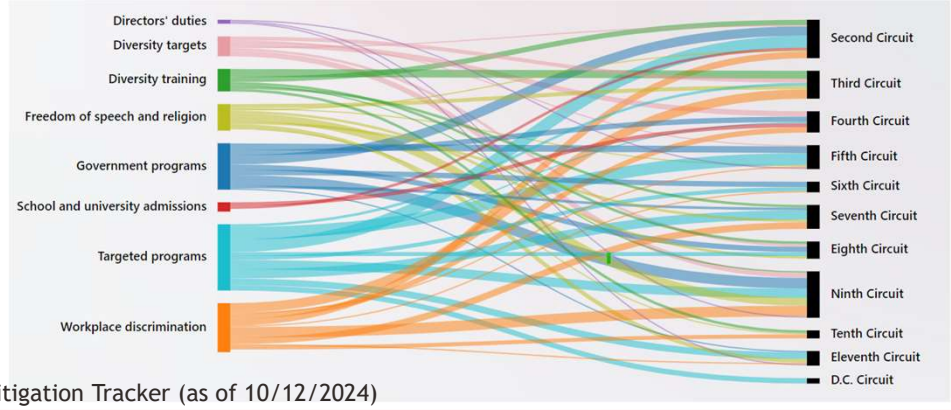
Legal activity one year after *SFFA*

NYU Law's Meltzer Center for Diversity, Inclusion, and Belonging estimates that there have been **over 120 Anti-DEI Cases since 2021**

https://advancingdei.meltzercenter.org/

Legal activity one year after *SFFA*

Their website has an interactive map that tracks the case topics and frequency



Meltzer Center Litigation Tracker (as of 10/12/2024)

https://advancingdei.meltzercenter.org/

Muldrow = More Reverse Discrimination Cases?

- *Muldrow v. City of St. Louis* (April 17, 2024)
  - The Supreme Court resolved a split among the federal circuit courts over whether an employee challenging a job transfer under Title VII must meet a heightened threshold of harm to bring suit
  - Rejecting lower court decisions that required employees to show "material," "serious," "significant," or "substantial" harm, the Court held that **employees need only show that a job transfer caused them "some harm" with respect to an identifiable term or condition of employment**

Muldrow v. City of St. Louis, Missouri, 601 U.S. 346 (2024).

Muldrow = More Reverse Discrimination Cases?

- **What does this mean for reverse discrimination cases challenging DEI practices?**
  - It lowers the bar for what "harm" means, so this may make it easier for employees to bring Title VII discrimination claims
  - Notably, they still need to prove that the employer took the challenged action *because of* protected class
  - This change may lead to increased claims challenging certain DEI programs

Muldrow v. City of St. Louis, Missouri, 601 U.S. 346 (2024).

Various employers and organizations have been affected by reverse discrimination lawsuits across industries, including but not limited to broadcasting, technology, banking, mining, telecommunications, healthcare, mass media, and retail.

Broadcasting

See Complaint, *Jeff Vaughn v. CBS Broadcasting, Inc. et al*, No. 2:24-CV-05570 (C.D. Cal. Jul 01, 2024), ECF No. 1. (alleging that Jeff Vaughn, a white male anchor, was terminated and replaced with a Black man because the company was adhering to illegal diversity policy and quotas against white men); *See* Complaint, *Brian Beneker v. CBS*

Studios, Inc. et al, No. 2:24-CV-01659 (C.D. Cal. Feb 29, 2024) (alleging that CBS failed to hire him as a staff writer due to his race, gender, and sexual orientation, while hiring and promoting less experienced individuals who were non-white, LGBTQ, or female).

Technology

See Complaint, *Kascsak v. Expedia, Inc. et al*, No. 1:23-CV-01373 (W.D. Tex. Nov 08, 2023), ECF No. 1 (alleging that Micheal Kascak, a white male corporate executive candidate, was orally offered a position and the job search was impermissibly extended allegedly to find a diverse candidate); *See* Complaint, *Wood v. Red Hat, Inc*., No. 2:24-CV-00237 (D. Idaho May 08, 2024), ECF No. 1 (alleging discriminatory treatment and termination due to Red Hat's DEI efforts).

Banking

See Complaint, *Smith v. Ally Financial, Inc*., No. 3:24-CV-00529 (W.D.N.C Jun 04, 2024), ECF No. 1 (alleging that Christopher Smith, a white male employee and applicant for an intelligence manager position was not selected due to the company's illegal Diversity, Equity, and Inclusion program).

Mining

See Powers v. Broken Hill Proprietary Inc., No. 4:21-CV-01334 (S.D. Tex. Apr 22, 2021) (alleging that the company

used impermissible means to achieve diversity goals to increase the hiring of women).

Telecommunications

See DiBenedetto v. AT&T Servs., Inc., No. 121-CV-04527, 2022 WL 1682420 (N.D. Ga. May 19, 2022) (alleging that the employer terminated a white male employee in order to replace him with diverse candidates).

Healthcare

See Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024) (after a lengthy jury trial and appeal, the court held that sufficient evidence was presented at trial to sustain the jury's finding of liability for reverse discrimination).

Mass Media

See Bradley et al v. Gannett Co., Inc*.,* No. 1:23-CV-01100 (E.D. Va. Aug 18, 2023) (challenging a policy under which the organization committed that by 2025 the staff of the publications would reflect the racial and ethnic demographics of the nation).

Retail

See Craig v. Target, et al, No. 2:23-CV-00599 (M.D. Fla. Aug 8, 2023) (a derivative suit challenging Target's support of

LGBT initiatives and Target's adoption of ESG/DEI initiatives in the 2022 and 2023 Proxy statements).

Legal activity one year after *SFFA*

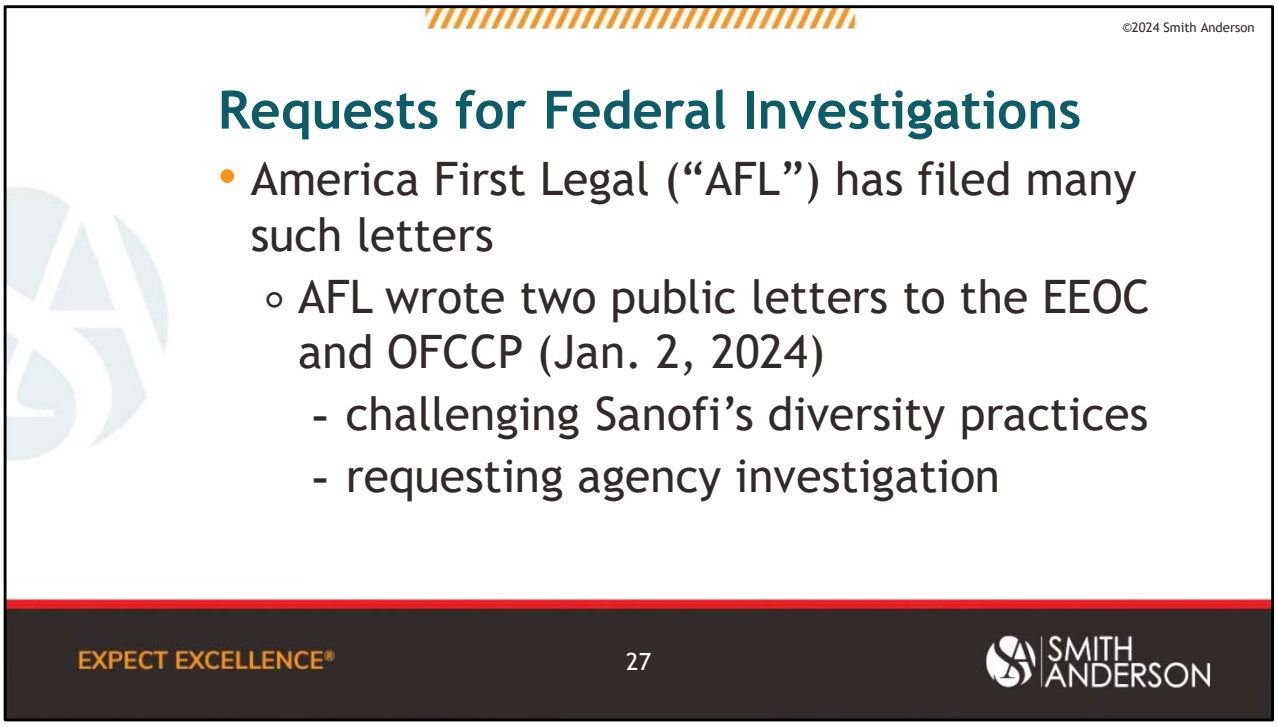
- These claims could take the form of:
  - Requests for Agency Investigation
  - Challenges to DEI Training
  - Challenges to the Termination of Executives Amid Diversity Initiatives
  - Challenges to Supplier Diversity Initiatives

Legal activity one year after *SFFA*

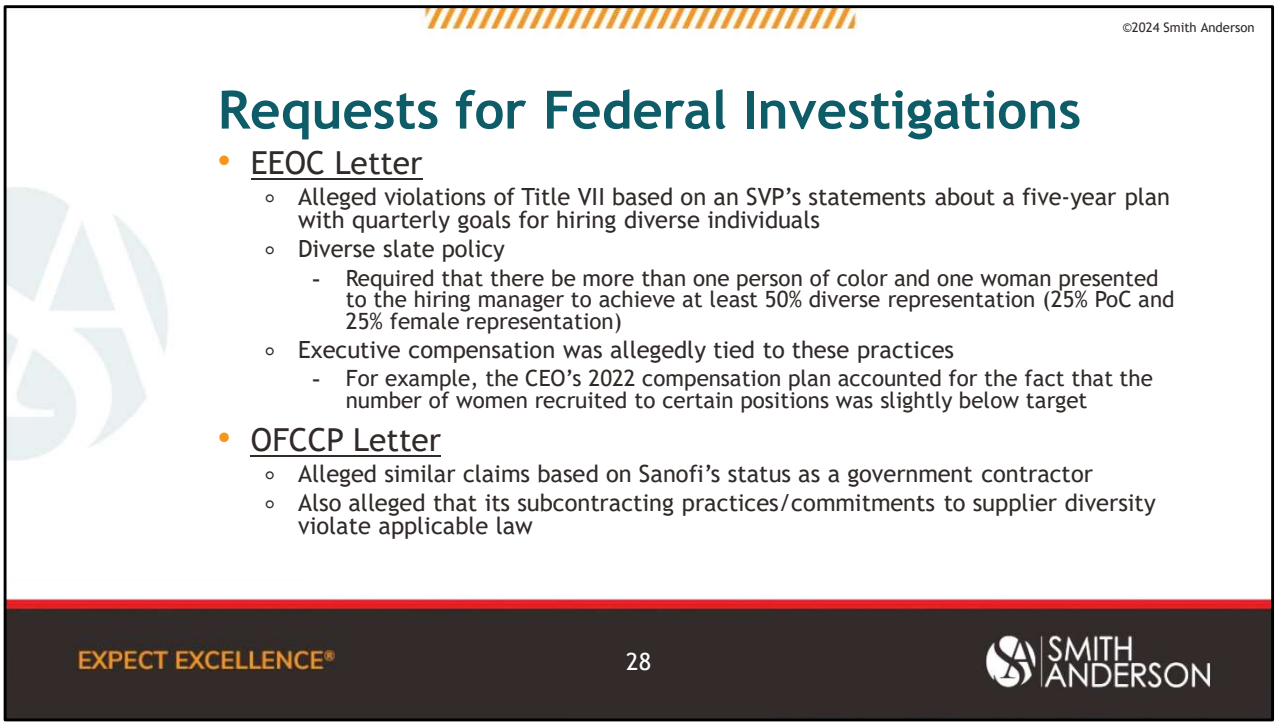
After each case or group of similar cases, we will pause for a “fix it” moment to discuss ways we could mitigate risk of similar claims in the future

Legal Demand Letters

- Plaintiffs and anti-DEI interest groups pen public demand letters to employers alleging that the employer's DEI practices are illegal under applicable law
- Often, the letters will request that the EEOC initiate a commissioner's charge to investigate the allegations



See America First Legal, America First Legal Slams French Big Pharma Vaccine Maker, Sanofi, for Racial Discrimination: Files Federal Civil Rights Complaints, AMERICA FIRST LEGAL (Jan. 5, 2024), https://aflegal.org/america-first-legal-slams-french-big-pharma-vaccine-maker-sanofi-for-racial-discrimination-files-federal-civil-rights-complaints/ (containing links to both letters and a summary of their position).



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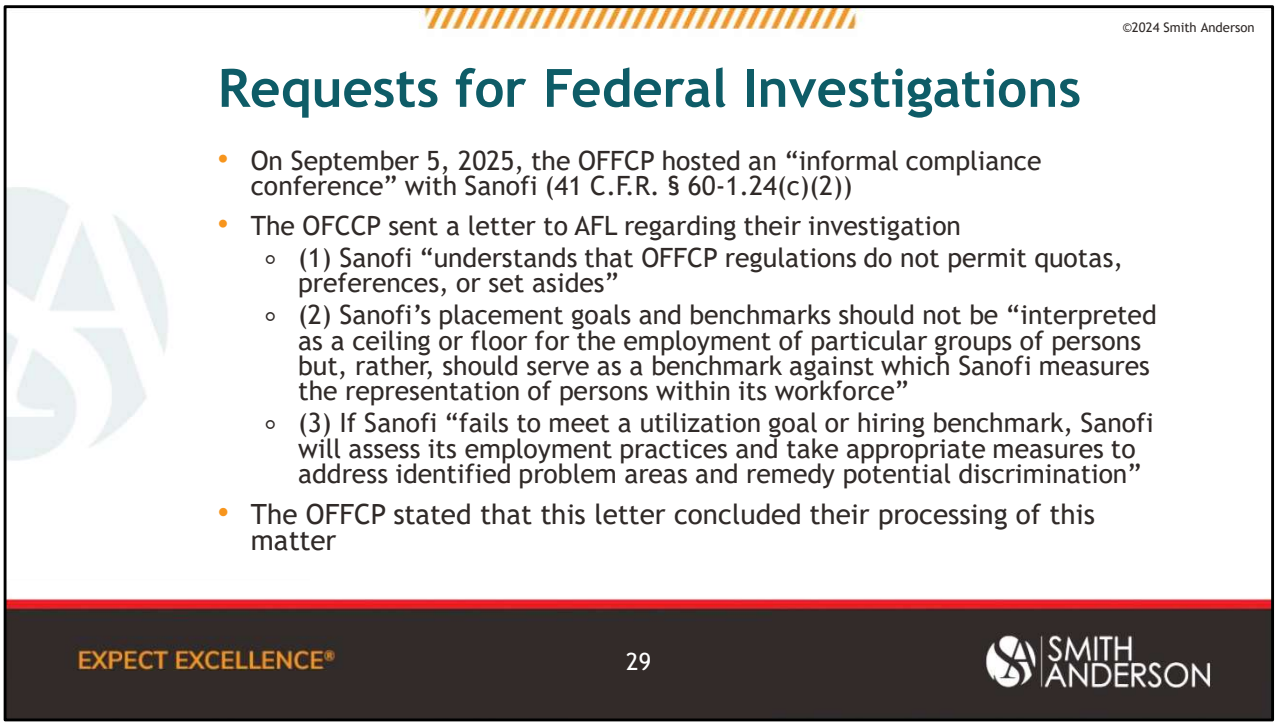


See (41 C.F.R. § 60-1.24(c)(2)) (listing the requirements for OFFCP complaints).

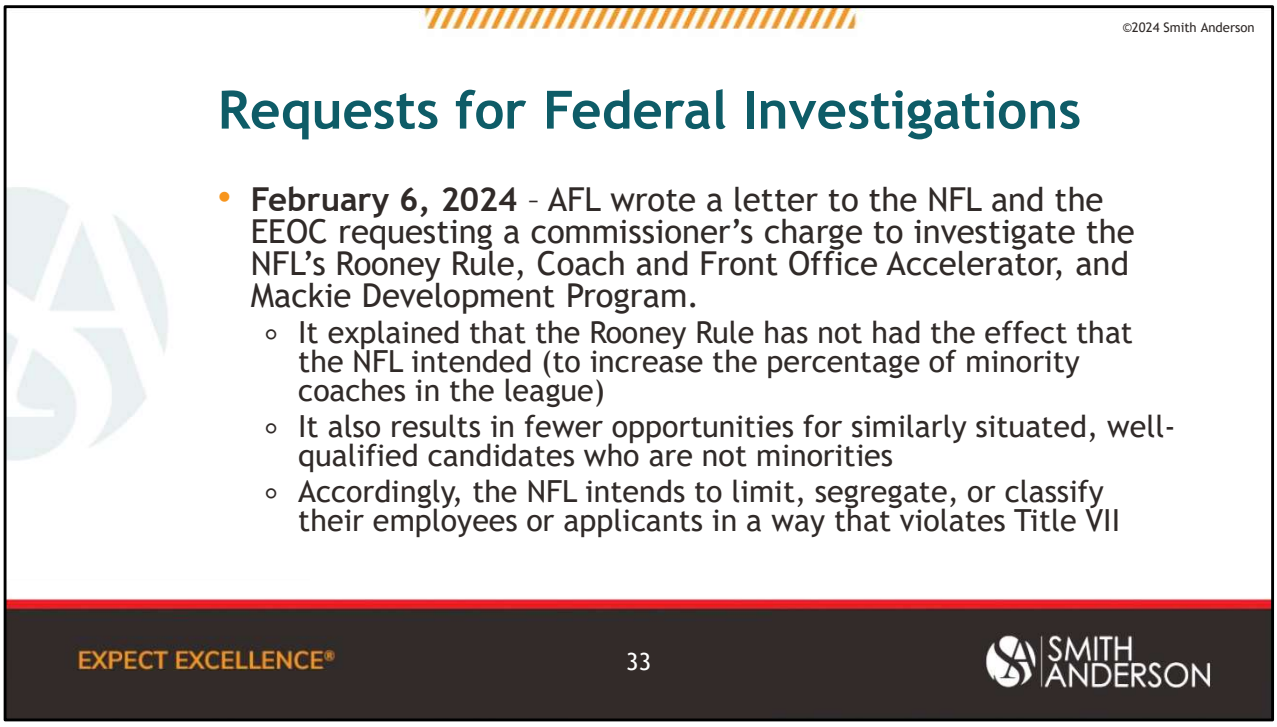
See America First Legal, VICTORY — Global Healthcare Company Sanofi Walks Back Illegal, Discriminatory Hiring Practices Following Federal Civil Rights Complaint from AFL, AMERICA FIRST LEGAL (Jan. 5, 2024), https://aflegal.org/victory-global-healthcare-company-sanofi-walks-back-illegal-discriminatory-hiring-practices-following-federal-civil-rights-complaint-from-afl/ (containing a copy of letter from the OFFCP and AFL's characterization of the letter).

Fix it Moment!

- Refrain from tying compensation to diversity hiring metrics
- Consider flexibility within diverse slate policies and commitments to outreach for positions
- Educate executives and leaders on the differences between goals and quotas (be careful not to characterize goals as quotas)
- Consider whether goals are grounded in availability data for positions

Requests for Federal Investigations

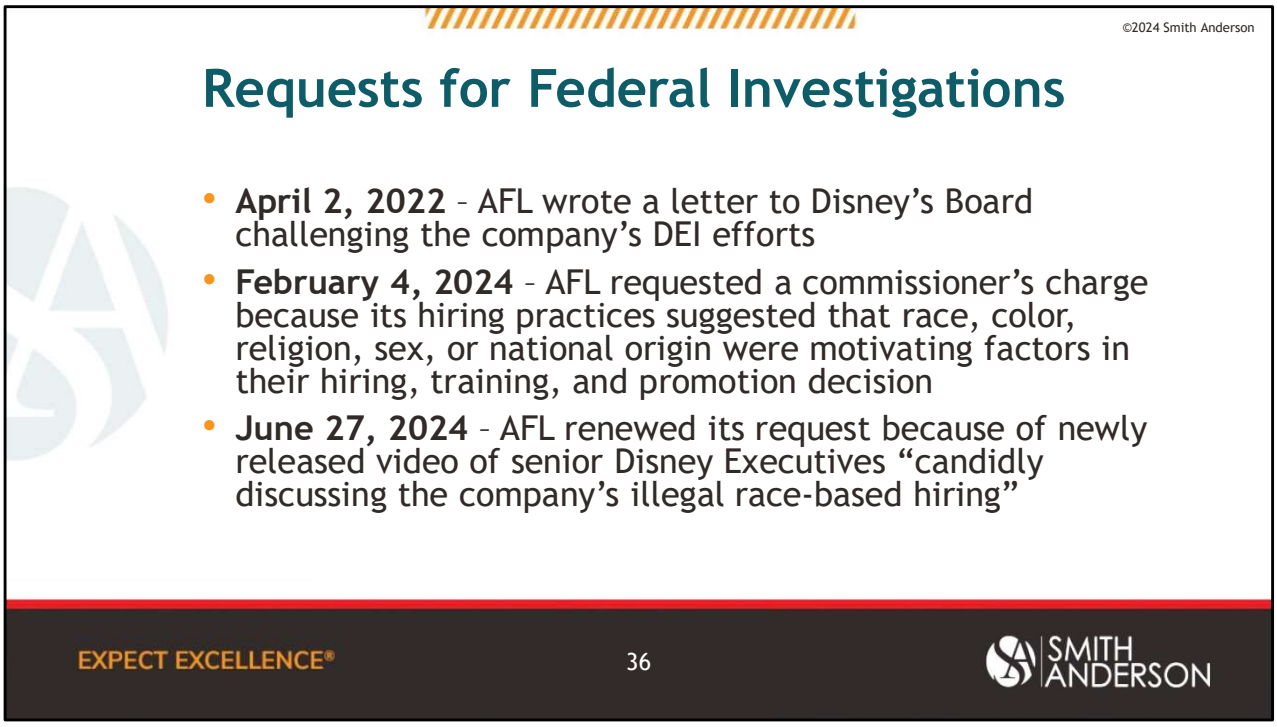
- AFL has not posted similar agency responses to their requests for EEOC commissioner's charges
- In fact, in some cases, they have requested a second commissioner's charge for the same company



See America First Legal, America First Legal Blasts the NFL's Illegal and Racist "Rooney Rule," Files Federal Civil Rights Complaint, AMERICA FIRST LEGAL (Feb. 6, 2024), https://aflegal.org/america-first-legal-blasts-the-nfls-illegal-and-racist-rooney-rule-files-federal-civil-rights-complaint/ (containing a link to the complaint and summary of their position).

Fix it Moment!

- There is little case law on diverse slate policies
- Questions remain about the lawfulness of diverse slate policies to the extent that they require a certain number of diverse candidates to be considered for ***every*** opening
  - It could create a "zero-sum" equation where diverse candidates are advanced at the exclusion of other qualified candidates who do not identify as diverse
- Risk mitigation tactics could be providing flexibility within the diverse slate policy. Some examples could include:
  - Goals to interview a certain percentage of diverse candidates in the aggregate
  - Commitment to additional outreach to seek diverse candidates for positions



See America First Legal, America First Legal Files Federal Civil Rights Complaint Against The Walt Disney Company For Illegal Race and Sex Discrimination, AMERICA FIRST LEGAL (Feb. 14, 2024), https://aflegal.org/america-first-legal-files-federal-civil-rights-complaint-against-the-walt-disney-company-for-illegal-race-and-sex-discrimination/ (containing a link to the complaint and summary of their position).

See America First Legal, *America First Legal Foundation Demands Follow-up Civil Rights Investigation of Disney Based on Recent Video Evidence,* AMERICA FIRST LEGAL (Jun. 27, 2024), https://aflegal.org/america-first-legal-foundation-demands-follow-up-civil-rights-investigation-of-

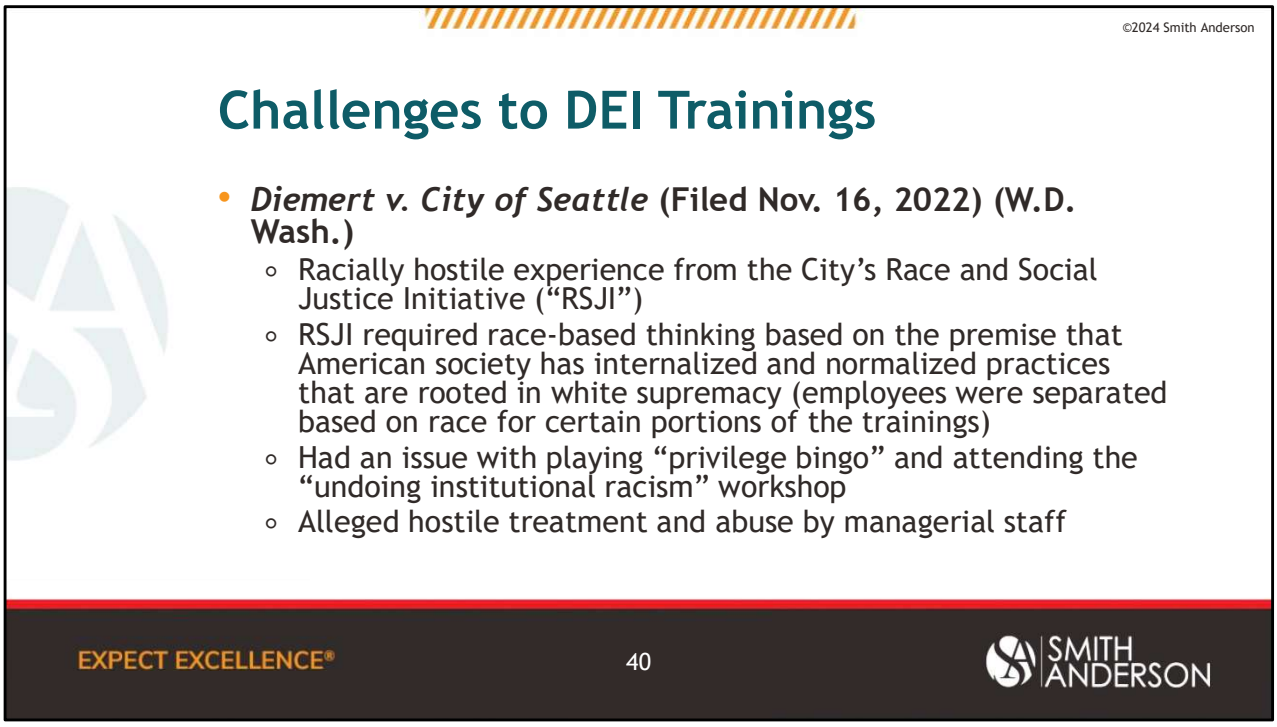
disney-based-on-recent-video-evidence/ (containing a link to the complaint and summary of their position).

Quick Fix it Moment!

- Again, educate executives on how to discuss and implement DEI policies

Challenges to DEI Trainings

Employees have begun to challenge employer's DEI training programs alleging that the training at issue is racial discrimination or cultivates a hostile work environment



Diemert v. City of Seattle, 689 F. Supp. 3d 956 (W.D. Wash. 2023).

Complaint, *Diemert v. City of Seattle*, No. 2:22-cv-01640 (W.D. Wash. Nov 16, 2022), ECF No. 1.

Challenges to DEI Trainings

- ***Diemert v. City of Seattle* (con.)**
  - City filed a motion to dismiss the claims
  - Court held employee alleged enough facts to state plausible claims for hostile work environment and disparate treatment based on race (Aug. 28, 2023)
    - citing to the verbal abuse by managers (beyond the training alone)
  - Court also held he had a plausible Equal Protection claim regarding the City's affinity group policy that encouraged employees to attend different trainings based on their race
  - City moved for summary judgment (Aug. 16, 2024)

Diemert v. City of Seattle, 689 F. Supp. 3d 956 (W.D. Wash. 2023).

Challenges to DEI Trainings

- ***Vavra v. Honeywell* (filed December 23, 2021) (7th Circuit)**
  - White engineering employee refused requests from management to participate in mandatory diversity, equity, and inclusion training
  - Employee alleged he had a reasonable belief that training was an unlawful employment practice in violation of state law and Title VII
    - Never watched the video to understand its content or application
    - Assumed it would vilify white people and treat people differently based on their race

Vavra v. Honeywell Int'l, Inc., 106 F.4th 702, 703 (7th Cir. 2024).

Challenges to DEI Trainings

- ***Vavra v. Honeywell* (con.)**
  - The court held that there was no evidence that Honeywell retaliated against the employee because he did not have a reasonable belief that the training was an unlawful employment practice
  - The only information he had about the training contradicted his assumptions

Vavra v. Honeywell Int'l, Inc., 106 F.4th 702, 703 (7th Cir. 2024).

Challenges to DEI Trainings

- ***Vavra v. Honeywell* (con.)**
  - Notably, the EEOC filed an amicus brief in this case stating: "anti-discrimination trainings, including unconscious bias trainings, are not per se discriminatory and may serve as vital measures to prevent or remediate workplace discrimination"
  - While also noting that opposition to DEI training "may constitute protected activity" under Title VII if the plaintiff "provides 'a fact-specific basis' for his belief that the training" violates Title VII

Vavra v. Honeywell Int'l, Inc., 106 F.4th 702, 703 (7th Cir. 2024).

Challenges to DEI Trainings

- Two cases challenging DEI were filed this calendar year:
  - *King v. Johnson & Johnson* (Mar. 6, 2024) (Eastern District of Pennsylvania)
  - *Arsenault v. HP Inc.* (May 29, 2024) (District of Connecticut)

See Complaint, *Arsenault v. HP Inc.*, No. 3:24-cv-00943 (D. Conn. May 29, 2024) (Arsenault, a solution architect, made a comment that the employer was giving more DEI training and awareness than was necessary. He was subjected to a shaming session in the presence of his co-workers that portrayed his comment in an unfavorable light. He was terminated as a result of a RIF). This matter is still pending.

See Complaint, *King v. Johnson & Johnson*, No. 2:24-cv-00968 (E.D. Pa. Mar 06, 2024) (King, a staff engineer, objected to several elements of the new DEI program, particularly trainings that messaged that White males were "the problem" and several non-white individuals were promoted. He was terminated as part of a restructuring). This matter settled in July.

Fix it Moment!

- Conduct regular legal review of DEI training materials (even if the material is from a third-party)
- Ensure that a wide array of examples/hypos are included
- Make careful decisions about what training is mandatory and what is optional
- Take employee objections or complaints about trainings seriously and carefully consider whether an exemption from training is needed or could be granted without creating legal risk

Termination of Executives

- *Duvall v. Novant* (4th Cir. 2024)
  - White male executive alleged that he was terminated amid an ongoing diversity and inclusion initiative that aimed to displace White male executives to meet diversity targets
  - He was not provided with a reason for termination other than that Novant was going in a different direction
  - During the case, Novant alleged that there were performance concerns, but none were documented, and some evidence suggested Duvall's performance was strong

Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024).

Termination of Executives

- *Duvall v. Novant* (con.)
  - This dispute resulted in lengthy litigation with a seven-day trial that included ten witnesses and over 100 exhibits
  - The jury found that Duvall's race and/or his sex was a motivating factor in Novant's decision to terminate his employment and there were multiple motions filed about the structure and amount of damages owed
  - Ultimately, Novant appealed the jury's finding of liability and award of punitive damages

Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024).

Termination of Executives

- *Duvall v. Novant* (con.)
  - On March 12, 2024, the Fourth Circuit affirmed the jury's finding of liability holding that Novant's inconsistent reasoning for a White male executive's termination "amid a substantial D&I initiative that called for remaking Novant Health's workforce to reflect a different racial and gender makeup" was more than sufficient evidence for a reasonable jury to conclude that Duvall's race and sex were motivating factors in his termination
  - The court noted:
    - Novant had the express goal of "adding additional dimensions of diversity to the executive and senior leadership team,"
    - provided incentive bonuses to team leaders to diversify,
    - and had a drastic increase in women in leadership shortly after being presented with demographic data about the overrepresentation of White males in leadership
  - This, together with all the evidence presented, helped support the Plaintiff's claims

Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024).

Fix It Moment!

- Carefully select the language used in DEI programming and **discussion of it (particularly by executive leaders)**
  - Ensure you are not considering or representing to consider protected class in employment decisions
- Accurately document the reasons for employment decisions

Supplier Diversity Challenges

- **Supplier Diversity Generally**
  - Supplier diversity challenges are largely brought under Section 1981
    - Which prohibits race discrimination in making and enforcing contracts
  - Courts have applied Title VII's voluntary affirmative action standard in both the employment and education-related space
  - We have yet to see if courts would apply a similar voluntary affirmative action standard in the supplier diversity space

Supplier Diversity Challenges

- *American Alliance for Equal Rights ("AAER") v. Fearless Fund Management LLC* (Aug 8, 2023)(Northern District of Georgia)
  - AAER alleged that the Fund that provides grants and other perks to small businesses owned by Black women violates Section 1981
  - AAER's complaint requested a preliminary injunction to prevent the Fund from awarding this cycle of grants
  - The Fund made three main arguments defending their program:
    - (1) the contest is not a contract;
    - (2) their First Amendment right to free speech barred the Section 1981 claim; and
    - (3) the grant program was an affirmative action program under *Johnson/Weber*
  - The district court denied the preliminary injunction finding Fearless Fund's First Amendment argument persuasive enough to defeat the motion for preliminary injunction (note: it did not find the other two arguments persuasive)
  - The 11th Circuit granted AAER's request for preliminary injunction on emergency appeal

Lower Court Decision – *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 2023 WL 6295121 (N.D. Ga. Sept. 27, 2023), *aff'd in part, rev'd in part and remanded,* 103 F.4th 765 (11th Cir. 2024).

Emergency Appeal – *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 6520763 (11th Cir. Sept. 30, 2023).

Supplier Diversity Challenges

- *AAER v. Fearless Fund Management LLC (con.)*
  - After oral arguments and extensive briefing, the 11th Circuit held AAER had standing and the preliminary injunction was appropriate because the Fund likely violates Section 1981
  - Many expected that this matter would continue to the Supreme Court
  - However, in Sept. 2024, the parties settled and both parties agreed that the Fund would permanently close the contest

Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 103 F.4th 765 (11th Cir. 2024).

Supplier Diversity Challenges

- *Ultima Servs. Corp. v. United States Dep't. of Agriculture* (E.D. Tenn. Mar 4, 2020)
  - Ultima (a company owned by a White woman) sued the USDA in 2020 after it lost a contract that had been moved to the 8(a) program
  - In an opinion that heavily cited to *SFFA*, the TN District Court struck down a government program providing preferences to minority-owned businesses under the Small Business Act
  - Prior to this ruling, certain minority groups applying for the program could establish that they were socially disadvantaged by demonstrating that they held themselves out as a member of one of those designated groups
  - The 8(a) program remains open and now all individuals, regardless of protected class, must establish program eligibility by completing a social disadvantage narrative

Decision striking down the program - *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023)

Information about changes to the program - https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program

Legal Challenges

- *Bolduc v. Amazon.com Inc.* (E.D. Tex. Jul 20, 2022)
  - Amazon faces a lawsuit alleging that the company's $10,000 startup bonus offered to "Black, Latinx, and Native American" delivery service partners (independent businesses contracted to deliver Amazon packages to customers' homes) violates "§ 1981 by excluding Whites and Asian-Americans"
  - On Apr. 24, 2024, the court dismissed the matter because the plaintiff lacked standing (a common issue in many of these cases)

Bolduc v. Amazon.com Inc., 2024 WL 1808616 (E.D. Tex. Apr. 25, 2024).

FINAL Fix it Moment!

- Ensure corporate commitments to use diverse vendors are goals not quotas
- A vendor's protected class should not be a factor in the selection process
- It remains appropriate to conduct outreach to diverse vendors to apply for supplier opportunities
- Review your corporate commitments to diverse suppliers for risk of Section 1981 challenges
- This area of law is developing

Summary of Mitigation Tactics

Ideal DEI Programs/Initiatives

- Ideal DEI programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach to certain underrepresented groups in the workforce, such as women, people of color, LGBTQ+ individuals, and people with disabilities
  - It is NOT "affirmative action"
  - It is NOT making decisions based on protected class status
- **Can still have diversity, equity, inclusion, belonging, and accessibility policies and a culture grounded in these values**

Ideal DEI Programs/Initiatives

- DEI programs might include:
  - outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent
  - non-exclusive mentoring programs aimed at supporting diverse talent within a company (beware of exclusive accelerated development programs)
  - unconscious bias training, bystander intervention training, and ally training (carefully vetted by legal and HR)
  - skills based training to develop employee skills to be better qualified to move into other roles
  - having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events (open to all)

Ideal DEI Programs/Initiatives

- DEI programs cannot include:
  - using protected categories, such as race, to decide who to hire or promote, or
  - setting aside positions to be filled by a woman or racial/ethnic minority, or
  - setting a quota for a specific number of individuals to be hired based on a protected class

Ideal DEI Programs/Initiatives

Consider Race-Neutral Diversity Factors

- Criteria that, while race neutral, nonetheless tend to increase racial diversity in the workplace
- Such factors may include socioeconomic status, first generation professionals, unique personal circumstances or geographic diversity
- Continue to always hire the best qualified person for the role

Examples of Activities in Each Category

Permissible	Uncertain/Caution	High Risk	Impermissible
• Recruiting using affinity-based job fairs, diverse media, HBCUs, and similar organizations • Equal employment opportunity to all employees and applicants • Defining "diversity" broadly (not limited to protected classes only) • Providing disability accommodations for applicants and reviewing job descriptions for accessibility • Trainings on anti-harassment, implicit bias, and anti-discrimination • Maintaining demographic data for EEO-1 forms and assessment of selection processes (with proper storage and appropriate access) • Mandatory (under EO 11246 and OFFCP regulations) and Voluntary Affirmative Action programs (compliant with Title VII and EEOC guidance) • Factoring in compliance with the EEO policy and Affirmative Action policies with compensation • For suppliers - fostering relationships with organizations that provide diverse business accreditation; asking vendors to describe their DEI programs/commitments	• Pipeline, mentorship, training, and sponsorship programs for individuals based on protected classes (consider opening to all employees to opt-in) • Statements discussing DEI goals (should be vetted by counsel to ensure not to inadvertently say anything impermissible or something that could be used as evidence of reverse discrimination) • Employee Resource Groups (should be open to all employees in and outside of the unifying protected class) • Aspirational goals for diversity of a workplace (allowed but careful not to be a quota; how goals are achieved matters) • Consideration of a diverse slate of qualified applicants • Practices that may be interpreted as employment decisions based on the employee's or applicant's protected class; Facially neutral policies/practices that may have adverse impact • Engaging suppliers based on diverse ownership • The use of self-identification surveys requesting more demographic information than required (permissible with proper procedures in place)	• Allowing those with hiring decision-making power to have access to demographic information creates a presumption that information was used in the decision-making process • Commitment to a certain dollar number to racially diverse suppliers (challenged under Section 1981 and various state law); a points-based system awarded to diverse vendors • Tying in compensation with certain diversity hiring targets	• Protected class quotas • Job openings, scholarships, and internships limited only to those of a certain protected class • Employment decisions based on the individual's protected class

Questions?


SMITH ANDERSON
Successfully Navigating Change: Legal Updates on Diversity, Equity and Inclusion
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