KROKIDAS & BLUESTEIN LLP

CLIENT ALERT

The Supreme Court's Higher Education Affirmative Action Decision: Will Employers Be Impacted?

On June 29, 2023, the United States Supreme Court held in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina ("SFFA cases") that race-based admissions programs violate the Constitution's Equal Protection Clause and Title VI of the Civil Rights Act of 1964 ("Title VI") which governs public and private higher educational institutions that receive federal financial assistance. Even with the important proviso that universities may still consider "an applicant's discussion of how race affected his or her life," the decision represents a dramatic departure from the Court's longstanding precedent authorizing consideration of race to promote diversity in assembling an entering class. While limited to the context of college admissions the decision signals that additional challenges to affirmative action and diversity, equity, and inclusion ("DEI") initiatives by employers may be on the horizon.

Employers are subject to the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 ("Title VII") and the similar Massachusetts statute (M.G.L. c. 151B). Notably, the Supreme Court's decision in the SFFA cases did not consider affirmative action initiatives in the context of Title VII and employment. Following the Supreme Court's ruling, the United States EEOC Chair, Charlotte Burrows, issued a statement making clear that:

> [The ruling] does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

Nevertheless, the Supreme Court's decision suggests that the Court may, in the future, find that employment-based affirmative action programs are unlawful and legal challenges to such programs should be expected in light of the decision in the SFFA cases.

While there is no need for most employers to implement changes to employment-related affirmative action initiatives at this time, now is a good time to review existing DEI programs, initiatives, and related policies and to consider:

- Are existing DEI initiatives such as targeted fellowships and internships expressly limited to particular racial groups? If so, are there other means by which the employer can support and improve diversity through efforts that are not expressly based on race or national origin?
- Do current employment policies and employee handbooks require updating to modify or clarify eligibility for employer-sponsored DEI programs or other efforts to increase diversity?
- Are trainings for human resource staff needed to ensure that hiring and recruitment practices, and internal and external messaging, focus on efforts to increase diversity that incorporate factors that are not limited to race or other protected categories?

If you have any questions about or need assistance reviewing employment-related affirmative action or DEI programs, initiatives, or policies, please contact Bettina Toner (btoner@kb-law.com), Jill Brenner Meixel (jmeixel@kb-law.com), Paul Holtzman (pholtzman@kb-law.com), Allison Lennon (alennon@kb-law.com), or Brian Richichi (brichichi@kb-law.com).