

Workplace diversity & equality

Corporate diversity in the crosshairs after US Supreme Court ruling

Decision striking down affirmative action in college admissions expected to invite a wave of challenges to companies' policies



Andrew Edgecliffe-Johnson in New York and Taylor Nicole Rogers in Aspen 10 HOURS AGO

Lawyers and conservative activists are warning of a wave of legal challenges to US companies' diversity initiatives following the Supreme Court's ruling against affirmative action in university admission programmes.

Opponents of affirmative action fought for years in the courts to end its use in college admissions. Now that they have won that battle, thanks to the Supreme Court's newly emboldened 6-3 conservative majority, business groups are worried companies will be the next target, pursued through the courts and through social media pressure campaigns over diversity-driven hiring programmes.

The Supreme Court's decision on Thursday in the cases against the University of North Carolina and Harvard University – which found that considering race in the admissions process was unconstitutional – was immediately embraced by critics who have painted corporate diversity, equity and inclusion (DEI) efforts as part of a "woke capitalism" agenda that distracts companies from focusing on shareholder returns.

"The days of racial discrimination in hiring, especially through these DEI programmes, are numbered," said Will Hill of Consumers Research, a conservative advocacy group. As lawyers operating on a no-win, no-fee basis see higher chances of success, he added, "I'd expect we're going to see a pretty large wave of litigation."

Neal Katyal, a Hogan Lovells partner and former US acting solicitor general, predicted "fights in the corporate setting" after the court's ruling, in remarks at the Aspen Ideas Festival.

"This decision has implications for how corporations think about their DEI programmes, their commitments to affirmative action and the like," he said.

US law already prohibits the use of racial quotas and the use of race as a factor in evaluating applicants for employment, noted the Public Equity Group, a network of consultants which has advised companies in recent weeks on how to respond to the widely expected ruling.

However, PEG's legal team added, the Supreme Court's legal reasoning in the college cases could be applied in other cases aiming to end companies' ability to use race as a factor in training, leadership and mentorship programmes designed to correct historic underrepresentation.

BSR, which advises companies on how to navigate their social responsibilities, said the ruling posed "a significant and material risk to long-term corporate economic success". Decades of efforts to make workplaces more representative of the country's racial and ethnic make-up could be upended as a result, said Jarrod Green co-director of BSR's Center for Business and Social Justice.

In an earlier submission to the court, companies including Apple, Johnson & Johnson and Procter & Gamble said studies had shown racial diversity was associated with increased sales, profits and innovation. "Now more than ever, companies must attract, retain, and elevate a racially diverse workforce to better serve a diverse marketplace of consumers," they argued.

The court's ruling that university affirmative action programmes violated the constitution's equal protection clause – which guarantees all people the same treatment under the law – was likely to prompt more legal claims from employees alleging they have lost jobs or opportunities because of "reverse discrimination" that disadvantaged non-minorities, lawyers and advisers to businesses said.

"I think that hiring and promotion decisions are an area where there is potential for more of those type of [reverse discrimination] cases," said Kristy Katsenstin, partner in the employment and compensation practice at Baker & McKenzie. Companies had been keeping "a very close eye" on the court in anticipation that its ruling may force them to overhaul their diversity programmes, she said.

America First Legal, a group led by a former aide to Donald Trump, has filed complaints with the Equal Employment Opportunity Commission alleging discriminatory race-based hiring practices at companies including BlackRock and Starbucks.

The ruling comes three years after the police killing of George Floyd, a black man whose death prompted pledges from many companies to do more to combat racial inequities. Progress on creating more opportunities for black employees has slowed, however, with a recent poll from Evidian finding that while 60 per cent of executives say their organisation is making a lot of progress against racism at work, less than 20 per cent of their junior employees agree.

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Grace Speights, a partner in Morgan Lewis's labour and employment practice, noted the impact of the court's decisions would not be felt immediately, as lower courts would first need to establish how the justices' analysis applies in other contexts. Even so, she said, organisations should examine their employment, supplier diversity and charitable giving strategies to minimise legal and reputational risks.

But pressure from employee resource groups could keep employers from giving up altogether on diversity efforts, BSR's Green said.

Some were "doing the bare minimum", based on Title VII of the Civil Rights Act, which bans employment discrimination based on race, colour, religion, sex or national origin, said Leen Prieto, an Academy of Management scholar and professor at Clayton State University. "Corporations should be emboldened now to go beyond affirmative action. It's their opportunity now to move beyond the legality and actually do what is just," he said.

Business leaders had "a responsibility to ensure that value-creating diversity goals are still achieved", said Rich Lesser, Boston Consulting Group's global chair. That may require that they broaden their networks for sourcing talent if the ruling affects the diversity of university-educated candidates, he said.

BSR's Green echoed the belief that companies would adapt to respond to the new legal backdrop. "It's the end of affirmative action as we know it," he said: "It's not the end of companies having an opportunity to have a diverse pipeline."

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