



Meltzer Center
for Diversity, Inclusion,
and Belonging
NYU School of Law

DEI: REAFFIRM COMMITMENT AND MITIGATE LEGAL RISKS

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THE AFTERMATH OF *STUDENTS FOR FAIR ADMISSIONS*

DEI efforts may be under attack, but companies aren't retreating from commitments

 **Jessica Guynn**
USA TODAY

Corporate America Tweaks Diversity Initiatives Amid Pushback

Legal pressure and other criticisms have led to a quiet rethinking of the programs

By *Richard Vanderford*
Feb. 5, 2024 5:30 am ET

Wall Street Banks Begin a DEI Retreat as Fear of Backlash Looms

HOME • NEWS

Despite Some People's Death Wish, DEI Is Still Here

The Legal Assault on Corporate Diversity Efforts Has Begun

Conservative groups are challenging Amazon, Comcast and others using many of the same arguments that boosted minority representation in the workforce.

Jan 10, 2024 - Business

Executives say they're still committed to DEI, new survey finds

Anti-DEI Outcry Online Spurs Flurry of Big-Name Firms to Retreat



THE OPTIMISTS VERSUS THE PESSIMISTS

The optimistic take: *SFFA* has nothing to do with workplace DEI. Keep calm and carry on.

The pessimistic take: Workplace DEI is now illegal.



**WHAT THE OPTIMISTS GET
WRONG:**

SOME DEI *IS* RISKY

RELEVANT LAW

Laws at issue in *SFFA*

Equal Protection Clause: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

Title VI: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Laws affecting workplace DEI

Title VII: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”

42 U.S. Code § 1981: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens.”



TWO MAJOR SCHOOLS OF THOUGHT

1

Anti-classification: racial classifications are presumptively wrong, no matter the purpose

2

Anti-subordination: racial classifications are allowed if they advance the equal status of historically oppressed groups



SFFA AND ANTI-CLASSIFICATION

“

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies ‘without regard to any differences of race, of color, or of nationality’—it is ‘universal in [its] application.’ . . . For ‘[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.’

”

“

[T]he inherent folly of . . . trying to derive equality from inequality—soon became apparent.

”

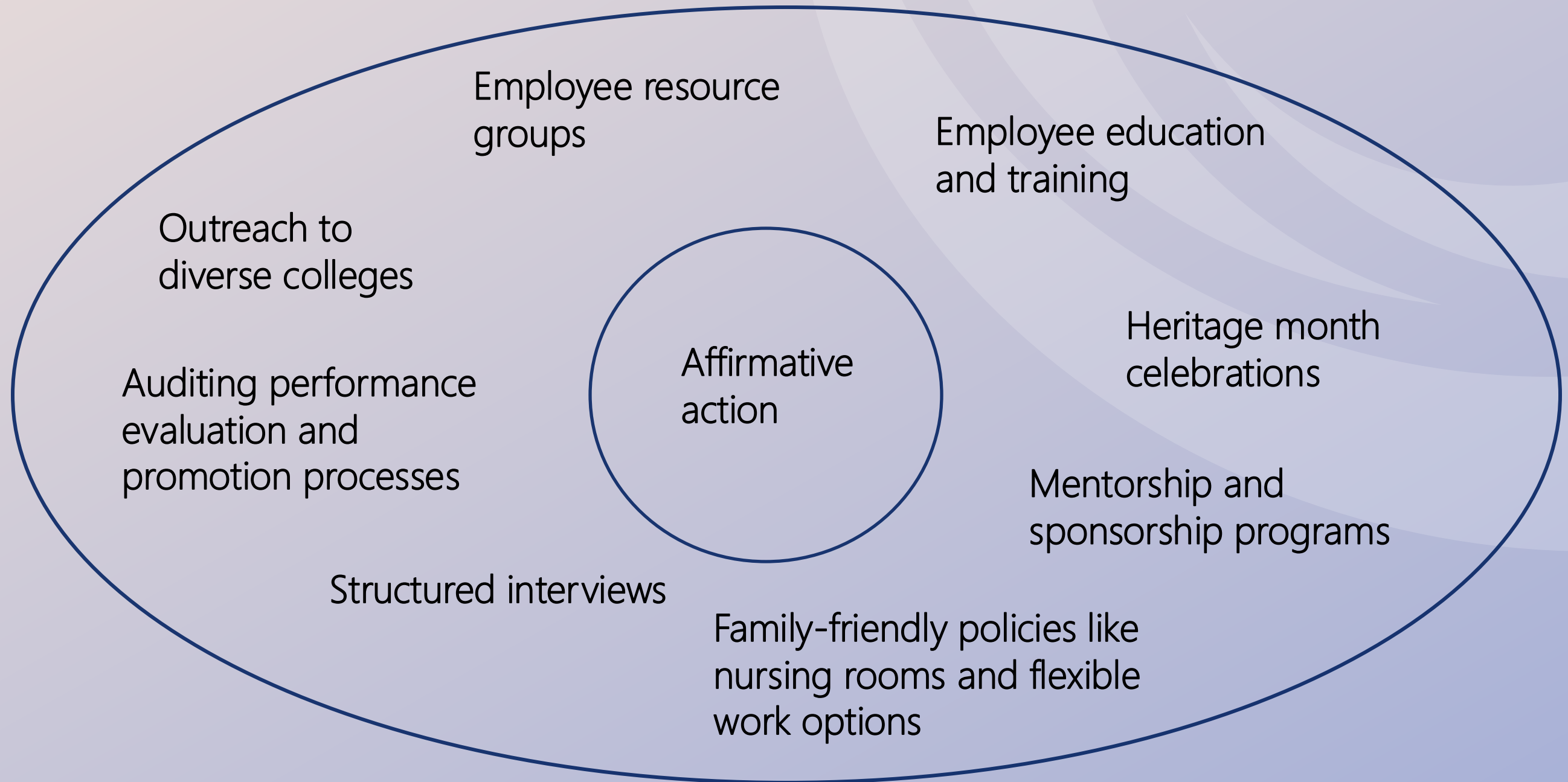
Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023)



**WHAT THE PESSIMISTS GET
WRONG:**

**MANY FORMS OF DEI WILL
ENDURE**

AFFIRMATIVE ACTION AND DEI



THE THREE P_s OF LEGAL RISK



EXAMPLES OF RED PROGRAMS

| PROGRAM | DOES IT CONFER A PREFERENCE? | ON A PROTECTED GROUP? | WITH RESPECT TO PALPABLE BENEFITS? |
|--|------------------------------|-----------------------|------------------------------------|
| Hiring quotas (“make sure at least 45% of our incoming hires are women”) | YES | YES | YES |
| Tiebreaker decision-making (“if you’re choosing between two similarly strong candidates and one is white and the other is a person of color, pick the person of color”) | YES | YES | YES |
| Group-specific internships and fellowships (“let’s create an internship that limits eligibility to Black and Latinx/a/e/o talent”) | YES | YES | YES |
| Tying manager compensation to diversity goals (“you will get a bonus if you hire more women and people of color on your team”) | PROBABLY YES | YES | YES |



EXAMPLES OF GREEN PROGRAMS

| PROGRAM | DOES IT CONFER A PREFERENCE? | ON A PROTECTED GROUP? | WITH RESPECT TO PALPABLE BENEFITS? |
|---|------------------------------|-----------------------|------------------------------------|
| Developing merit-based hiring criteria and adopting structured interviews to reduce bias in recruitment | NO | NO | YES |
| Offering a leadership development program to employees of any background who have a commitment to DEI and pass a competitive selection process | YES | NO | YES |
| Celebrating heritage months through events, volunteer opportunities, and book clubs | NO | YES | NO |
| Conducting employee education on topics such as implicit bias, allyship, or inclusive leadership | NO | NO | NO |



EXAMPLES OF **YELLOW** PROGRAMS

| PROGRAM | DOES IT CONFER A PREFERENCE? | ON A PROTECTED GROUP? | WITH RESPECT TO PALPABLE BENEFITS? |
|---|------------------------------|-----------------------|------------------------------------|
| Giving preference to groups that could be considered proxies for race | YES | MAYBE | YES |
| Diverse slate requirements | YES | YES | MAYBE |
| Diversity targets | MAYBE | YES | YES |



OTHER EXAMPLES OF LOW-RISK DEI WORK

- ✓ Invest in pipeline programs
- ✓ Expand outreach to broaden candidate pools
- ✓ Adopt pay transparency
- ✓ Purge stereotypical language from job advertisements and other communications
- ✓ Set clear and merit-based criteria for recruitment and promotion
- ✓ Create employee resource groups that are open to allies
- ✓ Adopt formal mentorship, sponsorship, and coaching programs with content-based criteria (commitment to DEI) rather than cohort-based restrictions

- ✓ Review employee benefits policies to ensure they are being applied equitably
- ✓ Expand flexible work arrangements, parental leave, and childcare support
- ✓ Create a supplier diversity policy to broaden the pool of vendors considered for contracts
- ✓ Develop programs that advance diversity and inclusion along lines of socioeconomic status, age, and disability
- ✓ Support community organizations focused on D&I issues, such as through pro bono work and philanthropy
- ✓ Require decision-makers to undergo rigorous anti-bias training before making employment decisions



RISKS OF *NOT* DOING DEI

Increasing risk of bias or discrimination against marginalized groups

Increasing risk of disparate impact lawsuits

Alienating potential recruits, such as members of younger generations

Alienating consumers and other members of the public





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TAKEAWAYS

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The law of DEI will likely move in a conservative direction under a 6:3 conservative supermajority Supreme Court

Programs that hit the “three Ps” (confer a preference on protected groups with respect to palpable benefits) are risky in the current legal landscape

Yet it is also risky to abandon or water down DEI initiatives

No matter what, it will remain lawful to adopt and promote many forms of DEI



ADVANCING DEI INITIATIVE

advancingdei.meltzercenter.org

The Advancing DEI Initiative aims to make information on the intersection of law and DEI accessible to supporters of DEI, including through resources and a DEI litigation tracker.

ABOUT CASES METHODOLOGY RESOURCES IN THE MEDIA

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Advancing DEI Initiative

The Advancing DEI Initiative is a project of the Meltzer Center for Diversity, Inclusion, and Belonging, committed to making information on the intersection of law and DEI accessible to supporters of DEI.

This website offers resources, including a DEI litigation tracker, to orient users to the DEI legal landscape. The tracker captures lawsuits likely to affect workplace DEI practices.

What types of cases are occurring?

This diagram captures the flow of anti-DEI cases arising in each geographic region of the United States, organized by circuit. Each case is categorized based on the DEI program challenged or the issues raised in the case. Since there may be multiple issues raised, some cases are categorized under multiple topics.

| Circuit | Targeted programs | Freedom of speech and religion | Diversity targets | Government programs | Workplace discrimination | Diversity training | School and university admissions | Directors' duties |
|------------------|-------------------|--------------------------------|-------------------|---------------------|--------------------------|--------------------|----------------------------------|-------------------|
| Second Circuit | High | Low | Low | Low | Low | Low | Low | Low |
| Third Circuit | High | Low | Low | Low | Low | Low | Low | Low |
| Fourth Circuit | Low | High | Low | Low | Low | Low | Low | Low |
| Fifth Circuit | Low | Low | High | Low | Low | Low | Low | Low |
| Sixth Circuit | Low | Low | Low | High | Low | Low | Low | Low |
| Seventh Circuit | Low | Low | Low | Low | High | Low | Low | Low |
| Eighth Circuit | Low | Low | Low | Low | Low | High | Low | Low |
| Ninth Circuit | Low | Low | Low | Low | Low | Low | High | Low |
| Tenth Circuit | Low | Low | Low | Low | Low | Low | Low | High |
| Eleventh Circuit | Low | Low | Low | Low | Low | Low | Low | Low |
| D.C. Circuit | Low | Low | Low | Low | Low | Low | Low | Low |

ABOUT THE INITIATIVE → ALL DEI LITIGATION →

JUSTICE SOTOMAYOR (IN DISSENT)

“

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on.

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Q&A