

2024 Employment Law Update: The State and Legality of Employer DEI Policies

presented by
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DEI Disclaimer



Civil Rights Act of 1964

- Established the U.S. Equal Employment Opportunity Commission (EEOC) to protect employees from discrimination based on race, color, religion, sex, or national origin.
- Prohibits discrimination in almost all aspects of employment including hiring, firing, wages, promotions, training, benefits.

Executive Order 11246

- Issued by President Johnson in 1965, this Order required federal contractors to ensure equal opportunity in employment and take affirmative action to promote it.
- Secretary of Labor was charged with enforcing these requirements.

EEO Statements

- Written commitment by an organization to comply with EEO regulations and prevent discrimination in the workplace.
- While not legally required to publish such statements in many cases, it has become common for employers to do so to signal their commitment to fair hiring practices.

EEO Statements (cont.)

- Identify company as EEO employer.
- Express dedication to provide work environment free from unlawful harassment or discrimination.
- State that all employment decisions are based on merit and business need and in no way on protected class status.

Rise of DEI Policies

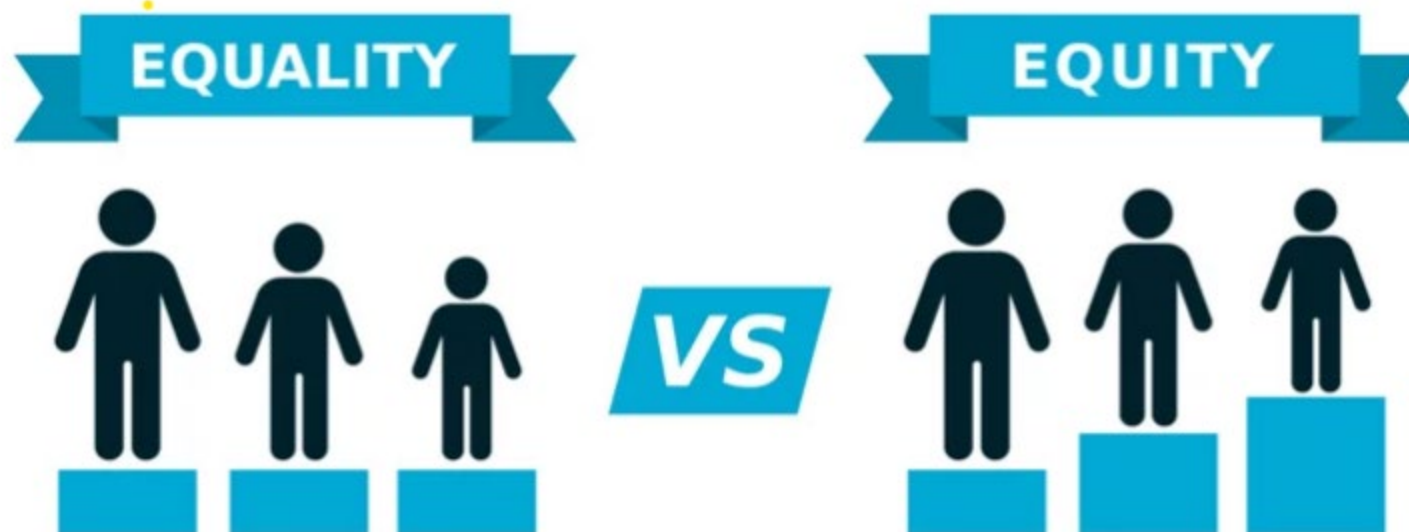
- Over the last several years, there has been a push for companies to create DEI policies, which typically include a DEI Statement.
- McKinsey Report – found that companies with high racial and ethnic diversity are more likely to have financial returns above their industry averages.
- Birth of new profession – DEI Consultant.

8 DEI Statement

- A formal declaration by a company that conveys its commitment to the values of diversity, equity, and inclusion in the workplace.
- Defines company's commitment to diversity, equity and inclusion.
- May provide examples of programs or initiatives to accomplish DEI goals.

EEO Statement vs. DEI Statement

- The same or different?
- Equality vs. Equity



Supreme Court Gets Involved

- Decisions related to affirmative action
- SFFA v. Harvard College
- SFFA v. University of North Carolina



Impact on DEI Policies

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How the U.S. Supreme Court's Decision Against Affirmative Action May Affect Employer DEI Policies



Posted on July 14, 2023

In a recent decision, the United States Supreme Court held that the use of race in university and college admissions is unconstitutional.

[Fair Admissions, Inc. v. President and Fellows of Harvard College](#), No. 20-1199 (U.S. 2023).

The Court's ruling is not directly applicable to private sector employers, nor does it change the law with respect to employment discrimination.

Nevertheless, employers should expect the Court's reasoning to be used to challenge employer Diversity, Equity, and Inclusion (DEI) initiatives and hiring practices. On July 13, 2023, just one week after the Supreme Court's decision, a group of thirteen state attorneys general sent a letter to large companies warning them against the use of racial preference in hiring and promotion decisions:

<https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf>

If your Company has a DEI policy or similar initiatives, it is strongly recommended that you:

- Review your policy to ensure that it is focused on lawful, non-discriminatory efforts to expand diversity of qualified candidates for hiring and promotions.
- Review all internal and public communications regarding your policies to ensure that no statements are made which could be characterized as discriminatory or unlawful.
- Confirm your policy contains a clear objective of inclusion for all, regardless of sex, gender, race or any other protected class status.
- Avoid DEI measures which are, or could be construed to be, focused on the recruitment and/or advancement of a particular group.

<https://www.kmgslaw.com/articles/show/the-u-s-supreme-courts-decision-against-affirmative-action-may-affect-employer-dei-policies>

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Taking these steps now can help protect your Company from a potential discrimination claim based on your DEI policy in the future.

Please contact Knox Law's [Labor and Employment group](#) if you would like to discuss or review your DEI policy.



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Legal Challenges to DEI Policies

- Duvall v. Novant Health, Inc. (March 2024)
 - U.S. Court of Appeals 4th Circuit
 - White male executive terminated and replaced with two women, one of which was a minority.
 - Duvall sued claiming reverse discrimination and won.
 - \$3.4 Million Award
 - **Panel of judges on appeal noted that the number of women and minority in senior leadership roles rose sharply after the company adopted a DEI plan, while several white executives lost their jobs.**

Legal Challenges to DEI Policies (cont.)

- Young v. Colorado Dept. of Corrections, et al.
 - 10th Circuit Court of Appeals
 - Employee claimed that mandated DEI training subjected him to hostile work environment.
 - While the court found that the single instance of training was not severe or pervasive to create a hostile work environment, it stated the company’s DEI training was “troubling on many levels” and could “create a hostile work environment.”
 - The Court noted that DEI training could also, “set the stage for actionable misconduct.”

Young v. Colorado Dept. of Corrections, et al. (cont.)

- The Court provided examples of when DEI training might create a hostile work environment.
 - When training occurs more than once.
 - If supervisors threaten to punish or discipline employees who fail to complete or agree with training materials.
 - If co-workers engage in specific acts of insult aimed at employees who are critical of training.

DEI Retreat



Moving Forward with DEI

- Review DEI policies to ensure it is focused on lawful, non-discriminatory efforts to expand diversity of qualified candidates.
- Review all internal and public communications regarding DEI policies to ensure that no statements could be characterized as discriminatory.
- Confirm your policy contains a clear objective of inclusive for all, regardless of sex, gender, race or other protected class – think EEO statement.
- Avoid DEI measures which are, or could be construed to be, focused on the recruitment and/or advancement of a particular group or groups.
- Assess or re-assess mandatory DEI training and materials.

Thank You!

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